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INTRODUCTORY NOTE TO QUESTION OF THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NICARAGUA AND COLOMBIA BEYOND 200 NAUTICAL MILES FROM THE NICARAGUAN COAST (NICAR. V. COLOM.) (I.C.J.)

BY CHRISTINE PICHEL*

[July 13, 2023]

Introduction

On July 13, 2023, the International Court of Justice (ICJ) delivered its judgment in the case concerning *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (2023 Judgment).[1] This is the first decision addressing the question of the delimitation of the continental shelf, between states with opposite coasts, in a situation where one state asserts a continental shelf extending beyond 200 nautical miles (extended continental shelf) within the 200 miles from the baselines of another state.[2]

Background

In *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Nicaragua had already requested the ICJ to delimit the overlapping area resulting from Nicaragua's entitlement, under Article 76(1) of the United Nations Convention on the Law of the Sea (UNCLOS), to an extended continental shelf from its coast and the continental shelf within 200 nautical miles of Colombia's mainland coast.[3] However, in its 2012 judgment, the ICJ decided not to entertain Nicaragua's request since Nicaragua had not submitted information on the limits of its extended continental shelf to the Commission on the Limits of the Continental Shelf (CLCS) in accordance with Article 76(8) of UNCLOS.[4] Thus, Nicaragua had not established that it had a continental margin extending far enough to overlap with Colombia's 200 nautical mile entitlement to a continental shelf measured from Colombia's mainland coast.[5]

On June 24, 2013, Nicaragua made a full submission to the CLCS, in accordance with Article 76(8) of UNCLOS, providing information on the limits of its extended continental shelf from the baselines from which the breadth of the territorial sea is measured.[6] On September 16, 2013, Nicaragua instituted new proceedings against Colombia, requesting the ICJ to delimit the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf that appertain to each of them beyond the boundaries determined by the ICJ in its 2012 judgement.[7]

The ICJ's (Brief) Decision

The ICJ focused its decision on the question of whether, under customary international law,[8] a state's entitlement to an extended continental shelf may extend within 200 nautical miles from the baselines of another state.[9] To reply to this question, the ICJ examined: (1) the relationship between the legal regime governing the exclusive economic zone (EEZ) and that of the continental shelf extending within 200 nautical miles; (2) the legal regime of the extended continental shelf; and (3) the practice of states before the CLCS.

On the first point, the ICJ noted that the legal regimes governing the EEZ and the continental shelf within 200 nautical miles are different and distinct, but also interrelated.[10] The ICJ recalled that, under Article 56(3) of UNCLOS, which reflects customary international law,[11] within the EEZ the rights with respect to the seabed and subsoil are to be exercised in accordance with the legal regime governing the continental shelf.[12] In this sense, while a continental shelf can exist where there is no EEZ, there cannot be an EEZ without a corresponding continental shelf.[13] On the existence of "grey areas"[14] in the two "*Bay of Bengal* cases,"[15] the ICJ noted that "grey areas" of limited size were created as an "incidental result" of the use of an adjusted equidistance line in a delimitation between adjacent states.[16] Since the circumstances of those cases were different from the case at hand, the ICJ did not consider them relevant to answering the first question.[17]

On the second point, the ICJ recognized that, under customary international law, there is a "single continental shelf," to the extent that rights of the coastal state over its continental shelf are generally the same within and beyond

*Christine Pichel is a legal officer and international relations officer at the Directorate-General for Maritime Affairs and Fisheries of the European Commission, Brussels, Belgium. She holds a Ph.D. in international law from the Graduate Institute of International and Development Studies, Geneva, Switzerland. The views expressed in this introductory note are those of the author and shall not be regarded as stating an official position of the European Commission. Email: cristina.pichel-medina@ec.europa.eu

200 nautical miles from its baselines. However, it also noted that, under customary international law as reflected in Article 76(1) of UNCLOS, a state's entitlement to a continental shelf had two different bases: the distance criterion (continental shelf up to 200 nautical miles from the coast) and the natural prolongation criterion (beyond 200 nautical miles, with the outer limits to be established on the basis of scientific and technical criteria).[18]

The ICJ then examined the *travaux préparatoires* of the Third United Nations Conference on the Law of the Sea (UNCLOS III) and concluded that the possibility of one state's extended continental shelf extending within 200 nautical miles of another state appeared not to have been debated during UNCLOS III.[19] However, the ICJ noted that the purpose of the substantive and procedural conditions for determining the outer limits of the extended continental shelf was to prevent the extended continental shelf from unduly encroaching on the international seabed area (the Area) and its resources, which are the "common heritage of mankind."[20] It then assumed that the extended continental shelf would only extend into the Area, not within 200 nautical miles of another state.[21] To support its assumption, the ICJ reasoned that payments or contributions made under Article 81(2) of UNCLOS with respect to the exploitation of the non-living resources of the extended continental shelf would not achieve the aim of that provision in a situation where the extended continental shelf of one state extended within 200 nautical miles of another state.[22]

On the third point, the ICJ noted that the "vast majority"[23] of states parties to UNCLOS had made submissions to the CLCS choosing not to assert outer limits of their extended continental shelf within the 200 nautical miles of the baselines of another state.[24] "Taken as a whole," the ICJ considered this state practice as constitutive of customary international law, since it was sufficiently widespread, convincing, and uniform, as well as indicative of *opinio juris* (even though it may have been motivated in part by reasons other than a sense of legal obligation).[25] In the ICJ's view, this practice also reflected *opinio juris*, given its extent over a long period of time.[26] The ICJ then concluded that, under customary international law, a state's entitlement to an extended continental shelf, even if the state concerned can demonstrate its entitlement, may not extend within 200 nautical miles from the baselines of another state.[27] As a result, if there are no overlapping entitlements over the same maritime areas, then there is no need for delimitation.[28] Because there was no possibility of an overlapping entitlement/area in the case at hand, the ICJ rejected Nicaragua's request for delimitation.[29]

Based on its answer to the first question, the ICJ did not consider it necessary to address its second question on the criteria, under customary international law, for the determination of the limit of the extended continental shelf.[30]

Conclusion

The ICJ's decision has been criticized by legal scholars[31] and questioned by some of the ICJ judges[32] on three main grounds.

The first ground is the identification of the *opinio juris* as a constitutive element of the rule of customary international law in this case.[33] Judges Tomka, Xue, and Robinson considered that states refraining from claiming an extended continental shelf within 200 miles from the baselines of another state in their submissions to the CLCS might have been motivated by reasons other than a sense of legal obligation.[34] In particular, a state concerned may want to avoid another state blocking the consideration of its submission by the CLCS if there is a dispute,[35] thus avoiding the situation where the establishment of the outer limits of its continental shelf remains unresolved.[36] Hence, the ICJ erred by inferring *opinio juris* from the practice of those states.

The second ground relates to the implications of the new rule of customary international law on the concept of the "single continental shelf" and the existence of "grey areas." The rule identified by the ICJ implies that a state's entitlement to a continental shelf based on the distance criterion takes precedence over the entitlement of another state based on the criterion of natural prolongation. This contradicts the concept of the "single continental shelf" upheld by the ICJ (and other international tribunals). Not only does this imply that the former entitlement "expunges" or "trumps" the latter entitlement, but it also suggests that there are two different continental shelves, within and beyond 200 nautical miles, rather than a single one.[37]

The rule that a state's entitlement to an extended continental shelf cannot encroach on the 200 nautical mile zone from the baselines of another state also implies the incompatibility of the "grey areas" with this rule;[38] and with the idea that the continental shelf regime is incorporated in the EEZ regime (separating seabed and subsoil from

superjacent waters within 200 nautical miles would be contrary to the EEZ concept). However, Judge Tomka noted that the *Bay of Bengal* cases[39] and the ICJ judgment in *Somalia v. Kenya*, had recognized the existence of "grey areas"[40] and, in that sense, the 2023 Judgment departed from the ICJ's and other international tribunals' jurisprudence.[41] Judge Xue also considered that, in those three cases, "the 'grey area,' albeit incidental in nature and small in size, is in itself a piece of hard evidence that disproves at least the inseparability of [the continental shelf and the EEZ] in the maritime delimitation."[42]

The ICJ might have decided that, in the case of opposite coasts, a state's entitlement to an extended continental shelf may not extend within an entitlement to a continental shelf within 200 miles of another state to avoid not only the potential creation of "grey areas,"[43] but also the creation of potential "complex legal and practical issues" because of the seabed and subsoil being within the national jurisdiction of one state and the superjacent waters being within the national jurisdiction of another state within 200 nautical miles.[44]

In relation to the third ground, the rule identified by the ICJ not only put an additional limit to Nicaragua's entitlement to an extended continental shelf but could also make moot other similar maritime claims, such as in the South China Sea.[45] Also, it could have implications for maritime delimitation, including the possibility of small maritime features to trump competing claims to extended continental shelves.[46]

ENDNOTES

1 Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Judgment (July 13, 2023), https://www.icj-cij.org/case/154/judgments [hereinafter 2023 judgment].

2 In Mauritius/Maldives, the Special Chamber of ITLOS had the opportunity to answer this same question but it declined to do so as it considered that after delimiting with a single maritime boundary the exclusive economic zones and continental shelves within 200 nautical miles between the Parties, the boundary rendered "moot" the question of delimitation of the overlapping area between the claim of the Maldives to an extended continental shelf and the claim of Mauritius to a 200 nautical mile zone. *See* Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), ITLOS Case No. 28, Judgment (28 April 2023), ¶ 274. As for other cases, the ICJ itself as well as other international courts and tribunals have dealt with the issue of the delimitation of the extended continental shelf but between states with adjacent coasts. *See, e.g.,* Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl./Myan.), Judgment, 2012 ITLOS Rep. 4; Bangladesh v. India, Perm. Ct. Arb., Judgment (July 7, 2014); Maritime Delimitation in the Indian Ocean (Som. v. Ken.), Judgment (Oct. 12, 2021).

3 Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 624, ¶¶ 17.I(3), 119, 121 (Nov. 19) [hereinafter 2012 Judgment]. Conversely, the ICJ delimited the territorial sea, the exclusive economic zone and the continental shelf within 200 nautical miles between the two countries.

4 The ICJ recalled that "any claim of continental shelf rights beyond 200 nautical miles [by a state Party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the CLCS established thereunder" (*Id*. ¶ 126). In this respect, the ICJ observed that Nicaragua had submitted to the CLCS only "Preliminary Information," and thus Nicaragua did not meet the requirements for information on the limits of the extended continental shelf which shall be submitted by the coastal states to the CLCS in accordance with Article 76(8) of UNCLOS (*Id*. ¶ 127).

5 *Id*. ¶¶ 129, 130, 131.

6 2023 Judgment, *supra* note 1, ¶ 25.

7 *Id*. ¶ 26.

8 Unlike Nicaragua, Colombia is not a Party to UNCLOS. Thus, only customary international law as reflected in UNCLOS was applicable to the case at hand (*Id*. ¶¶ 44, 45).

9 Before examining any technical and scientific questions, the ICJ considered necessary to decide on certain questions of law. By Order dated 4 October 2022, the ICJ decided to bifurcate the proceedings on the merits requesting the parties to focus its oral pleadings on two questions: (1) "Under customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State?;" and (2) "What are the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and, in this regard, do paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea reflect customary international law?" (Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colomb.), Order, 2022 I.C.J. Rep. 563–565).

10 2023 Judgment, *supra* note 1, ¶ 70. *See* also Continental Shelf (Libyan Arab Jamahiriyia/Malta), Judgment, 1985 I.C.J. Rep. ¶¶ 33, 34.

11 Recalling its previous jurisprudence, the ICJ noted that Articles 56, 58, 61, 62 and 73 of UNCLOS lying down rights and duties of both coastal states and other states in the EEZ reflect customary international law (2023 Judgment, *supra* note 1, ¶ 69). *See* Alleged Violations of Sovereign Rights

and Maritime Spaces in the Caribbean Sea (Nicar. v. Colomb.), Judgment (April 21, 2022), ¶ 57.

12 2023 Judgment, *supra* note 1, ¶ 70.

13 *Id*.

14 A "grey area" is "an area [that] results when a delimitation line which is not an equidistance line reaches the outer limit of one State's exclusive economic zone and continues beyond it in the same direction, until it reaches the outer limit of the other State's exclusive economic zone." (Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl./Myan.), Judgment, 2012 ITLOS Rep. 4, ¶ 464). "The delimitation of the continental shelf beyond 200 nm gives rise to an area of limited size located beyond 200 nm from the coast of Bangladesh but within 200 nm from the coast of Myanmar, yet on the Bangladesh side of the delimitation line" (*Id*. ¶ 463).

15 Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl./Myan.), Judgment, 2012 ITLOS Rep. 4; Bangladesh v. India, Perm. Ct. Arb., Judgment (July 7, 2014), https://pca-cpa.org/en/cases/18.

16 2023 Judgment, *supra* note 1, ¶ 72.

17 *Id*.

18 *Id*. ¶ 75.

19 *Id*. ¶ 76.

20 *Id*.

21 *Id*.

22 *Id*.

23 Colombia had argued that out of 93 submissions to the CLCS, 55 submissions could have extended within the 200-nautical mile zones of other states; 51 of those 55 stopped at the 200-nautical-mile entitlements of neighbouring states when those submissions could have gone further on technical grounds. *See* 2023 Judgment, Verbatim Record, CR 2022/26, 33–34 (Dec. 6, 2022) (Agent of Colombia).

24 *Id*. ¶ 77. In addition, the ICJ noted that only few states have claimed, in their submissions to the CLCS, an extended continental shelf encroaching on "maritime areas within 200 nautical miles" of other states and that in those situations, the states concerned had objected to those submissions (*Id*.). In relation to the practice of the small number of coastal states non-parties to UNCLOS, the ICJ stated that it was not aware of any state that had claimed an extended continental shelf extending within 200 nautical miles from the baselines of another state (*Id*.).

25 *Id*.

26 *Id*.

27 *Id*. ¶ 79. Through its 2023 Judgment, the ICJ mentions that a state's entitlement to an extended continental shelf cannot extend within 200 nautical miles from the baseline of another state. The judgment confirms however that a state's entitlement to an extended continental shelf may not extend within another state's entitlement to a continental shelf within 200 nautical miles (*Id*. ¶ 82). The ICJ might have used the expression "within 200 nautical miles from the baselines of another State" to keep consistency with the idea of the "inseparability" between the EEZ and the continental shelf within 200 nautical miles that the ICJ itself and other international tribunals have upheld.

28 *Id*. ¶¶ 80–82.

29 The ICJ determined that it could not proceed to the delimitation of the maritime boundary as requested by Nicaragua since, under customary international law, Nicaragua is not entitled to an extended continental shelf within 200 nautical miles from the baselines of Colombia's main coast, and thus there is no overlapping entitlement to be delimited. This regardless of the technical and scientific considerations (*Id*. ¶¶ 85–87). For the same reasons, the ICJ also determined that it could not delimit the maritime boundary between Nicaragua's extended continental shelf and the continental shelf within 200 nautical miles from the baselines of the coasts of San Andrés and Providencia, two islands belonging to Colombia (*Id*. ¶¶ 90–92). Finally, with respect to the effect, if any, of the maritime entitlements of Serranilla and Bajo Nuevo (three maritime features under Colombia's sovereignty) on any remaining maritime delimitation between Nicaragua and Colombia, the ICJ concluded that, regardless of the maritime zones generated by Serranilla and Bajo Nuevo, there could be no area of overlapping entitlement to a continental shelf to be delimited. If those maritime features were entitled to an EEZ and a continental shelf, Nicaragua's extended continental shelf may not extend into the 200-nautical mile maritime entitlements of those islands. Conversely, if Serranilla and Bajo Nuevo did not generate an EEZ and a continental shelf, they would not have any maritime entitlements in the area in which Nicaragua asserts an extended continental shelf (*Id*. ¶¶ 93, 97–100).

30 *Id*. ¶¶ 80–82. Accordingly, the ICJ did not pronounce itself either on whether Article 76 paragraphs 2–7 of UNCLOS reflected customary international law.

31 See Evans Malcolm and Nicholas A. Ioannides, *The International Court of Justice and the Law of the Sea Dispute Settlement System*, *in* RESEARCH HANDBOOK ON THE INTERNATIONAL COURT OF JUSTICE (Achilles Skordas and Lisa Mardikian eds., Forthcoming (both authors agree with the rule of customary law identified in the 2023 Judgment, but criticise the ICJ for not elaborating on the broader potential implications of that rule, in particular with regards to maritime delimitation), https://ssrn.com/abstract=4514860). *See also* Hilde Woker, *Preliminary Reflections on the ICJ Judgment in Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia) of 13 July 2023*, EJIL: Talk! (July 21, 2023), https://www.ejiltalk.org/preliminary-reflections-on-the-icj-judgment-in-question-of-the-delimitation-of-the-continental-shelf-between-nicaragua-and-colombia-beyond-200-nautical-miles-from-the-nicaraguan-coast-nicaragua-v-co/; Matei Alexianu, *The Nicaragua v. Colombia Continental Shelf Judgment: Short but Significant*, 27(9) ASIL INSIGHTS (Sept. 29, 2023), https://www.asil.org/insights/volume/27/issue/9.

32 In the operative part of its judgment, the ICJ decided by thirteen votes in favor to four against on rejecting Nicaragua's request for delimitation and by twelve votes in favor to five against on rejecting Nicaragua's request with respect to the maritime entitlements of Serranilla and Bajo Nuevo (Colombia's maritime features). Judges Tomka, Robinson, Charlesworth and Judge *ad hoc* Skotnikov appended dissenting opinions while Judges Xue, Iwasawa, and Nolte appended separate opinions. Judge Bhandari appended a declaration.

33 Besides this issue, critics of the judgment have casted doubt on whether the practice of states examined by the ICJ could be considered as general state practice, but even then, they have recognised that in spite of "not being perfect," this practice

could be considered a general one. Judge Tomka observed that "the Judgment does not acknowledge, much less analyse, the existence of contrary State practice whereby States have claimed a continental shelf entitlement that extends within 200 nautical miles from the baselines of another State" (2023 Judgment, *supra* note 1, Dissenting Opinion of Judge Tomka, ¶ 45). However, he also stated that "[s]ome inconsistencies and contradictions are not necessarily fatal to a finding of 'a general practice' [and] that for some States, practice varies and should arguably be given less weight" (*Id*. ¶ 49). *See* also *Id*. Dissenting Opinion of Judge Robinson, ¶¶ 12, 13; *Id*. Dissenting Opinion of Judge Charlesworth, ¶ 26. It is also worth noting that the ICJ seems to rely on the objective element (state practice) rather than the subjective element (*opinio juris*) to find the customary rule. The ICJ also seems to justify the existence of this rule based on its interpretation of the *travaux préparatoires* and the logic behind the EEZ and continental shelf regimes.

34 *Id*. Dissenting Opinion of Judge Tomka, ¶ 59; *Id*. Separate Opinion of Judge Xue, ¶ 47; *Id*. Dissenting Opinion of Judge Robinson, ¶ 19. Judge Tomka elaborated on the alternative motives that could explain the state practice (*Id*. Dissenting Opinion of Judge Tomka, ¶¶ 53-56).

35 *See* Rule 46 of the Rules of Procedure of the CLCS, Annex I, paragraph 5(a): "In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute."

36 *See* Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl./Myan.), Judgment, 2012 ITLOS Rep. 4, ¶¶ 386–392.

37 *See* Sir Malcolm D. Evans and Nicholas A. Ioannides, *A Commentary on the 2023 Nicaragua v Colombia case,* EJIL: Talk! (Aug. 4, 2023), https://www.ejiltalk.org/a-commentary-on-the-2023-nicaragua-v-colombia-case/; H.J. Woker, *Challenging the Notion of a "Single Continental Shelf," in* OCEAN DEV. & INT'L L. (2023), https://doi.org/10.1080/00908320.2023.2271393.

38 *See, e.g.,* Sir Malcolm D. Evans and Nicholas A. Ioannides, *supra* note 37.

39 In the *Bangladesh/Myanmar* case, for instance, ITLOS acknowledged the existence of "grey areas" as a consequence of delimitation of the overlapping area of the Parties' continental shelves and concluded that both the EEZ and the continental shelf legal regimes can coexist, and each coastal state must exercise its rights and perform its duties with due regard to the rights and duties of the other, Bangladesh in its extended continental shelf and Myanmar in the superjacent waters (Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl./Myan.), Judgment, 2012 ITLOS Rep. 4, ¶¶ 471, 474, 475).

40 2023 judgment, *supra* note 1, Dissenting Opinion of Judge Tomka, ¶ 67.

41 *Id*. ¶ 38. He added that delimitation could result in maritime areas in which jurisdiction over the EEZ is adjudicated to one state and jurisdiction over the continental shelf to another (*Id*. ¶ 72).

42 *Id*. Separate Opinion of Judge Xue, ¶ 27.

43 If there is no overlapping of entitlements, there is no need for delimitation. If there is no need for delimitation, the potential existence of "grey areas" is avoided *ab initio*.

44 ITLOS had addressed the consequences of the "grey area" that resulted from delimitation by asserting that the states concerned should cooperate to determine the measures that they consider appropriate to ensure that each of them exercise its rights and perform its duties with due regard to the rights and duties of the other (Delimitation of the Maritime Boundary in the Bay of Bengal (Bangl./Myan.), Judgment, 2012 ITLOS Rep. 4, ¶¶ 475, 476).

45 *See* Matei Alexianu, *supra* note 31, at 5–6.

46 *See* Sir Malcolm D. Evans and Nicholas A. Ioannides, *supra* note 37.

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QUESTION OF THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NICARAGUA AND COLOMBIA BEYOND 200 NAUTICAL MILES FROM THE NICARAGUAN COAST (NICAR. V. COLOM.) (I.C.J.)*
[July 13, 2023]

13 JULY 2023
JUDGMENT

QUESTION OF THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NICARAGUA AND COLOMBIA BEYOND 200 NAUTICAL MILES FROM THE NICARAGUAN COAST

(NICARAGUA *v.* COLOMBIA)

QUESTION DE LA DÉLIMITATION DU PLATEAU CONTINENTAL ENTRE LE NICARAGUA ET LA COLOMBIE AU-DELÀ DE 200 MILLES MARINS DE LA CÔTE NICARAGUAYENNE

(NICARAGUA c. COLOMBIE)

13 JUILLET 2023
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QUESTION OF THE DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NICARAGUA AND COLOMBIA BEYOND 200 NAUTICAL MILES FROM THE NICARAGUAN COAST

(NICARAGUA *v.* COLOMBIA)

General background — Geography — The Court's 2012 Judgment in Territorial and Maritime Dispute (Nicaragua *v.* Colombia) *delimiting the Parties' continental shelves and exclusive economic zones up to a 200-nautical-mile limit from Nicaragua's coast — Application filed by Nicaragua on 16 September 2013 — Request to determine maritime boundary in areas of continental shelf beyond the boundaries determined in 2012 Judgment — Delimitation lines proposed by Nicaragua in its written pleadings — The Court's Order of 4 October 2022 — Certain questions of law to be decided first.*

*

First question formulated in the Order of 4 October 2022 — Whether a State's entitlement to a continental shelf beyond 200 nautical miles from its baselines may extend within 200 nautical miles from the baselines of another State — Determination of the existence of overlapping entitlements as a first step in any maritime delimitation — Preliminary character of the first question — Must be answered to ascertain whether the Court may proceed to the delimitation requested by Nicaragua.

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within 200 nautical miles from the baselines of another State apparently not debated during the Conference — Vast majority of States parties to UNCLOS that have made submissions to the Commission on the Limits of the Continental Shelf ("CLCS") have not asserted limits that extend within 200 nautical miles of the baselines of another State — Practice of States before the CLCS is indicative of opinio juris *— Objections where States have asserted a right to an extended continental shelf encroaching on maritime areas within 200 nautical miles of other States — Practice of States sufficiently widespread and uniform — This State practice may be seen as an expression of* opinio juris *— Under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from its baselines may not extend within 200 nautical miles from the baselines of another State.*

*

Second question formulated in the Order of 4 October 2022 — Identification of the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles of a State's baselines and question whether paragraphs 2 to 6 of Article 76 of UNCLOS reflect customary international law — No need for the Court to address the second question in light of the answer to the first question.

*

Consideration of Nicaragua's submissions made in its written pleadings.

Request contained in Nicaragua's first submission — Nicaragua proposes co-ordinates for the continental shelf boundary in the area beyond 200 nautical miles from its baselines but within 200 nautical miles from Colombia's baselines — Nicaragua not entitled to an extended continental shelf within 200 nautical miles from the baselines of Colombia's mainland coast — No area of overlapping entitlement to be delimited — Request contained in Nicaragua's first submission cannot be upheld.

Request contained in Nicaragua's second submission — Nicaragua's contention that maritime entitlements of San Andrés, Providencia and Santa Catalina should not extend east of the 200-nautical-mile limit of its exclusive economic zone — Nicaragua not entitled to an extended continental shelf within 200 nautical miles from the baselines of San Andrés and Providencia — No area of overlapping entitlement to be delimited — Request contained in Nicaragua's second submission cannot be upheld.

Request contained in Nicaragua's third submission — Effect, if any, of the maritime entitlements of Serranilla, Bajo Nuevo and Serrana on any maritime delimitation between the Parties — Two possibilities regarding Serranilla and Bajo Nuevo — Either they are entitled to exclusive economic zones and continental shelves, or they are not — In either case, no area of overlapping entitlement to be delimited — Effect of Serrana's maritime entitlements determined conclusively in the 2012 Judgment — Request contained in Nicaragua's third submission cannot be upheld.

JUDGMENT

Present: *President* DONOGHUE; *Vice-President* GEVORGIAN; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE, CHARLESWORTH, BRANT; *Judges* ad hoc MCRAE, SKOTNIKOV;
Registrar GAUTIER.

In the case concerning the question of the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast,

between

the Republic of Nicaragua,

represented by

HE Mr Carlos José Argüello Gómez, Permanent Representative of the Republic of Nicaragua to the international organizations based in the Kingdom of the Netherlands, member of the International Law Commission,

as Agent and Counsel;

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

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

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

as Counsel and Advocates;

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

Mr Benjamin Samson, Centre de droit international de Nanterre (CEDIN), University Paris Nanterre,

as Assistant Counsel;

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

as Scientific and Technical Adviser;

Ms Sherly Noguera de Argüello, Consul General of the Republic of Nicaragua,

as Administrator,

and

the Republic of Colombia,

represented by

HE Mr Eduardo Valencia-Ospina, former Registrar and Deputy-Registrar of the International Court of Justice, former member, Special Rapporteur and Chairman of the International Law Commission,

as Agent and Counsel;

HE Ms Carolina Olarte-Bácares, Dean of the School of Law at the Pontificia Universidad Javeriana, member of the Permanent Court of Arbitration, Ambassador of the Republic of Colombia to the Kingdom of the Netherlands,

HE Ms Elizabeth Taylor Jay, former Ambassador of the Republic of Colombia to the Republic of Kenya, former Permanent Representative of the Republic of Colombia to the United Nations Environment Programme and the United Nations Human Settlements Programme,

as Co-Agents;

HE Mr Álvaro Leyva Durán, Minister for Foreign Affairs of the Republic of Colombia,

HE Mr Everth Hawkins Sjogreen, Governor of San Andrés, Providencia and Santa Catalina, Republic of Colombia,

as National Authorities;

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

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

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

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

Ms Laurence Boisson de Chazournes, Professor of International Law and International Organization at the University of Geneva, Professor at the Collège de France (2022-2023), member of the Institut de droit international,

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

as Counsel and Advocates;

Mr Andrés Villegas Jaramillo, Co-ordinator, Group of Affairs before the International Court of Justice at the Ministry of Foreign Affairs of the Republic of Colombia, associate of the Instituto Hispano-Luso-Americano de Derecho Internacional,

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

Mr Eran Sthoeger, Esq., Adjunct Professor of International Law at Brooklyn Law School and Seton Hall Law School, member of the Bar of the State of New York,

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

Mr Gershon Hasin, Visiting Lecturer in Law at Yale University,

Mr Gabriel Cifuentes, adviser to the Minister for Foreign Affairs of the Republic of Colombia, as Counsel;

Ms Jenny Bowie Wilches, First Secretary, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

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

Mr Raúl Alfonso Simancas Gómez, Third Secretary, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

Mr Oscar Casallas Méndez, Third Secretary, Group of Affairs before the International Court of Justice,

Mr Carlos Colmenares Castro, Third Secretary, Group of Affairs before the International Court of Justice, as representatives of the Ministry of Foreign Affairs of the Republic of Colombia;

Rear Admiral Ernesto Segovia Forero, Chief of Naval Operations,

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

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

as representatives of the Navy of the Republic of Colombia;

Mr Lindsay Parson, Geologist, Director of Maritime Zone Solutions Ltd, United Kingdom, former member and Chair of the United Nations International Seabed Authority's Legal and Technical Commission,

Mr Peter Croker, Geophysicist, Consultant at The M Horizon (UK) Ltd, former Chair of the United Nations Commission on the Limits of the Continental Shelf,

Mr Walter R. Roest, Geophysicist, Director of Roest Consultant EIRL, France, member of the United Nations Commission on the Limits of the Continental Shelf,

Mr Scott Edmonds, Cartographer, Director of International Mapping, Mr Thomas Frogh, Cartographer, International Mapping,

as Technical Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 16 September 2013, the Government of the Republic of Nicaragua (hereinafter "Nicaragua") filed in the Registry of the Court an Application instituting proceedings against the Republic of Colombia (hereinafter

"Colombia") with regard to a dispute concerning "the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia".

2. In its Application, Nicaragua sought to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the "Pact of Bogotá".

3. In accordance with Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated the Application to the Government of Colombia. He also notified the Secretary-General of the United Nations of the filing of the Application by Nicaragua.

4. Pursuant to Article 40, paragraph 3, of the Statute of the Court, the Registrar notified the Members of the United Nations through the Secretary-General of the filing of the Application, by transmission of the printed bilingual text.

5. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Nicaragua chose Mr Leonid Skotnikov. Colombia first chose Mr Charles N. Brower, who resigned on 5 June 2022, and subsequently Mr Donald McRae.

6. By an Order of 9 December 2013, the Court fixed 9 December 2014 and 9 December 2015 as the respective time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Colombia.

7. On 14 August 2014, before the expiry of the time-limit for the filing of the Memorial of Nicaragua, Colombia, referring to Article 79 of the Rules of Court of 14 April 1978 as amended on 1 February 2001, raised preliminary objections to the jurisdiction of the Court and to the admissibility of the Application. By an Order of 19 September 2014, the Court, noting that by virtue of Article 79, paragraph 5, of the Rules of Court the proceedings on the merits were suspended, fixed 19 January 2015 as the time-limit for the presentation by Nicaragua of a written statement of its observations and submissions on the preliminary objections raised by Colombia. Nicaragua filed its statement within the time-limit thus fixed.

8. By a letter dated 10 November 2014, pursuant to the instructions of the Court under Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notification provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar also addressed to the Organization of American States (hereinafter the "OAS") the notification provided for in Article 34, paragraph 3, of the Statute. By letter dated 5 January 2015, the Secretary-General of the OAS indicated that the Organization did not intend to present any observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court.

9. By a letter dated 17 February 2015, the Government of the Republic of Chile (hereinafter "Chile"), referring to Article 53, paragraph 1, of the Rules of Court, asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with that same provision, the President of the Court decided to grant that request. The Registrar duly communicated that decision to the Government of Chile and to the Parties. Copies of the preliminary objections raised by Colombia and the written statement of its observations and submissions thereon filed by Nicaragua were therefore communicated to Chile.

10. Public hearings on the preliminary objections raised by Colombia were held on 5, 6, 7 and 9 October 2015. In its Judgment of 17 March 2016, the Court found that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the first request put forward by Nicaragua in its Application (see paragraph 18 below), asking the Court to determine "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012" in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, and that this request was admissible (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 140, para. 126).

11. By an Order of 28 April 2016, the Court fixed 28 September 2016 and 28 September 2017, respectively, as the new time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Colombia. These pleadings were filed within the time-limits thus fixed. Along with its Memorial, Nicaragua also provided to the Court copies of its full submission to the Commission on the Limits of the Continental Shelf (hereinafter the "CLCS" or the "Commission"), explaining that this submission was part of its Memorial and that it was classified as confidential in accordance with the rules contained in Annex II to the Rules of Procedure of the CLCS.

12. By letters dated 6 October 2016 and 22 November 2016, respectively, the Government of the Republic of Costa Rica (hereinafter "Costa Rica") and the Government of the Republic of Panama (hereinafter "Panama"), referring to Article 53, paragraph 1, of the Rules of Court, asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with the same provision, the Court granted those requests, with the exception of the submission of Nicaragua to the CLCS, which would not be provided to Costa Rica and Panama. The Registrar duly communicated those decisions to Costa Rica and Panama and to the Parties. A copy of Nicaragua's Memorial, not including said submission, was also made available to Chile (see paragraph 9 above).

13. By an Order of 8 December 2017, the Court authorized the submission of a Reply by Nicaragua and a Rejoinder by Colombia, and fixed 9 July 2018 and 11 February 2019 as the respective time-limits for the filing of those pleadings. The Reply of Nicaragua and the Rejoinder of Colombia were filed within the time-limits thus fixed.

14. In an Order of 4 October 2022, the Court indicated that, in the circumstances of the case, before proceeding to any consideration of technical and scientific questions in relation to the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the baselines from which the breadth of the territorial sea of Nicaragua is measured, it was necessary to decide on certain questions of law, after hearing the Parties thereon. Accordingly, the Court decided that,

> "at the forthcoming oral proceedings in the case, the Republic of Nicaragua and the Republic of Colombia shall present their arguments exclusively with regard to the following two questions:
>
> (1) Under customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State?
>
> (2) What are the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and, in this regard, do paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea reflect customary international law?" (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Order of 4 October 2022*.)

15. Having ascertained the views of the Parties and in light of the scope of the oral proceedings, the Court decided, pursuant to Article 53, paragraph 2, of the Rules of Court, that copies of the written pleadings and documents annexed would not be made accessible to the public at the time of the opening of the oral proceedings.

16. Public hearings on the two questions formulated by the Court in its Order of 4 October 2022 (see paragraph 14 above) were held on 5, 6, 7 and 9 December 2022, at which the Court heard the oral arguments and replies of:

For Nicaragua:	HE Mr Carlos José Argüello Gómez, Mr Vaughan Lowe, Mr Alex Oude Elferink, Mr Alain Pellet.
For Colombia:	HE Mr Eduardo Valencia-Ospina, Sir Michael Wood, Mr Rodman Bundy, Mr Lorenzo Palestini, Mr Jean-Marc Thouvenin, Ms Laurence Boisson de Chazournes.

17. At the hearings, a Member of the Court put a question to Colombia, to which a reply was given orally in accordance with Article 61, paragraph 4, of the Rules of Court. Nicaragua submitted written comments on the oral reply provided by Colombia on 15 December 2022.

*

18. In the Application, the following claims were made by Nicaragua:
"Nicaragua requests the Court to adjudge and declare:

First: The precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012.

Second: The principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast."

19. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Nicaragua,

in the Memorial:

"For the reasons given in the present Memorial, the Republic of Nicaragua requests the Court to adjudge and declare that:

1. The maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundary determined by the Court in its Judgment of 19 November 2012, follows geodetic lines connecting the points with the following co-ordinates:

Point	Latitude	Longitude
1	14° 43′ 20.6" N	74° 34′ 49.1" W
2	14° 21′ 53.4" N	75° 15′ 39.3" W
3	13° 59′ 29.8" N	76° 5′ 15.6" W
4	13° 51′ 26.0" N	76° 21′ 57.1" W
5	13° 46′ 6.1" N	76° 35′ 44.9" W
6	13° 42′ 31.1" N	76° 41′ 20.33" W
7	12° 41′ 56.9" N	77° 32′ 27.4" W
8	12° 15′ 38.3" N	77° 47′ 56.3" W

2. The islands of San Andrés and Providencia are entitled to a continental shelf up to a line consisting of 200 nm arcs from the baselines from which the territorial sea of Nicaragua is measured connecting the points with the following co-ordinates:

Point	Latitude	Longitude
A	13° 46′ 35.7" N	79° 12′ 23.1" W
C	12° 42′ 24.1" N	79° 34′ 4.7" W
B	12° 24′ 9.4" N	79° 34′ 4.7" W

3. Serranilla and Bajo Nuevo are enclaved and granted a territorial sea of twelve nautical miles."

in the Reply:

"For the reasons given in the Memorial and the present Reply, the Republic of Nicaragua requests the Court to adjudge and declare that:

1. The maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundary determined by the Court in its Judgment of 19 November 2012, follows geodetic lines connecting the points with the following co-ordinates:

Point	Latitude	Longitude
1	14° 43' 20.6" N	74° 34' 49.1" W
2	14° 21' 53.4" N	75° 15' 39.3" W
3	13° 59' 29.8" N	76° 5' 15.6" W
4	13° 51' 26.0" N	76° 21' 57.1" W
5	13° 46' 6.1" N	76° 35' 44.9" W
6	13° 42' 31.1" N	76° 41' 20.33" W
7	12° 41' 56.9" N	77° 32' 27.4" W
8	12° 15' 38.3" N	77° 47' 56.3" W

2. The islands of San Andrés and Providencia are entitled to a continental shelf up to a line consisting of 200 nm arcs from the baselines from which the territorial sea of Nicaragua is measured connecting the points with the following co-ordinates:

Point	Latitude	Longitude
A	13° 46' 35.7" N	79° 12' 23.1" W
C	12° 42' 24.1" N	79° 34' 4.7" W
B	12° 24' 9.4" N	79° 34' 4.7" W

3. Serranilla and Bajo Nuevo are enclaved and granted a territorial sea of twelve nautical miles, and Serrana is enclaved as per the Court's November 2012 Judgment."

On behalf of the Government of Colombia,
in the Counter-Memorial:

"[F]or the reasons set out in this Counter-Memorial, and reserving the right to amend or supplement these Submissions, Colombia respectfully requests the Court to adjudge and declare that:

Nicaragua's request for a delimitation of the continental shelf beyond 200 nautical miles from its coast is rejected with prejudice."

in the Rejoinder:

"[F]or the reasons set out in its Counter-Memorial and Rejoinder, and reserving the right to amend or supplement these Submissions, Colombia respectfully requests the Court to adjudge and declare that:

Nicaragua's request for a delimitation of the continental shelf beyond 200 nautical miles from its coast is rejected with prejudice."

20. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Nicaragua,

"In the case concerning *The Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, for the reasons explained in the Written and Oral phase, Nicaragua respectfully requests the Court to adjudge and declare that:

I. The response to the questions of law is in the affirmative:

A. Under customary international law a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured may extend within 200 nautical miles from the baselines of another State.

B. Paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea reflect customary international law.

II. Nicaragua respectfully requests the Court to proceed to fix a timetable to hear and decide upon all of the outstanding request in Nicaragua's pleadings.

Nicaragua, formally reserves its right to complete its Final Submissions in view of the factual circumstances of the case as decided by the Court in its Order of 4 October 2022."

On behalf of the Government of Colombia,

"With respect to the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, having regard to the Order dated 4 October 2022 and the questions of law contained therein, Colombia respectfully requests the Court to adjudge and declare that:

1. In relation to the first question:

i. Under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured cannot extend within 200 nautical miles from the baselines of another State.

2. In relation to the second question:

i. Under customary international law, there are no criteria for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured whenever the outer limit of said continental shelf is located within the 200-nautical-mile zone of another State.

ii. Paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea do not reflect customary international law.

Furthermore, considering that the answers to these two questions govern all of Nicaragua's submissions as set out during the course of the proceedings, Colombia further requests the Court to adjudge and declare that:

3. Nicaragua's request for a delimitation of the continental shelf beyond 200 nautical miles from its coast is rejected with prejudice.

4. Consequently, Nicaragua's request for the fixing of a timetable to hear and decide upon all the outstanding requests in Nicaragua's pleadings is rejected."

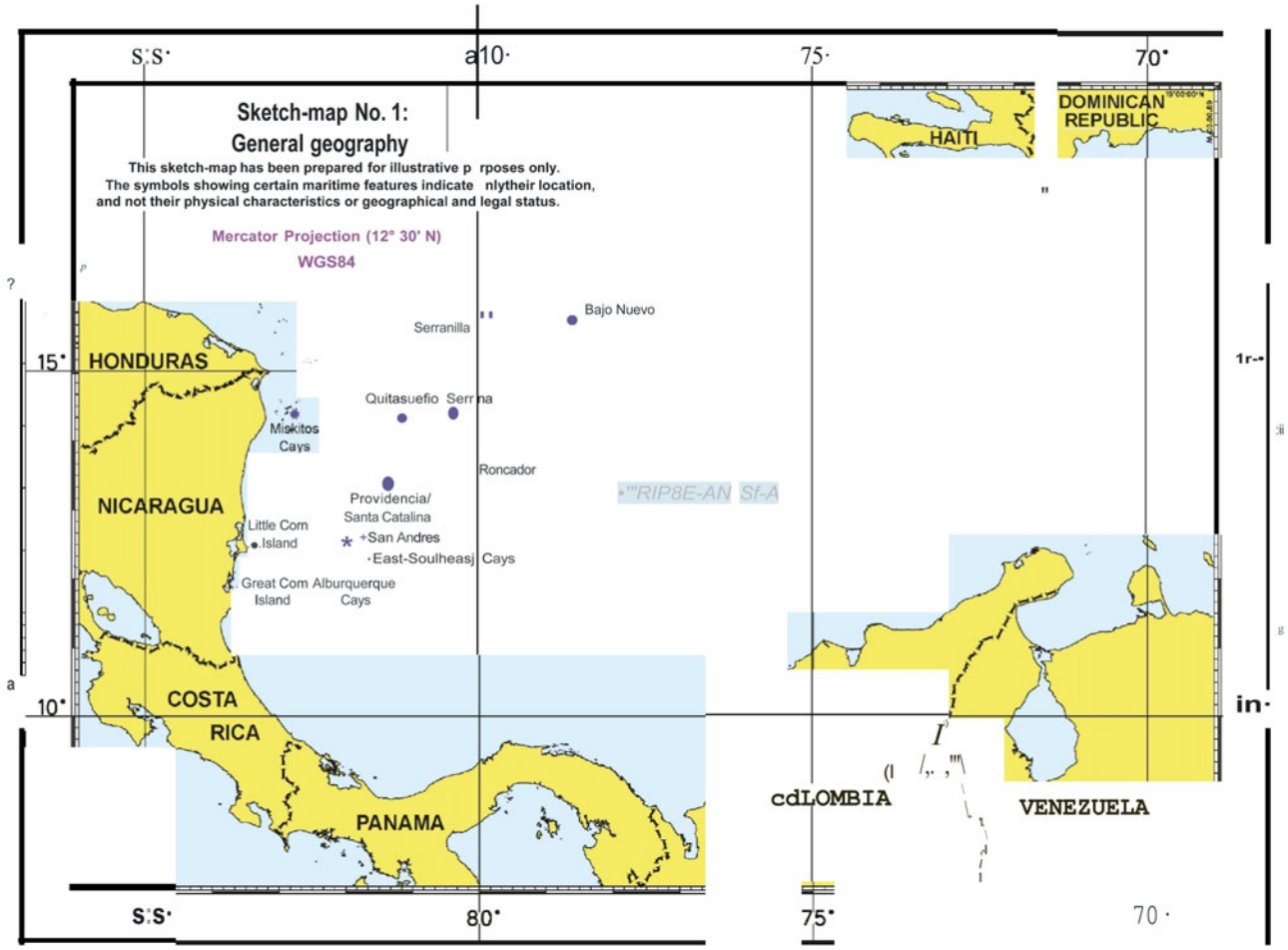
*

* *

I. GENERAL BACKGROUND

21. The maritime areas with which the present proceedings are concerned are located in the Caribbean Sea, an arm of the Atlantic Ocean partially enclosed to the north and east by a number of islands, and bounded to the south and west by South and Central America. Nicaragua's eastern coast faces the south-western part of the Caribbean Sea. To the north of Nicaragua lies Honduras and to the south lie Costa Rica and Panama. To the north-east, Nicaragua faces Jamaica, and to the east, it faces the mainland coast of Colombia. Colombia is situated to the south of the Caribbean Sea. On its Caribbean front, Colombia is bordered to the west by Panama and to the east by Venezuela. The Colombian islands of San Andrés, Providencia and Santa Catalina lie in the south-west of the Caribbean Sea, approximately 100 to 150 nautical miles to the east of the Nicaraguan coast. (For the general geography of the area, see sketch-map No. 1.)

. SKETCH-MAP NO. 1: GENERAL GEOGRAPHY



22. On 6 December 2001, Nicaragua filed in the Registry of the Court an Application instituting proceedings against Colombia in respect of a dispute consisting of "a group of related legal issues subsisting" between the two States "concerning title to territory and maritime delimitation" in the western Caribbean (case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*).

23. 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"), the Court decided that Colombia "has sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla" (*I.C.J. Reports 2012 (II)*, p. 718, para. 251, subpara. 1). The Court also 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 (*ibid.*, pp. 719-720, para. 251, subpara. 4). The Court, however, noted in its reasoning that, since Nicaragua had not yet notified the Secretary-General of the United Nations of the location of those baselines under Article 16, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or the "Convention"), the precise location of the eastern endpoints of the maritime boundary could not be determined and was therefore depicted only approximately on the sketch-map included at page 714 of that Judgment (*ibid.*, p. 713, para. 237). (For the course of the maritime boundary established by the Court in its 2012 Judgment, see sketch-map No. 2.)

24. In the 2012 Judgment, the Court further found that it could not uphold Nicaragua's claim contained in its final submission I (3), requesting that the Court adjudge and declare that

> "[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 636, para. 17, and p. 719, para. 251, subpara. 3).

In particular, the Court noted that,

> "since Nicaragua . . . ha[d] not established that it ha[d] a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court [was] not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it" (*ibid.*, p. 669, para. 129).

The Court observed in this regard that Nicaragua had submitted to the CLCS only "Preliminary Information" which "[fell] short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical miles" to be submitted under Article 76, paragraph 8, of UNCLOS (*ibid.*, p. 669, para. 127).

25. On 24 June 2013, in accordance with Article 76, paragraph 8, of UNCLOS, Nicaragua presented its full submission to the CLCS regarding the limits of its continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.

26. On 16 September 2013, Nicaragua filed the Application instituting the current proceedings, requesting the Court to adjudge and declare the precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its 2012 Judgment (see paragraph 1 above).

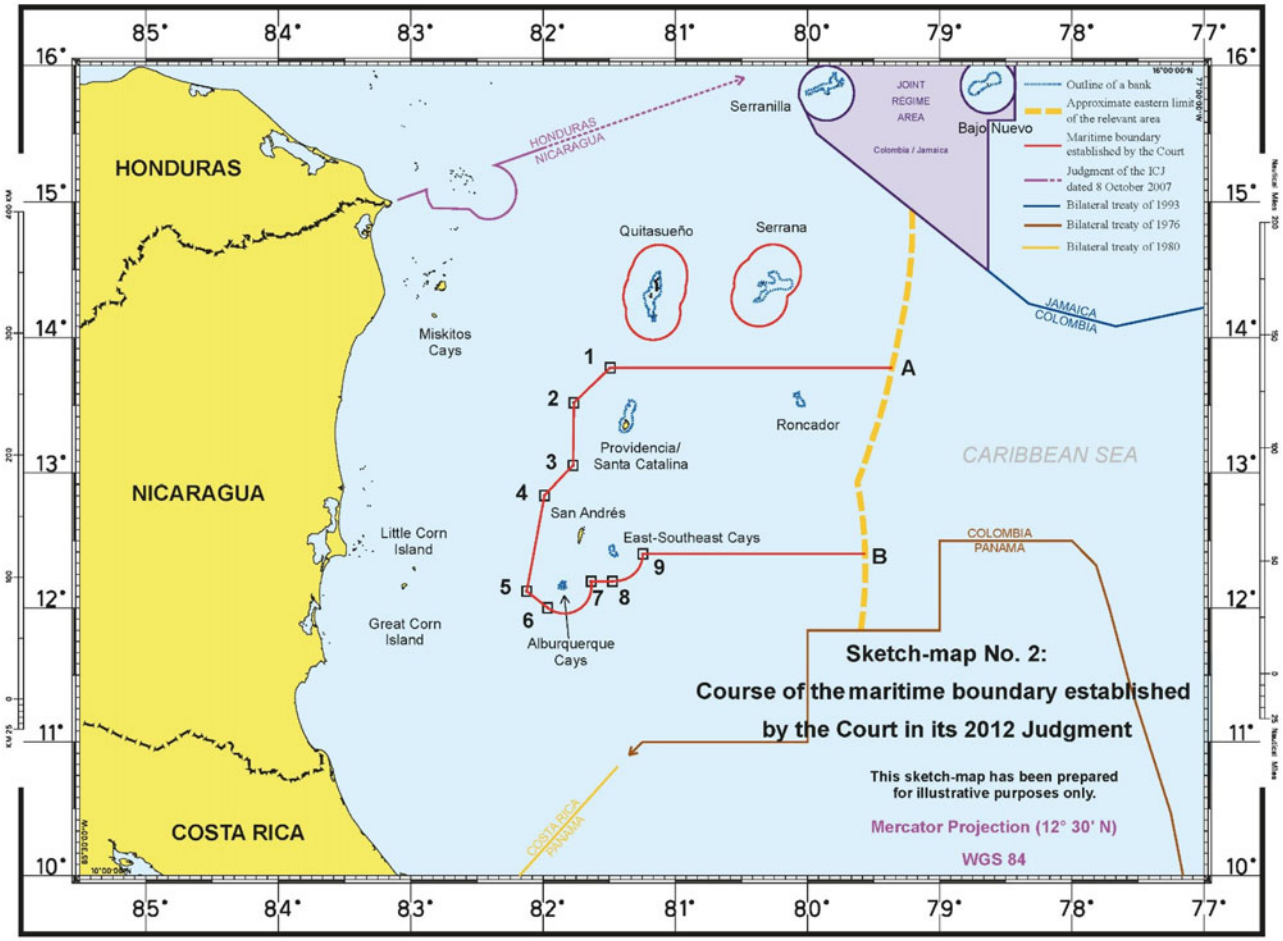
Both Parties have adduced extensive technical and scientific evidence as to whether Nicaragua has established an entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (also referred to as an "extended continental shelf") and, if so, the precise outer limits of that continental shelf.

II. OVERVIEW OF THE PARTIES' POSITIONS

27. Nicaragua argues that it has an entitlement to a continental shelf beyond 200 nautical miles of its coast. In order to substantiate its claim, Nicaragua relies on the submission that it presented to the CLCS on 24 June 2013,

which, in its view, contains "complete technical information" that enables the Commission to review that submission and make its recommendations under Article 76, paragraph 8, of UNCLOS on the outer limits of Nicaragua's continental shelf. Nicaragua contends that it has established the existence of a natural prolongation of its land territory up to the outer edge of the continental margin and that there is both geological and geomorphological continuity between its landmass and the sea-bed and subsoil beyond 200 nautical miles from its baselines.

. SKETCH-MAP NO. 2: COURSE OF THE MARITIME BOUNDARY ESTABLISHED BY THE COURT IN ITS 2012 JUDGMENT



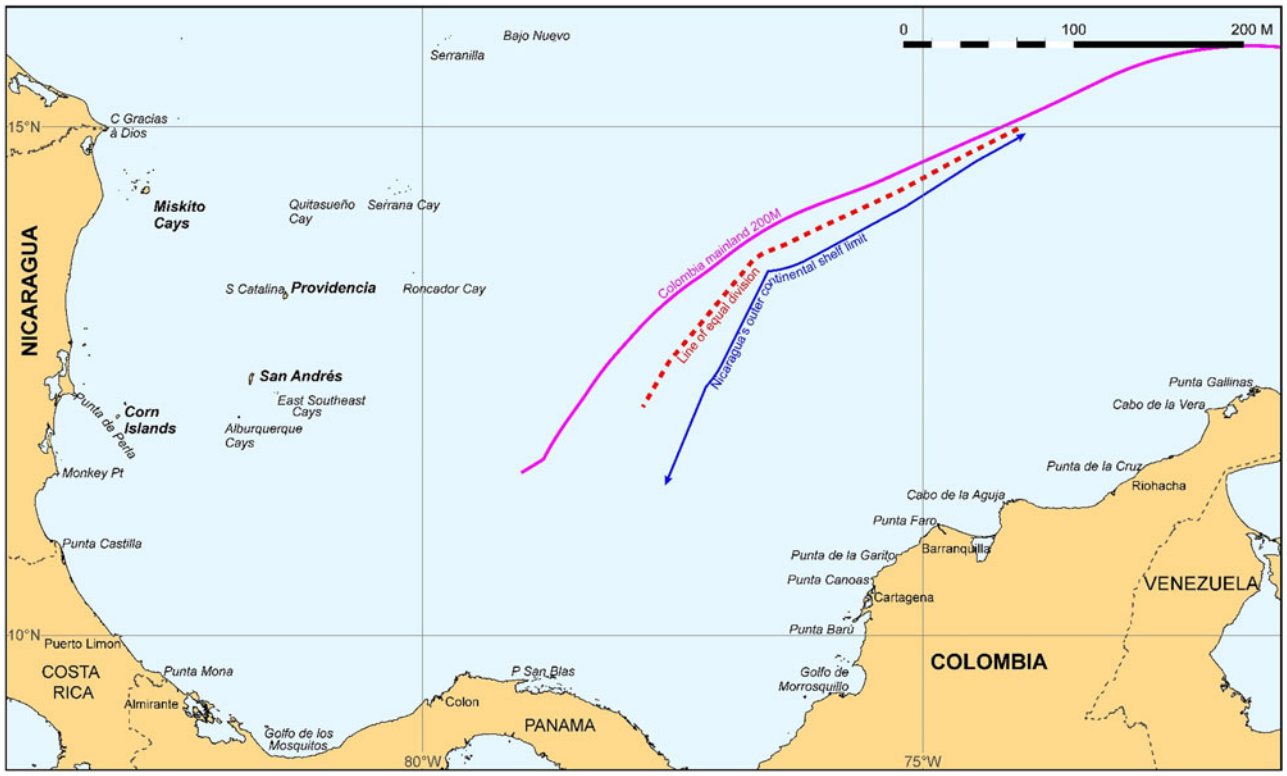
28. Nicaragua defines the outer edge of the continental margin, wherever the margin extends beyond 200 nautical miles of its coast, by reference to the formulae and criteria contained in Article 76, paragraphs 4 to 6, of UNCLOS. It asserts that the CLCS applies these provisions to determine the existence of a State's entitlement to a continental shelf beyond 200 nautical miles. According to Nicaragua, Article 76, paragraphs 2 to 6, of UNCLOS reflect customary international law.

29. Nicaragua notes that Colombia only claims, with respect to its mainland, a continental shelf up to 200 nautical miles from its baselines. Nicaragua proposes, with respect to Colombia's mainland, a provisional delimitation line which Nicaragua refers to as the "provisional mainland-mainland delimitation line". This line divides equally the area of overlap between the 200-nautical-mile limit of the continental shelf entitlement generated by Colombia's mainland coast and the outer limits of the extended continental shelf as described by Nicaragua in its submission to the CLCS. That line is depicted in figure 5.1 of Nicaragua's Memorial, which is reproduced below.

30. With respect to the entitlement derived from Colombian islands, Nicaragua contends that only the maritime features of San Andrés, Providencia and Santa Catalina qualify as islands entitled to a continental shelf in accordance with the customary rule reflected in Article 121, paragraph 2, of UNCLOS, whereas Quitasueño,

Alburquerque, Bajo Nuevo, East-Southeast Cays, Roncador, Serrana and Serranilla fall under the definition of "rocks" under customary international law reflected in Article 121, paragraph 3, of UNCLOS and do not generate any entitlement to a continental shelf. Nicaragua considers that San Andrés, Providencia and Santa Catalina are situated on the same continental margin as Nicaragua's mainland and hence could have a potential continental shelf entitlement beyond 200 nautical miles to the edge of that continental margin. In Nicaragua's view, however, the continental shelf of these islands should not extend east of the 200-nautical-mile limit from Nicaragua's baselines because the 2012 Judgment already allocated these islands continental shelf rights that are very substantial in relation to their limited size. Thus, Nicaragua is of the view that these islands are entitled to a continental shelf up to a line consisting of 200-nautical-mile arcs from the baselines from which the territorial sea of Nicaragua is measured connecting points A, C and B, the co-ordinates of which are indicated in the submissions presented by Nicaragua in its Memorial and reiterated in its Reply (see paragraph 19 above). Nicaragua also considers that the Colombian maritime features of Serranilla Cay and Bajo Nuevo should be afforded only a 12-nautical-mile territorial sea. The final delimitation proposed by Nicaragua is depicted in figure 7.1. of its Reply, which is reproduced below.

. MAP SHOWING THE "PROVISIONAL MAINLAND-MAINLAND DELIMITATION LINE" PROPOSED BY NICARAGUA
(*Source:* Nicaragua's Memorial, figure 5.1, p. 128)



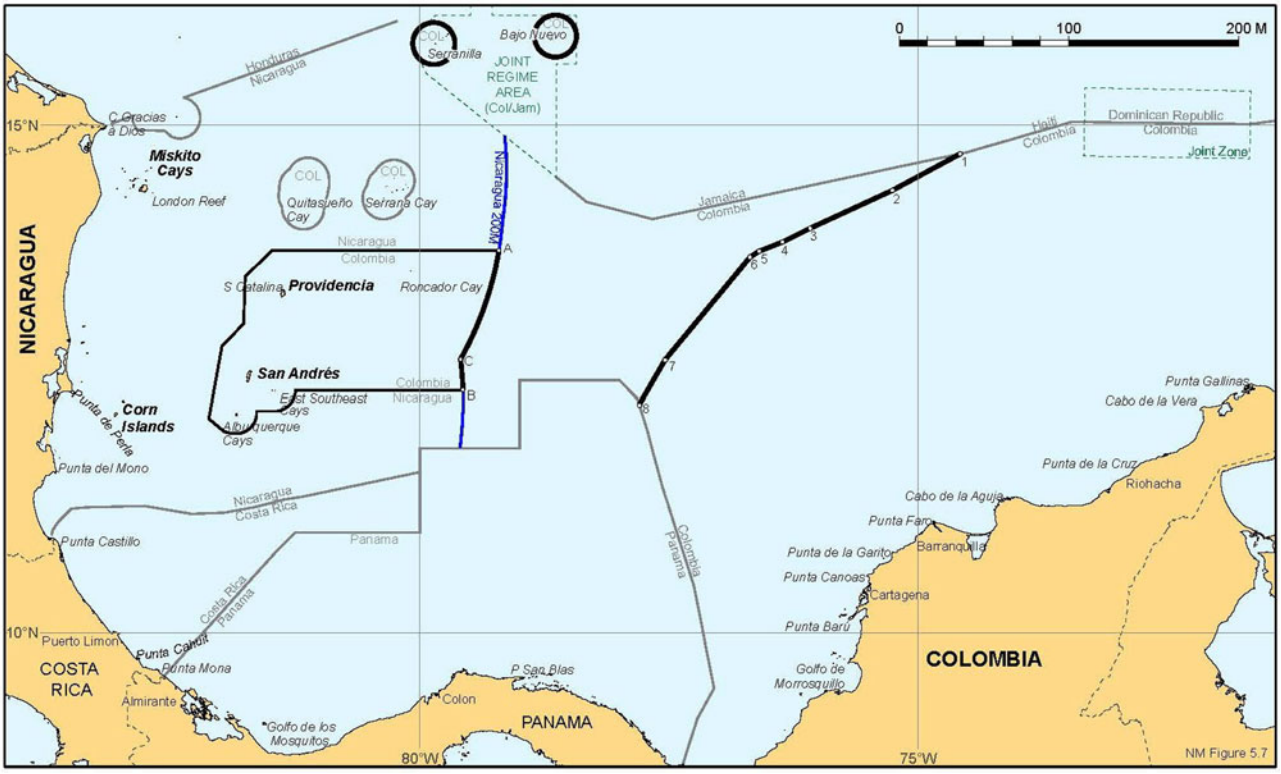
*

31. Colombia asks the Court to reject Nicaragua's request for a delimitation of the continental shelf beyond 200 nautical miles of the latter's coast. It argues in particular that, as a matter of customary international law, a State may not claim a continental shelf beyond 200 nautical miles from its baselines that encroaches on another State's entitlement to a 200-nautical-mile exclusive economic zone and continental shelf measured from its mainland coast and islands.

32. With respect to the alleged entitlement of Nicaragua to a continental shelf beyond 200 nautical miles of Nicaragua's coast, Colombia argues that the Applicant erroneously assumes that its submission to the CLCS is in itself proof of the existence of its extended continental shelf. According to Colombia, Article 76, paragraphs 2 to 6, which set out precise scientific and technical formulae for fixing limits beyond which an extended continental shelf may not be claimed, do not reflect customary international law. The Respondent contends that a coastal

State's entitlement to a continental shelf beyond 200 nautical miles must be based on the natural prolongation of its land territory as evidenced by the physical characteristics of the shelf based on geological and geomorphological factors. In this regard, Colombia argues that Nicaragua fails to demonstrate with scientific certainty the existence of the natural prolongation of its land territory beyond 200 nautical miles of its coast. Colombia claims that there are a number of fundamental geomorphological disruptions and geological discontinuities in the physical continental shelf that terminate the natural prolongation of Nicaragua's land territory well before the 200-nautical-mile limit from the Nicaraguan coast is reached.

. MAP SHOWING THE FINAL DELIMITATION PROPOSED BY NICARAGUA
(*Source:* Nicaragua's Reply, figure 7.1, p. 208)



33. Turning to its own entitlements, Colombia alleges that, in conformity with customary international law, both its mainland and its islands are entitled to a 200-nautical-mile exclusive economic zone with its "attendant" continental shelf. It recalls that, in the 2012 Judgment, the Court ruled that San Andrés, Providencia and Santa Catalina generated a territorial sea, an exclusive economic zone and a continental shelf, and that they possessed substantial entitlements to the east of the 200-nautical-mile line from Nicaragua's baselines. Colombia further asserts that Roncador, Serrana, Serranilla and Bajo Nuevo are not rocks and are thus entitled to an exclusive economic zone with its "attendant" continental shelf, including in areas lying more than 200 nautical miles from Nicaragua's baselines. It contends that all these islands are capable of sustaining human habitation or economic life of their own. It adds that, even if Serrana, Roncador, Serranilla and Bajo Nuevo were deemed not to be entitled to an exclusive economic zone and continental shelf, Nicaragua's claim would still fail because its extended continental shelf cannot "leapfrog" over or "tunnel" under the exclusive economic zone and "attendant" continental shelf of San Andrés, Providencia and Santa Catalina.

* *

34. In its Order of 4 October 2022, the Court stated that, in the circumstances of the case, it was first necessary to decide on certain questions of law, after hearing the Parties thereon, and thus posed two questions to the

Parties (see paragraph 14 above). The Court will examine the first question (Part III) before turning to the second question (Part IV). It will then consider the requests contained in Nicaragua's submissions (Part V).

III. FIRST QUESTION FORMULATED IN THE ORDER OF 4 OCTOBER 2022

35. The Court recalls that the first question formulated in the Order of 4 October 2022 (hereinafter the "first question") is worded as follows:

> "Under customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State?" (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Order of 4 October 2022*.)

36. The Court will begin by considering the preliminary character of the first question (Section A). It will then determine the customary international law applicable in this case to the maritime areas at issue (Section B), before responding to the first question (Section C).

A. The preliminary character of the first question

37. The Court recalls that, in its Application of 16 September 2013, Nicaragua instituted proceedings against Colombia with regard to a dispute concerning

> "the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia".

38. In its Order of 4 October 2022, the Court considered that, in the circumstances of the case,

> "before proceeding to any consideration of technical and scientific questions in relation to the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the baselines from which the breadth of the territorial sea of Nicaragua is measured, . . . it [was] necessary to decide on certain questions of law, after hearing the Parties thereon" (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Order of 4 October 2022*).

39. The Court notes that, while the Parties agree that the first question posed by the Court arises in the particular factual context of the present case, the Parties have approached this question differently.

40. Nicaragua contends that there is an overlap between its own entitlement to an extended continental shelf and Colombia's entitlement to a continental shelf within 200 nautical miles of the latter's coast and that, therefore, the Court must proceed to an equitable delimitation. According to Nicaragua, it is this overlap that necessitates the delimitation of maritime zones in the area in which the Parties have competing entitlements.

41. Colombia, for its part, considers that a State must first establish that it has a legal title to a certain maritime area that overlaps with an area that may be claimed by another State, before the principles and rules of maritime delimitation come into play. In Colombia's view, it is not delimitation that generates a legal title, but rather a legal title that gives rise to the need for delimitation.

42. As the Court has indicated previously, "[a]n essential step in any delimitation is to determine whether there are entitlements, and whether they overlap" (*Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 276, para. 193; see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 42, para. 34). Determining whether there is any area of overlap between the entitlements of two States, each founded on a distinct legal title, is the first step in any maritime delimitation, because "the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 89, para. 77).

43. Therefore, the first question has a preliminary character in the sense that it must be answered in order to ascertain whether the Court may proceed to the delimitation requested by Nicaragua and, consequently, whether it is necessary to consider the scientific and technical questions that would arise for the purposes of such a delimitation.

44. The Court asked the Parties to base their arguments on customary international law, which is applicable to the present case because, unlike Nicaragua, Colombia is not a party to UNCLOS.

45. The Court will now determine the customary international law applicable to the maritime areas at issue, namely the exclusive economic zone and the continental shelf.

B. THE CUSTOMARY INTERNATIONAL LAW APPLICABLE TO THE MARITIME AREAS AT ISSUE

46. The Court recalls that "the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States", and that "multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 29-30, para. 27; see also *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 42, para. 73).

47. UNCLOS was drawn up at the Third United Nations Conference on the Law of the Sea, which was held over a period of nine years, from December 1973 until the adoption of the Convention in Montego Bay on 10 December 1982. As is indicated in the preamble of UNCLOS, the objective of the Convention was to achieve "the codification and progressive development of the law of the sea". Even prior to the conclusion of the negotiations, certain aspects of the legal régimes governing the maritime areas of coastal States, notably the continental shelf and the exclusive economic zone, were reflected in State practice, primarily through declarations, laws and regulations. This practice was taken into account during the drafting of the Convention. A very large number of States have since become parties to UNCLOS, which has significantly contributed to the crystallization of certain customary rules.

48. As recognized in the preamble to the Convention, "the problems of ocean space are closely related and need to be considered as a whole". The method of negotiation at the Conference was designed against this background and had the aim of achieving consensus through a series of provisional and interdependent texts on the various questions at issue that resulted in a comprehensive and integrated text forming a package deal.

49. The integrated character of the various parts of the Convention is particularly evident in relation to Part V of UNCLOS, which concerns the exclusive economic zone, and Part VI, which concerns the continental shelf. The relationship between these two parts is specified in Article 56, paragraph 3. This Article provides:

> "1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
>
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
>
> (i) the establishment and use of artificial islands, installations and structures;
>
> (ii) marine scientific research;
>
> (iii) the protection and preservation of the marine environment;
>
> (c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI."

50. In the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, the Court concluded that Article 56 reflects customary rules on the rights and duties in the exclusive economic zone of coastal States (*Judgment of 21 April 2022*, para. 57).

51. The Court turns next to the continental shelf, which is defined in Article 76, paragraph 1, of UNCLOS:

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

52. The Court recalls that this definition forms part of customary international law (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 666, para. 118).

53. In view of the foregoing, the Court will consider whether, under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may extend within 200 nautical miles from the baselines of another State.

C. Under customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State?

54. The Parties disagree as to whether a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may extend within 200 nautical miles from the baselines of another State.

55. Nicaragua argues that a State's entitlement to a continental shelf beyond 200 nautical miles may extend within 200 nautical miles from the baselines of another State.

56. Nicaragua asserts that the continental shelf and the rights relating to it automatically appertain to the coastal State, without there being any need for that State to exercise or declare those rights, which is not the case for the exclusive economic zone. According to the Applicant, there is no rule in customary international law, or in UNCLOS, that makes an exclusive economic zone an *ipso facto* and *ab initio* appurtenance of every coastal State.

57. Nicaragua acknowledges that, where there is an overlap between a State's continental shelf based on natural prolongation and another State's 200-nautical-mile zone, States have in general preferred to have a single maritime boundary rather than have any part of the continental shelf of one State lie within the 200-nautical-mile zone of the other. It adds, however, that this practice is not proof of a customary norm in this regard, given the lack of *opinio juris*. Nicaragua argues that the practice of States that refrain from asserting, in their submissions to the CLCS, outer limits of their extended continental shelf that extend within 200 nautical miles from the baselines of another State is motivated by considerations other than a sense of legal obligation, in particular a desire to avoid the possibility of their submission giving rise to a dispute with the result that the Commission would not consider it. Nicaragua also refers to certain examples of States which have made submissions to the CLCS that included the extension of their continental shelf within 200 nautical miles of another State, and notes that this practice supports the argument that the continental shelf beyond 200 nautical miles may extend within 200 nautical miles from the baselines of a neighbouring State.

58. Nicaragua also refers to the two cases concerning delimitation in the Bay of Bengal: *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, pp. 64-68, paras. 225-240, and *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India), Award of 7 July 2014*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXXII, pp. 104-106, paras. 336-346 (hereinafter the "*Bay of Bengal* cases"). According to Nicaragua, the decisions in these two cases mean that, when a State's continental shelf beyond 200 nautical miles from its baselines extends within the exclusive economic zone of another State, this gives rise to a "grey area" in which the two States must co-operate. It follows, in Nicaragua's view, that there is no rule of customary international law extinguishing the entitlement of one State to an extended continental shelf that overlaps with another State's entitlement to a continental shelf within 200 nautical miles from the latter's baselines.

59. Nicaragua contends that there can be no difference in law between a State's entitlement to a continental shelf based on the natural prolongation criterion and one founded on the distance criterion. Nicaragua argues that there is a single continental shelf within and beyond 200 nautical miles from the baselines of the coastal State and that the same legal régime applies to all of it. While recognizing that States parties to UNCLOS are obligated to make contributions in return for the exploitation of the non-living resources of their continental shelf beyond 200 nautical miles, Nicaragua argues that the juridical nature of the rights of the coastal State is the same throughout its entire continental shelf. It adds that the unity of the continental shelf was confirmed in the 2006 arbitral award in the *Barbados* v. *Trinidad and Tobago* case (*Award of 11 April 2006, RIAA,* Vol. XXVII, pp. 208–209, para. 213), the decision of the International Tribunal for the Law of the Sea (ITLOS) in the case between Bangladesh and Myanmar (*Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, pp. 96–97, paras. 361–362) and the decision of the Special Chamber of ITLOS in *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (*Judgment, ITLOS Reports 2017*, p. 136, para. 490, and p. 142, para. 526).

60. According to Nicaragua, natural prolongation is the source of the coastal State's legal title both within and beyond 200 nautical miles. It considers that no "distance" criterion has been introduced to limit the scope of continental shelf claims, except in the provisions of UNCLOS concerning the determination of the outer edge of the continental margin, and that such is the situation at present. Recalling the historical origins of the concept of the continental shelf, Nicaragua asserts that, in the *North Sea Continental Shelf* cases, the Court confirmed that every coastal State has sovereign rights over the exploitable natural resources of the sea-bed that constitutes a natural prolongation of its land territory into and under the sea, with no "distance" criterion to be applied.

*

61. Colombia, for its part, considers that the continental shelf of a State beyond 200 nautical miles may not extend within 200 nautical miles from the baselines of another State.

62. Colombia argues that Article 56, paragraph 3, in Part V of UNCLOS, which concerns the exclusive economic zone, provides that the rights with respect to the sea-bed and its subsoil are to be exercised in accordance with Part VI of the Convention, which concerns the continental shelf, and that the rules of Part VI are thus incorporated by reference into the legal régime that governs the exclusive economic zone.

63. The Respondent asserts that the delimitation Nicaragua seeks would entail the vertical superimposition of two distinct national jurisdictions for distinct layers of the sea. According to Colombia, Nicaragua's claim in this case bears no relation to the "grey areas" created in the delimitation decisions in the *Bay of Bengal* cases. Colombia argues that such grey areas are a by-product of the adjustment made to the equidistance line in plotting the single maritime boundary between two States with adjacent coasts. It adds that the existence of a grey area cannot be upheld in this case without calling into question the very notion of the exclusive economic zone, which, it claims, was meant to join all the physical layers of the sea under one national jurisdiction in which the coastal State would exercise sovereign rights over both the living and non-living resources. Colombia concludes on this matter that the two *Bay of Bengal* decisions are irrelevant in this case, since those proceedings did not involve a delimitation between the 200-nautical-mile entitlement of one State and the extended continental shelf claim of another.

64. Colombia emphasizes that the legal régime that governs the exclusive economic zone is the result of a compromise reached at the Third United Nations Conference on the Law of the Sea, taking into account the proposals made by a number of Latin American and African countries regarding the creation of a new *sui generis* 200-nautical-mile zone. In this zone, which was to have a "specific legal regime" and that would be neither territorial sea nor high seas, the coastal State would have exclusive sovereign rights over all the living and non-living resources of the water column, the sea-bed and the subsoil. The Respondent thus contends that an exclusive economic zone the water column of which is divorced from the sea-bed and subsoil is no longer an exclusive economic zone.

65. With regard to the continental shelf, Colombia recalls that, within 200 nautical miles, legal title depends on distance and that geology and geomorphology are not pertinent in this regard. While recognizing that the substantive content of the institution of the continental shelf is generally the same within and beyond 200 nautical miles from a State's baselines, Colombia maintains that the idea of the single continental shelf put forward by Nicaragua is irrelevant because the rules to be followed in determining a coastal State's entitlement to a continental shelf are different depending on whether the area in question is within or beyond 200 nautical miles.

66. According to Colombia, the package deal reflected in UNCLOS results from the negotiators' concerns about defining the outer limits of the continental margin in relation to the international sea-bed area (hereinafter the "Area"), considered the common heritage of mankind. In its view, this is confirmed by the obligation incumbent on the coastal State to make certain payments and contributions in respect of minerals taken from the area beyond 200 nautical miles.

67. According to the Respondent, in certain circumstances, State practice may be evidence of *opinio juris* and an examination of the extended continental shelf submissions filed by States with the CLCS clearly shows that the vast majority of those States do not claim a continental shelf that would encroach on maritime areas within 200 nautical miles from the baselines of another State. Colombia adds that the great majority of delimitations by way of agreement between States have disregarded geological and geomorphological features within 200 nautical miles of any coast.

* *

68. In support of their respective positions, the Parties have set out their views both on the relationship between the régime governing the exclusive economic zone and that governing the continental shelf and on certain considerations relevant to the régime governing the extended continental shelf. The Court considers each of these in turn.

69. The Court recalls that the régime that governs the exclusive economic zone set out in UNCLOS is the result of a compromise reached at the Third United Nations Conference on the Law of the Sea. Notably, this régime confers exclusively on the coastal State the sovereign rights of exploration, exploitation, conservation and management of natural resources within 200 nautical miles of its coast, while specifying certain duties on the part of the coastal State (Article 56), as well as the rights and duties of other States in that zone (Article 58). The Court has stated that the rights and duties of coastal States and other States in the exclusive economic zone set out in Articles 56, 58, 61, 62 and 73 of UNCLOS reflect customary international law (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Judgment of 21 April 2022*, para. 57).

70. As stated above (see paragraph 49), the legal régimes governing the exclusive economic zone and the continental shelf of the coastal State within 200 nautical miles from its baselines are interrelated. Indeed, within the exclusive economic zone, the rights with respect to the sea-bed and subsoil are to be exercised in accordance with the legal régime that governs the continental shelf (UNCLOS, Article 56, paragraph 3) and the coastal State exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources (UNCLOS, Article 77, paragraphs 1 and 2). The Court stated in its 1985 Judgment in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case that

> "[a]lthough the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone

> are defined by reference to the régime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf." (*Judgment, I.C.J. Reports 1985*, p. 33, para. 34.)

71. As regards the *Bay of Bengal* cases, the Court recalls that, in the case between Bangladesh and Myanmar, ITLOS delimited the 200-nautical-mile zones of two adjacent States by constructing a provisional equidistance line, which it then adjusted. The Tribunal determined that both parties had entitlements to an extended continental shelf and it continued the course of the adjusted equidistance line beyond the 200-nautical-mile limit of Bangladesh (*Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 118, paras. 460-462). The use of an adjusted equidistance line produced a wedge-shaped area of limited size located within 200 nautical miles of the coast of Myanmar but on the Bangladesh side of the line delimiting the parties' continental shelves. As the Tribunal noted, this "grey area ar[ose] as a consequence of delimitation" (*ibid.*, pp. 119-120, paras. 463 and 472). Likewise, in the case between Bangladesh and India, the arbitral tribunal found both parties to have entitlements to an extended continental shelf and followed an adjusted equidistance methodology, which produced a "grey area" of limited size lying within the extended continental shelf of Bangladesh and the 200-nautical-mile zone of India (*Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014, RIAA*, Vol. XXXII, p. 147, para. 498). Each tribunal specified that, within the "grey area", the maritime boundary determined the rights that the parties had over the continental shelf pursuant to Article 77 of UNCLOS, but did not otherwise limit the rights of Myanmar and India, respectively, to the exclusive economic zone, as set out in Article 56 of UNCLOS, notably those with respect to the superjacent water column. Both tribunals underlined that it was for the parties to take measures they considered appropriate with regard to the maritime areas in which they had shared rights, including through the conclusion of further agreements or the creation of a co-operative arrangement (*ibid.*, pp. 148-149, paras. 505 and 507-508; *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 121, paras. 474-476).

72. In the two *Bay of Bengal* cases, the use of an adjusted equidistance line in a delimitation between adjacent States gave rise to a "grey area" as an incidental result of that adjustment. The circumstances in those cases are distinct from the situation in the present case, in which one State claims an extended continental shelf that lies within 200 nautical miles from the baselines of one or more other States. The Court considers that the aforementioned decisions are of no assistance in answering the first question posed in the present case.

73. In the *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)* case, the Court adopted an adjusted equidistance line as the single maritime boundary within the parties' 200-nautical-mile zones. The delimitation line continued on that course beyond 200 nautical miles from the baselines of both parties. The Court observed that the delimitation might give rise to an area of limited size lying within 200 nautical miles of the coast of Somalia but on the Kenyan side of the boundary. However, unlike the situation in the two *Bay of Bengal* cases, the Court considered that the existence of a "grey area" was only a possibility, depending on the extent of Kenya's entitlement to an extended continental shelf. The Court therefore did not consider it necessary to pronounce on the legal régime that would apply in this possible "grey area" (*Judgment, I.C.J. Reports 2021*, p. 277, para. 197).

74. The Court turns next to certain considerations relevant to the régime that governs the extended continental shelf.

75. The Court notes that, in contemporary customary international law, there is a single continental shelf in the sense that the substantive rights of a coastal State over its continental shelf are generally the same within and beyond 200 nautical miles from its baselines. However, the basis for the entitlement to a continental shelf within 200 nautical miles from a State's baselines differs from the basis for entitlement beyond 200 nautical miles. Indeed, in customary international law, as reflected in Article 76, paragraph 1, of the Convention, a State's entitlement to a continental shelf is determined in two different ways: the distance criterion, within 200 nautical miles of its coast, and the natural prolongation criterion, beyond 200 nautical miles, with the outer limits to be established on the basis of scientific and technical criteria.

76. The Court further notes that the substantive and procedural conditions for determining the outer limits of the continental shelf beyond 200 nautical miles were the result of a compromise reached during the final sessions of

the Third United Nations Conference on the Law of the Sea. The aim was to avoid undue encroachment on the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, considered the "common heritage of mankind" and referred to in UNCLOS as the "Area" (Article 1, paragraph 1, of the Convention). The text of Article 76 of UNCLOS, in particular the rules in paragraphs 4 to 7 thereof, the role given to the CLCS in paragraph 8, and the obligation to deposit charts and relevant information in paragraph 9, suggests that the States participating in the negotiations assumed that the extended continental shelf would only extend into maritime areas that would otherwise be located in the Area. In this regard, the Court has emphasized that the main role of the CLCS

> "consists of ensuring that the continental shelf of a coastal State does not extend beyond the limits provided for in paragraphs 4, 5 and 6 of Article 76 of UNCLOS and thus preventing the continental shelf from encroaching on the 'area and its resources', which are 'the common heritage of mankind' (UNCLOS, Article 136)" (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 136, para. 109).

On the basis of the above-mentioned assumption, Article 82, paragraph 1, of the Convention makes provision for payments or contributions to be made through the International Seabed Authority in respect of the exploitation of "the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured". Such a payment would not serve the purpose of this provision in a situation where the extended continental shelf of one State extended within 200 nautical miles from the baselines of another State. Furthermore, although the Parties have referred extensively to the *travaux préparatoires* of UNCLOS, it appears that the possibility of one State's extended continental shelf extending within 200 nautical miles from the baselines of another State was not debated during the Third United Nations Conference on the Law of the Sea.

77. The Court notes that, in practice, the vast majority of States parties to the Convention that have made submissions to the CLCS have chosen not to assert, therein, outer limits of their extended continental shelf within 200 nautical miles of the baselines of another State. The Court considers that the practice of States before the CLCS is indicative of *opinio juris*, even if such practice may have been motivated in part by considerations other than a sense of legal obligation. Furthermore, the Court is aware of only a small number of States that have asserted in their submissions a right to an extended continental shelf encroaching on maritime areas within 200 nautical miles of other States, and in those instances the States concerned have objected to those submissions. Among the small number of coastal States that are not States parties to the Convention, the Court is not aware of any that has claimed an extended continental shelf that extends within 200 nautical miles from the baselines of another State. Taken as a whole, the practice of States may be considered sufficiently widespread and uniform for the purpose of the identification of customary international law. In addition, given its extent over a long period of time, this State practice may be seen as an expression of *opinio juris*, which is a constitutive element of customary international law. Indeed, this element may be demonstrated "by induction based on the analysis of a sufficiently extensive and convincing practice" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 299, para. 111).

78. The Court notes that the reasoning set out above is premised on the relationship between, on the one hand, the extended continental shelf of a State and, on the other hand, the exclusive economic zone and continental shelf, within 200 nautical miles from the baselines of another State.

79. In view of the foregoing, the Court concludes that, under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State.

IV. SECOND QUESTION FORMULATED IN THE ORDER OF 4 OCTOBER 2022

80. The Court recalls that the second question formulated in the Order of 4 October 2022 is worded as follows:

> "What are the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and, in this regard, do paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea reflect customary international law?"

81. The Court concluded, in response to the first question, that a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State (see paragraph 79 above). Therefore, even if a State can demonstrate that it is entitled to an extended continental shelf, that entitlement may not extend within 200 nautical miles from the baselines of another State.

82. It follows from the Court's answer to the first question that, regardless of the criteria that determine the outer limit of the extended continental shelf to which a State is entitled, its extended continental shelf cannot overlap with the area of continental shelf within 200 nautical miles from the baselines of another State. In the absence of overlapping entitlements over the same maritime areas, the Court cannot proceed to a maritime delimitation (see paragraph 42 above). Consequently, there is no need for the Court to address the second question.

V. CONSIDERATION OF NICARAGUA'S SUBMISSIONS

83. Based on the conclusion reached above (see paragraph 79), the Court now turns to the requests contained in Nicaragua's submissions.

84. In this regard, the Court recalls that Nicaragua's Application asks the Court to determine "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in [the 2012 Judgment]". Throughout the proceedings in the present case, Nicaragua has maintained that the object of its request consists in the delimitation of that maritime boundary. During the oral proceedings, Nicaragua explained that the submissions in its Memorial and Reply merely add precision to the request made in its Application. The Court considers that Nicaragua's submissions must be examined against this background.

A. The request contained in the first submission made by Nicaragua

85. The request contained in Nicaragua's first submission, which was presented in the Memorial and reiterated in the Reply (see paragraph 19 above), proposes co-ordinates for the continental shelf boundary between Nicaragua and Colombia in the area beyond 200 nautical miles from the baselines of Nicaragua's coast but within 200 nautical miles from the baselines of Colombia's mainland coast.

86. The Court has concluded that, under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State (see paragraph 79 above). It follows that, irrespective of any scientific and technical considerations, Nicaragua is not entitled to an extended continental shelf within 200 nautical miles from the baselines of Colombia's mainland coast. Accordingly, within 200 nautical miles from the baselines of Colombia's mainland coast, there is no area of overlapping entitlement to be delimited in the present case.

87. For these reasons, the request contained in Nicaragua's first submission cannot be upheld.

B. The request contained in the second submission made by Nicaragua

88. The request contained in Nicaragua's second submission, which was presented in the Memorial and reiterated in the Reply (see paragraph 19 above), proposes co-ordinates to delimit the area of the continental shelf in which, according to Nicaragua, its entitlement to an extended continental shelf overlaps with Colombia's entitlement to a continental shelf within 200 nautical miles from the baselines of the coasts of San Andrés and Providencia. Nicaragua accepts that, in principle, San Andrés and Providencia are each entitled to a continental shelf extending at

least up to 200 nautical miles. It contends, however, that the continental shelf of these islands should not extend east of the 200-nautical-mile limit of Nicaragua's exclusive economic zone, due to their small size and their already "much more than adequate" maritime areas resulting from the 2012 Judgment.

89. For its part, Colombia considers that the maritime entitlements of San Andrés and Providencia project in all directions from their baselines, and that they therefore extend to the east of the line lying 200 nautical miles from the Nicaraguan baselines. Colombia adds that Nicaragua's claim contradicts the 2012 Judgment in so far as it would result in the islands being cut off from their maritime entitlements to the east.

90. In its 2012 Judgment, the Court observed that the Parties agreed on the potential maritime entitlements of San Andrés, Providencia and Santa Catalina, in particular on the fact that those islands "are entitled to a territorial sea, exclusive economic zone and continental shelf" (*I.C.J. Reports 2012 (II)*, p. 686, para. 168). The Court added that "[i]n principle, that entitlement is capable of extending up to 200 nautical miles in each direction" and, in particular, that it extends to the east "to an area which lies beyond a line 200 nautical miles from the Nicaraguan baselines" (*ibid.*, pp. 686 and 688, para. 168; see also *ibid.*, p. 716, para. 244). In the present case, Nicaragua claims that this area lies within its extended continental shelf.

91. The Court notes that the maritime entitlements of San Andrés and Providencia extend to the east beyond 200 nautical miles from Nicaragua's baselines and therefore into the area within which Nicaragua claims an extended continental shelf. The Court has concluded however that, under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State (see paragraph 79 above). It follows that Nicaragua is not entitled to an extended continental shelf within 200 nautical miles from the baselines of San Andrés and Providencia. Accordingly, within 200 nautical miles from the baselines of San Andrés and Providencia, there is no area of overlapping entitlement to be delimited in the present case.

92. For these reasons, the request contained in Nicaragua's second submission cannot be upheld.

C. The request contained in the third submission made by Nicaragua

93. The request contained in Nicaragua's third submission, as presented in its Reply (see paragraph 19 above), concerns the maritime entitlements of Serranilla, Bajo Nuevo and Serrana. Specifically, Nicaragua requests the Court to declare that "Serranilla and Bajo Nuevo are enclaved and granted a territorial sea of twelve nautical miles, and [that] Serrana is enclaved as per the Court's November 2012 Judgment".

94. In support of its request, Nicaragua invokes the Court's conclusion in the 2012 Judgment that the legal régime over islands set out in Article 121 of UNCLOS forms an indivisible whole, which has the status of customary international law in its entirety (*I.C.J. Reports 2012 (II)*, p. 674, para. 139). According to that régime, if an island qualifies as a rock that cannot sustain human habitation or economic life of its own, it shall have no exclusive economic zone or continental shelf.

95. Nicaragua contends that, on that basis, Serranilla and Bajo Nuevo are not entitled to an exclusive economic zone or a continental shelf. Nicaragua observes that Serrana was enclaved in the 2012 Judgment and asserts that, in any event, it is a rock incapable of sustaining human habitation or economic life of its own. In Nicaragua's view, therefore, Serrana cannot generate entitlements to an exclusive economic zone or a continental shelf.

96. Colombia maintains that the three maritime features, being islands of the San Andrés Archipelago that are capable of sustaining human habitation or economic life, are each entitled to an exclusive economic zone with its "attendant" continental shelf up to 200 nautical miles, extending east of the line lying 200 nautical miles from the Nicaraguan baselines.

97. The Court recalls that, in its 2012 Judgment, it found that Colombia has sovereignty over the islands at Serranilla, Bajo Nuevo and Serrana (*I.C.J. Reports 2012 (II)*, p. 718, para. 251, subpara. 1). It also observes that, through the request presented in its Application, as further specified in its written pleadings, Nicaragua sought the delimitation of the maritime boundary between the Parties in the areas of the continental shelf that appertain

to each of them beyond the boundaries determined by the Court in the 2012 Judgment. Therefore, Nicaragua's third submission, which it described as adding precision to the delimitation request contained in its Application (see paragraph 84 above), must be understood as seeking a specific finding regarding the effect, if any, that the maritime entitlements of Serranilla, Bajo Nuevo and Serrana would have on any maritime delimitation between the Parties.

98. In its 2012 Judgment, the Court found that it was not called upon to determine the scope of the maritime entitlements of Serranilla and Bajo Nuevo, because they fell outside the area of delimitation identified in that Judgment (*I.C.J. Reports 2012 (II)*, p. 689, para. 175).

99. The Court observes that there are two possibilities with regard to the potential maritime entitlements of Serranilla and Bajo Nuevo. If Serranilla and Bajo Nuevo are entitled to exclusive economic zones and continental shelves, then, in view of the Court's conclusion above (see paragraph 79), any extended continental shelf that Nicaragua claims may not extend within the 200-nautical-mile maritime entitlements of these islands. If, on the other hand, Serranilla or Bajo Nuevo are not entitled to exclusive economic zones or continental shelves, then they do not generate any maritime entitlements in the area in which Nicaragua claims an extended continental shelf. In either case, as a consequence of the Court's conclusion in relation to the first question (see paragraph 79 above), within 200 nautical miles from the baselines of Serranilla and Bajo Nuevo, there can be no area of overlapping entitlement to a continental shelf to be delimited in the present proceedings.

100. The Court therefore considers that it does not need to determine the scope of the entitlements of Serranilla and Bajo Nuevo in order to settle the dispute submitted by Nicaragua in its Application.

101. The Court further recalls that the 2012 Judgment has already determined the effect produced by Serrana's maritime entitlements. Having found that Serrana is entitled to a territorial sea, the Court concluded that

> "[i]ts small size, remoteness and other characteristics mean that, in any event, the achievement of an equitable result requires that the boundary line follow the outer limit of the territorial sea around the island. The boundary will therefore follow a 12-nautical-mile envelope of arcs measured from Serrana Cay and other cays in its vicinity." (*I.C.J. Reports 2012 (II)*, p. 715, para. 238.)

In the operative paragraph of that Judgment, the Court decided that the maritime boundary between the Parties around Serrana followed a 12-nautical-mile envelope of arcs measured from Serrana Cay and the other cays in its vicinity (*ibid.*, p. 718, para. 251, subpara. 5). As the effect produced by Serrana's maritime entitlements was determined conclusively in the 2012 Judgment, there is no need for the Court to reaffirm it in the present case.

102. For these reasons, the request contained in Nicaragua's third submission cannot be upheld.

*

103. In light of the above, the Court has no need to fix a timetable for further proceedings in this case, as requested by Nicaragua in its submissions at the oral proceedings.

*

* *

104. For these reasons,

THE COURT,

(1) By thirteen votes to four,

Rejects the request made by the Republic of Nicaragua that the Court adjudge and declare that the maritime boundary between the Republic of Nicaragua and the Republic of Colombia in the areas of the continental shelf which, according to the Republic of Nicaragua, appertain to each of them beyond the boundary determined by the Court in its Judgment of 19 November 2012 follows geodetic lines connecting the points 1 to 8, the co-ordinates of which are referred to in paragraph 19 above;

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

AGAINST: *Judges* Tomka, Robinson, Charlesworth; *Judge* ad hoc Skotnikov;

(2) By thirteen votes to four,

Rejects the request made by the Republic of Nicaragua that the Court adjudge and declare that the islands of San Andrés and Providencia are entitled to a continental shelf up to a line consisting of 200-nautical-mile arcs from the baselines from which the breadth of the territorial sea of Nicaragua is measured connecting the points A, C and B, the co-ordinates of which are referred to in paragraph 19 above;

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

AGAINST: *Judges* Tomka, Robinson, Charlesworth; *Judge* ad hoc Skotnikov;

(3) By twelve votes to five,

Rejects the request made by the Republic of Nicaragua with respect to the maritime entitlements of Serranilla and Bajo Nuevo.

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Salam, Iwasawa, Brant; *Judge* ad hoc McRae;

AGAINST: *Judges* Tomka, Robinson, Nolte, Charlesworth; *Judge* ad hoc Skotnikov.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirteenth day of July, two thousand and twenty-three, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Nicaragua and the Government of the Republic of Colombia, respectively.

(Signed) Joan E. DONOGHUE,
President.

(Signed) Philippe GAUTIER,
Registrar.

Judge TOMKA appends a dissenting opinion to the Judgment of the Court; Judge XUE appends a separate opinion to the Judgment of the Court; Judge BHANDARI appends a declaration to the Judgment of the Court; Judge ROBINSON appends a dissenting opinion to the Judgment of the Court; Judges IWASAWA and NOLTE append separate opinions to the Judgment of the Court; Judge CHARLESWORTH appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* SKOTNIKOV appends a dissenting opinion to the Judgment of the Court.

(Initialled) J.E.D.
(Initialled) Ph.G.

DOI:10.1017/ilm.2024.4

DISSENTING OPINION OF JUDGE TOMKA

Serious misgivings about Judgment's conclusion that under customary international law a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State — Court arrives at a conclusion it could have arrived at in 2012 had it believed that such a rule existed — Bifurcated procedure — No opportunity for the Applicant to present its case in full.

Conclusion of the Court based on hypothetical "assumption" and inconclusive travaux préparatoires *of the Convention — No trace in Convention or in* travaux préparatoires *that States participating in negotiations "assumed" that a State's continental shelf entitlement beyond 200 nautical miles "would only extend into maritime areas that would otherwise be located in the Area".*

Identification of customary international law — No widespread and uniform State practice in support of alleged customary rule — Court ignores State practice that contradicts its finding.

No opinio juris *in support of alleged customary rule — Flawed methodology — Court infers* opinio juris *from negative State practice — Negative State practice not motivated by a sense of legal obligation — Court ignores the view of those States that maintain that a State's continental shelf beyond 200 nautical miles may extend within 200 nautical miles from the baselines of another State.*

Finding of the Court based on relationship between continental shelf and exclusive economic zone — Court's 1985 Judgment Continental Shelf (Libyan Arab Jamahiriya/Malta) *misrepresented — 1985 Judgment does not support finding of the Court.*

Finding of the Court departs from the jurisprudence of international courts and tribunals — Court provides no rationale for this departure — Fragmentation.

1. This Judgment is disquieting. It has been arrived at by an irregular procedure which prevented the Applicant from presenting its case in full as required by the Rules of Court. The Court rejects the Applicant's submissions just on the basis of its written pleadings. The Court is expected to rule on the final submissions of the applicant as presented at the end of the oral proceedings which have to be submitted by the agent in written, duly signed form[1]. The Court in its Order of 4 October 2022 directed the Parties to address "*exclusively*" the two questions it put to them[2].

2. The Court adopted this procedure without ascertaining the Parties' views on the procedure as required by the Rules of Court[3].

3. The Judgment is not based on the application of international law but on a rule that the Court simply "invented". The Judgment does not provide any serious analysis of State practice nor the required *opinio juris*. It limits itself to a simple assertation of "customary rule".

4. It is perplexing that, in its 2012 Judgment, the Court did not dismiss Nicaragua's claim to a continental shelf beyond 200 nautical miles on the basis of what the Court now asserts to be a "customary rule of international law". It is to be recalled that, already in 2012, Colombia presented legal arguments in support of its position that a State's entitlement to a continental shelf beyond 200 nautical miles may not extend within 200 nautical miles from the baselines of another State[4], the same arguments it has repeated in the current proceedings. The Court did not consider these legal arguments in 2012. Instead, the Court decided that it could not uphold Nicaragua's continental shelf delimitation claim contained in its final submission I (3)[5] because Nicaragua, being a party to the 1982 United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or the "Convention"), had not presented its full submission to the Commission on the Limits of the Continental Shelf (hereinafter the "CLCS" or the "Commission") in accordance with Article 76, paragraph 8, of the Convention[6].

5. The Court subsequently confirmed, in its Judgment on preliminary objections rendered in 2016 in.the present case, that it did not proceed to the delimitation of Nicaragua's continental shelf beyond 200 nautical

miles for that particular reason, and not because Nicaragua's entitlement cannot extend within 200 nautical miles from Colombia's mainland coast. Having heard the Parties' arguments on the scope of its 2012 Judgment, the Court stated that

> "[i]t has found that delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast was conditional on the submission by Nicaragua of information on the limits of its continental shelf beyond 200 nautical miles, provided for in paragraph 8 of Article 76 of UNCLOS, to the CLCS. The Court thus did not settle the question of delimitation in 2012 because it was not, at that time, in a position to do so."[7]

6. Still in 2016, the Court was of the view that it would be able to proceed to the delimitation of the continental shelf beyond 200 nautical miles claimed by Nicaragua subsequent to the filing of Nicaragua's submission to the Commission in 2013. The Court has thus allowed a further decade of litigation between the Parties, only to arrive in 2023 at the conclusion it could have arrived at in 2012, had it been convinced that this rule of customary international law existed.

7. In its Order of 4 October 2022, the Court formulated two questions of law to the Parties:

> "(1) Under customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State?
>
> (2) What are the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and, in this regard, do paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea reflect customary international law?"[8]

8. In today's Judgment the Court rejects Nicaragua's request for delimitation because, according to it, under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured "may not extend within 200 nautical miles from the baselines of another State" (Judgment, para. 79). Today's conclusion by the Court is surprising since the Court is supposed to know the law (*iura novit curia*). As the Court has stated in the past,

> "as an international judicial organ, [it] is deemed to take judicial notice of international law . . . It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court."[9]

The question remains why the Court did not adopt this view in 2012. No answer is given in the present Judgment.

9. As I disagree with the Court's conclusion, I should explain why.

I. SCOPE AND MEANING OF THE FIRST QUESTION

10. The Court's first question concerns only one step in the delimitation process. As the Judgment correctly points out, "[a]n essential step in any delimitation is to determine whether there are entitlements, and whether they overlap" (Judgment, para. 42). This step is essential for at least two reasons. For one, what States claim to be entitled to, and what they are in point of fact entitled to, do not always coincide; the Court must therefore determine for itself what the parties' entitlements are. It does so by identifying the parties' coasts that generate entitlements to maritime areas. Entitlements are said to "overlap" when the projections from the coast of one party overlap with projections from the coast of the other party[10]. This step is also essential because overlapping entitlements are a condition precedent for the Court to proceed to delimitation; in the absence of overlapping entitlements, there is simply nothing for the Court to delimit.

11. The Court's question is directed at this preliminary step of the delimitation process (which I will for convenience refer to simply as "the identification step"). The question has been framed in terms of law, as a legal question in general, not in terms of the circumstances of the present case.

12. At risk of stating the obvious, just because a State is entitled to a certain maritime area, this does not mean that it must obtain the full extent of that entitlement at the end of the delimitation process. Unlike a valid title over a certain territory, which implies the exclusion of any other title over the same territory, maritime entitlements have the particular feature that they can overlap with other maritime entitlements[11]. As the Court explained in the *Maritime Delimitation in the Black Sea* case, the task of delimitation consists of "resolving the overlapping claims by drawing a line of separation of the maritime areas concerned"[12]. This requires that, so far as possible, the line of delimitation should "allow the coasts of the [p]arties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way"[13]. Entitlements can be amputated to achieve an equitable solution. The delimitation process often results in one or both parties not obtaining areas that they would otherwise be entitled to had it not been for the presence of the other[14].

13. It follows that an affirmative answer to the Court's question in no way implies that Nicaragua must be allocated all, most — or indeed any — of the area where the Parties' entitlements might overlap within 200 nautical miles from Colombia's coast.

14. It is also useful to say a word about the problem which is at the heart of the Court's question and to put this problem into context. Usually, the identification step is a straightforward exercise, even when the parties disagree, for example, about the identification of their relevant coasts. Not so in the present case. The existence and breadth of Nicaragua's entitlement to a continental shelf beyond 200 nautical miles[15] must be determined by the application of the geomorphological and geological criteria set out in Article 76 of the Convention, rather than just the configuration of its coasts[16]. To establish its entitlement, Nicaragua relies on its 2013 submission to the Commission. According to Nicaragua, this submission provides sufficient data to show that it has an entitlement to a continental shelf beyond 200 nautical miles in accordance with the geological and geomorphological criteria, the limits of which are subject to the constraints set out in Article 76, paragraph 5, of the Convention. Colombia opposes this claim. It argues that Nicaragua has not established that the natural prolongation from Nicaragua's land territory extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast[17].

If Colombia is correct *on the facts*, there would be no need for the Court to proceed to the delimitation as there would be no overlapping entitlements within 200 nautical miles from Colombia's mainland coast.

15. But this is not the problem at the heart of the Court's question. The problem at the heart of the Court's question — and of today's Judgment — is one of law. It concerns a situation where, in a given area, broad-margin State A claims an entitlement to a continental shelf beyond 200 nautical miles from its coast and within 200 nautical miles from the coast of State B, where the latter State has a continental shelf entitlement based on the 200 nautical miles distance criterion and an entitlement to an exclusive economic zone up to 200 nautical miles. This situation is not a new phenomenon, nor is it uncommon; international courts and tribunals have been faced with it on several occasions.

16. In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, the parties debated a similar issue, where Canada, for convenience, referred to an area of overlapping entitlements beyond 200 nautical miles from the United States' coast but within 200 nautical miles from its coast as the "grey area"[18]. While the Chamber of the Court was not called upon to delimit the parties' entitlements in that area, the parties in that case advocated for different delimitation lines that created grey areas of varying sizes when extended seaward[19]. This issue was also before the arbitral tribunal in the *Arbitration between Barbados and the Republic of Trinidad and Tobago*[20]. However, the tribunal took no position on "the substance of the problem"[21]. Three other cases, namely the two cases concerning the delimitation in the Bay of Bengal, *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*[22] and *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India)*[23] (hereinafter the "*Bay of Bengal* cases"), as well as the Court's Judgment in the *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)* case[24], have also addressed this issue. I shall return to these cases and their implications below.

17. In the present case, the area of overlapping entitlements arises because Nicaragua claims a continental shelf entitlement beyond 200 nautical miles that extends far out into the Western Caribbean and within 200 nautical

miles of Colombia's mainland coast, where it encounters Colombia's entitlement to a continental shelf based on the 200 nautical miles distance criterion.

18. At the identification step, such an area of overlap raises various questions of law which for some time had mostly been the concern of scholarly writings[25]. One question is whether as a matter of law such an overlap of entitlements may occur in the first place. That is: is a State "prevented" from claiming its continental shelf entitlement beyond 200 nautical miles into an area that is claimed by another coastal State as its own continental shelf on the basis of the 200 nautical miles distance criterion? Colombia has strenuously argued that this is so.

19. It should be clear that today's Judgment is concerned with the area of overlapping entitlements at the identification step. The question is whether the Parties' entitlements overlap thus calling for a delimitation. How the Court should then approach delimiting the area of overlapping entitlements, and what the Parties' rights would be in such a maritime area, is a question of equitable delimitation that is *not* within the scope of the Court's first question. In this sense, it is important to distinguish between (1) an area of overlapping entitlements and (2) the maritime area that may be established by a court or tribunal. This distinction is important. The Respondent seems to assume that the existence of an area of overlapping entitlements in the Caribbean Sea within 200 nautical miles of its mainland coast necessarily means that the Court will have to establish the same kind of maritime area established, for instance, in the *Bay of Bengal* cases, with the same division of rights. This is not so. Should the Parties' entitlements overlap, it would be for the Court to adopt its own equitable solution.

20. I have set out these preliminary considerations in some length because they are necessary to understand the Court's first question.

II. ENTITLEMENT TO THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES

21. The starting-point of the enquiry is Article 76, paragraph 1, of the Convention. While the Convention is not applicable as between the Parties, the Court has stated that the definition of the continental shelf set out therein forms part of customary international law[26]. There is no doubt in my mind that the other key provisions defining the outer limits of the continental shelf beyond 200 nautical miles are also reflective of customary international law[27]. The continental shelf concept cannot have a different meaning in customary international law than in the Convention. The Convention provides that the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that either *(a)* extend "beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin", or *(b)* "to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured *where* the outer edge of the continental margin does not extend up to that distance"[28]. In this respect, Article 76 of the Convention contains a series of complementary provisions that define the continental margin and specify how its outer edge is to be determined beyond 200 nautical miles.

22. The first key provision is paragraph 3, which defines the "continental margin". The second key provision, contained in paragraph 4 *(a)* (i) and (ii), determines the position of the outer limit of the continental margin by means of the application of two rules (sometimes referred to as "formulae"). Both the "1 per cent sediment thickness formula" and the "60-nautical-mile distance formula" specified in paragraph (4) *(a)* are applied by reference to the foot of the continental slope, a geological feature. The result that one derives from the application of the formulae must then be subjected to the constraints specified in paragraph 5. The first constraint in paragraph 5 (the "distance constraint") provides that the outer limits of the continental shelf may not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. Alternatively, States may apply the second constraint in paragraph 5 (the "depth constraint"), which provides that the outer limits of the continental shelf may not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

23. The distance constraint of 350 nautical miles can be set aside when submarine elevations are still natural parts of the continental margin, such as its plateaux, rises, caps, banks and spurs[29].

24. A State can use the most favourable combination of the formulae in order to establish the outer edge of its continental margin and it can also use the most favourable combination of the depth and distance constraints to establish the outer limits of the continental shelf[30].

25. If I have outlined the rules defining the outer limits of the continental shelf beyond 200 nautical miles in some detail, it is not to show that the determination of the outer limits of the continental shelf beyond 200 nautical miles is a complicated matter. It is to show what the rules bring and do not bring to the table; they bring in concepts of geodesy, geology, geophysics and hydrography, as well as very precise formulae and constraints. What they do not bring, however, is this: the notion that a State's entitlement to a continental shelf beyond 200 nautical miles "stops" at, or "cannot extend" within, 200 nautical miles from the baselines of another State.

26. The Convention is silent on the issue whether a State's entitlement to a continental shelf beyond 200 nautical miles may extend within 200 nautical miles from the baselines of another State. In the absence of a limitation to this effect, it must be accepted that the existence and breadth of a continental shelf entitlement beyond 200 nautical miles depend solely on the geological and geomorphological criteria set out above, subject to the applicable constraints under paragraph 5 of Article 76. This conclusion is in harmony with the cardinal principle, often repeated in delimitation cases, that "the land dominates the sea". A State's maritime entitlements derive from *its* sovereignty over the land, notably *its* coast that generates maritime entitlements. As the Court observed in the *North Sea Continental Shelf* cases[31], and later in the *Maritime Delimitation in the Black Sea* case[32], this principle is the basis for a continental shelf entitlement. The existence of a coastal State's continental shelf entitlement does not depend on the proximity to the coast of another State.

27. There is also no reservation in the Convention that specifies that a State's continental shelf entitlement beyond 200 nautical miles cannot overlap with the continental shelf within 200 nautical miles of another State. In the absence of such a reservation, it must be accepted that these entitlements may overlap. As mentioned above, a feature of maritime entitlements is that they can overlap with one another.

28. The Parties have referred extensively to the *travaux préparatoires* of the Convention in support of their arguments. But, as the Court's Judgment correctly notes, the issue of one State's continental shelf beyond 200 nautical miles extending within 200 nautical miles from the baselines of another State was "not debated during the Third United Nations Conference on the Law of the Sea" (Judgment, para. 76). This is not entirely surprising. It may be recalled that during the negotiation of the continental shelf régime, only 30 or so States were seen as possibly having continental margins beyond 200 nautical miles from their coasts that would call for the application of the delineation procedure set out in Article 76[33]. States may not have envisioned all aspects of this issue during the negotiations.

29. Despite the foregoing and the absence of any express limitation, in paragraph 76 of the Judgment, the Court seems inclined to find a tacit limitation to the entitlement to a continental shelf beyond 200 nautical miles on the basis of paragraphs 4 to 9 of Article 76, as well as Article 82, paragraph 1, of the Convention, which concerns payments and contributions with respect to the exploitation of the non-living resources of the continental shelf which would otherwise have been part of the Area.

The Judgment ventures that these provisions suggest that "the States participating in the negotiations *assumed* that the [continental shelf beyond 200 nautical miles] would only extend into maritime areas that would otherwise be located in the Area" — the implication being that a continental shelf beyond 200 nautical miles can *only* extend in the Area and not within 200 nautical miles from the baselines of another State (Judgment, para. 76, emphasis added). There is no trace of such an assumption in the *travaux préparatoires* of the Convention. In my view, this is a mere supposition which, even if accepted, could not jettison the clear text of the Convention.

The concept of the continental shelf had developed several decades before the adoption of the 1982 Convention. As the Court stated authoritatively in 1969, the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea "exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land"[34]. States had long recognized this concept and accepted that it could extend beyond 200 nautical miles from a State's coast up to the continental slope, even if the precise outer limits of the continental shelf remained debated[35]. For a time, the breadth of the continental shelf was conventionally defined with an exploitability test[36]. But this was rather imprecise. The formulae and constraints of Article 76 described above were the results of extensive negotiation, and they constituted an attempt at defining, but also limiting, the breadth of the continental shelves of broad-margin States[37]. They provide a methodology to establish the limits of the continental shelf. Given that the provisions of the Convention were subjected to scrutiny and extensive negotiation, the idea that

the Convention imposes a tacit limitation on States' continental shelf entitlements beyond 200 nautical miles is untenable.

30. Thus, in my view, the answer to the question "may a State's entitlement to a continental shelf beyond 200 nautical miles . . . extend within 200 nautical miles from the baselines of another State?" is "yes". There is nothing in the Convention to suggest otherwise.

III. JURISPRUDENCE

31. The jurisprudence of the Court and international tribunals in maritime delimitation cases supports the conclusion just reached. The Court and other tribunals have accepted that a State's entitlement to a continental shelf beyond 200 nautical miles may extend within 200 nautical miles from the baselines of another State. The *Bay of Bengal* cases, as well as the Court's Judgment in the *Maritime Delimitation in the Indian Ocean* case, are particularly relevant here.

32. In the Bay of Bengal cases, both the International Tribunal for the Law of the Sea (hereinafter "ITLOS") and an Annex VII tribunal accepted that the parties' entitlements overlapped in the grey area. In the first *Bay of Bengal* case, ITLOS delimited the maritime entitlements of Bangladesh and Myanmar, including their entitlements beyond 200 nautical miles from their coasts. As the ITLOS shifted the provisional equidistance line in favour of Bangladesh, the delimitation of the continental shelf beyond 200 nautical miles involved an area located beyond 200 nautical miles from the coast of Bangladesh but within 200 nautical miles from the coast of Myanmar, yet on the Bangladeshi side of the delimitation line[38]. Similarly, the arbitral tribunal's delimitation within and beyond 200 nautical miles in *Bangladesh* v. *India* involved an area lying beyond 200 nautical miles from the coast of Bangladesh and within 200 nautical miles from the coast of India, yet on the Bangladeshi side of the delimitation line[39]. As a matter of delimitation, the tribunals allocated to Bangladesh an area corresponding to its continental shelf beyond 200 nautical miles that would have otherwise been areas of the continental shelf within 200 nautical miles of Myanmar and India. Thus, these decisions are premised on the finding that the parties' continental shelf entitlements could and did overlap[40]. As discussed above, this concerns the identification step (see paragraph 11 above).

33. The Court's Judgment in *Somalia* v. *Kenya* is also relevant. There, the Court accepted that Kenya's entitlement to a continental shelf beyond 200 nautical miles *could extend* within 200 nautical miles from Somalia's coast. In that case, the Court stated that, depending on the extent of Kenya's entitlement (as it may be established on the basis of the Commission's recommendations), the delimitation line constructed by the Court might give rise to an area "located beyond 200 nautical miles from the coast of Kenya and within 200 nautical miles from the coast of Somalia, but on the Kenyan side of the delimitation line"[41]. The Court described this area as a "possible grey area" (which is depicted on sketch-map No. 12 of the Judgment as a small grey wedge)[42]. The reason the Court used the term "possible" is plain. When the Judgment was rendered in 2021, the Commission had not issued its recommendations in respect of Kenya's submission on the continental shelf beyond 200 nautical miles[43]. There thus remained — at the time, but no more[44] — some doubt about the extent of Kenya's continental shelf entitlement beyond 200 nautical miles. That said, the Court considered that the parties' continental shelf entitlements could overlap as a matter of law.

34. That the Court so considered is also evident from the way the Court delimited the maritime boundary beyond 200 nautical miles between the parties. It did so by extending, beyond 200 nautical miles, the same geodetic line that constitutes the single maritime boundary delimiting the exclusive economic zone and the continental shelf up to 200 nautical miles[45]. The issue is this: had there been no overlapping continental shelf entitlements, the Court would have been precluded from doing so — at least initially. Somalia alone would have had a continental shelf entitlement within the wedge. The Court would have had to draw a delimitation line taking a "zig-zag" course. The Court did not do so, however. Presumably, it saw no bar in international law to delimit the maritime boundary in such a way as resulting in Kenya's continental shelf beyond 200 nautical miles extending within 200 nautical miles from the baselines of Somalia.

35. The question may be asked how these decisions differ from the present one?

36. In paragraph 72 — which is not a model of clarity — the Court's Judgment is quick to reply that these three decisions are "of no assistance". The Judgment attempts to find safety in the suggestion that the present case differs from these decisions because Nicaragua "claims an extended continental shelf that lies within 200 nautical miles from the baselines of one or more other States" (*ibid.*). By contrast, says the Judgment, in the two *Bay of Bengal* cases, it was the "use of an adjusted equidistance line in a delimitation between adjacent States [that], as an incidental result of that adjustment, gave rise to a grey area". Likewise, in *Somalia* v. *Kenya*, it was the use of an adjusted equidistance line that gave rise, "as an incidental result", to a possible grey area between two adjacent States.

It is hard to know what to make of this cryptic statement. What it seems to boil down to is a distinction between States with adjacent coasts (the *Bay of Bengal* cases and *Somalia* v. *Kenya*) and States with opposite coasts (as in this case). It is true that an area of overlap may arise and be dealt with differently depending on the coastal configuration. When a tribunal delimits the entitlements of adjacent States both within and beyond 200 nautical miles, a grey area will arise whenever the single maritime boundary of the 200-nautical-mile entitlements departs from an equidistance line. Between States with opposite coasts, where the distance between the two coasts is greater than 400 nautical miles, and only one State has an entitlement to a continental shelf beyond 200 nautical miles — as is the case here — the grey area may have a different shape than the wedge-shaped areas seen with adjacent States. The shape and size of the grey area, if any, will vary depending on the extent of a State's entitlement to a continental shelf beyond 200 nautical miles as determined by a court or tribunal applying the rules on maritime delimitation calling for the achievement of an equitable result.

37. The Respondent insists that the grey areas of the *Bay of Bengal* cases and *Somalia* v. *Kenya* were merely "incidental results" of the delimitation process. This looks to me self-defeating: to suggest that they were incidental results of the delimitation is to accept that the parties' entitlements overlapped to begin with, and hence, that they can overlap as a matter of law[46]. Again, courts and tribunals may only delimit the parties' entitlements that overlap.

The Respondent further suggests that the "small" grey areas at stake in these decisions are different from "the huge grey area that Nicaragua seeks to create in the present [case]"[47].

This confuses the preliminary identification step with the final delimitation. I agree that, depending on the circumstances of a particular case, there may be something inequitable in allocating to broad-margin State A an area which it may claim as a continental shelf beyond 200 nautical miles but that falls within 200 nautical miles of State B. In such a hypothesis, State B could be left with a continental shelf not reaching 200 nautical miles from its coast, whereas State A would enjoy its continental shelf both up to and beyond 200 nautical miles from its coast. However, this is a matter of delimitation. The size of a grey area may have some role to play at later stages of the delimitation — for instance, as a possible circumstance relevant to an equitable solution — but it plays no role in determining whether there is an overlap of entitlements.

The coastal configuration of States — whether they are States with opposite or adjacent coasts — can have no bearing on the issue of principle whether, at the identification step, a State's continental shelf entitlement beyond 200 nautical miles may overlap with another State's entitlement to a continental shelf based on the 200-nautical miles distance criterion. The entitlement of the coastal State over the continental shelf is the same, no matter its coastal situation[48].

Rather, if grey areas are "impossible" because legally there can be no overlapping entitlements — as today's Judgment seems to conclude in paragraph 82 — then grey areas are impossible no matter the circumstances.

38. It seems, therefore, that there is no escape from the conclusion that today's Judgment departs from the Court's jurisprudence and that of international tribunals. This jurisprudence contains a consistent finding of law which the Court simply ignores. I regret that the Court provides no convincing rationale for this departure[49]. As my distinguished colleagues observed in the past, the Court "must ensure consistency with its own past case law in order to provide predictability . . . This is especially true in different phases of the same case or with regard to closely related cases"[50].

IV. PRACTICE OF STATES

39. I pass now to an examination of the existence of an alleged rule of customary international law that would prevent a State's entitlement to a continental shelf beyond 200 nautical miles from extending within 200 nautical miles from the baselines of another State. According to the Court's settled jurisprudence, the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris*[51]. Despite the importance of this question and the extensive pleadings of the Parties on this issue, it is hard to say that the Court has taken its task of identifying custom very seriously. The Court's Judgment devotes only a single paragraph to its "analysis" of this practice (Judgment, para. 77). In fact, the Judgment does not even summarize the Parties' arguments properly. I thus feel the need to give a very summary account of the Parties' legal contentions. Without being exhaustive, I shall also examine the two elements of custom below.

40. Basically, the Respondent argues that States follow a customary rule according to which natural prolongation "is not a source of title within maritime areas that lie 200 nautical miles from another State's baselines"[52]. It refers to the practice of some 30 broad-margin States (35 States in its Counter-Memorial[53], 31 States in its Rejoinder[54]) which, it says, "could have potentially claimed [a continental shelf beyond 200 nautical miles from their coasts] that would have encroached upon the 200-nautical-mile entitlement of another State, but. . . stopped at the other State's 200-nautical-mile zone"[55]. This alleged body of practice mostly takes the form of 51 CLCS submissions, which Colombia compiled in an annex to its Counter-Memorial[56].

41. This argument is not new. The Respondent made the same argument in 2012[57].

A. State practice

42. Is there a general practice of States in support of the putative customary rule? The answer appears to be affirmative — but only at first sight. A number of States in their submissions or "preliminary information" to the Commission have limited their claims to a continental shelf entitlement beyond 200 nautical miles in a way that does not extend within 200 nautical miles from a neighbouring State's baselines. This practice of self-restraint varies in shape but is generally consistent. Some States have placed the fixed points of their proposed continental shelf outer limits on the 200 nautical miles limit of a neighbouring State. Others have used endpoints that deliberately stop short of the 200 nautical miles limit of a neighbouring State. This is true both of individual CLCS submissions and of joint submissions. This practice may be described as a form of "negative practice", in the sense that it consists of abstentions. I agree that this body of practice is not insignificant. It originates from various parts of the world, and it appears widespread.

43. Nicaragua argues that this body of practice is insufficient to give rise to a customary rule because the States that have engaged in it "do not represent even 25 [per cent] of the State Parties" to the Convention[58]. This threshold argument misses the mark. In assessing the generality of State practice, regard must be had to those States that are particularly involved in the relevant activity or are most likely to be concerned with the alleged customary rule. In the present case, this includes those broad-margin States that can claim a continental shelf beyond 200 nautical miles that can extend within 200 nautical miles from the baselines of another State. Within this more limited "pool" of States, the question is whether most States have adopted a representative and consistent practice not to claim a continental shelf entitlement so close to another State's coast. The Court's Judgment proceeds on the basis of this postulate to assess this body of practice. Rightly so.

44. This being said, I feel bound to say that the Court's analysis is incomplete.

45. For one, the Judgment does not acknowledge, much less analyse, the existence of contrary State practice whereby States have claimed a continental shelf entitlement that extends within 200 nautical miles from the baselines of another State. Examples — some of them uncontroversial as between the Parties — include: (i) Bangladesh's 2011 submission in respect of the Bay of Bengal[59]; (ii) Cameroon's 2009 preliminary information in respect of the Gulf of Guinea[60]; (iii) China's 2012 partial submission in part of the East China Sea[61]; (iv) France's 2014 partial submission in respect of Saint-Pierre-et-Miquelon[62]; (v) Korea's 2012 partial submission in respect of the East China Sea[63]; (vi) the Applicant's 2013 submission in respect of the Caribbean Sea[64]; (vii) Russia's 2001 submission in respect

of the Arctic Ocean[65]; (viii) Somalia's 2015 amended executive summary of its submission in respect of the Indian Ocean[66]; (ix) Tanzania's 2009 preliminary information in respect of the Indian Ocean[67]; or (x) Argentina's 2009 submission in respect of the South Atlantic Ocean[68]. This practice cuts against the Judgment's rather exaggerated assertion that the "vast majority" of States parties to UNCLOS that have made submissions to the CLCS have chosen not to assert therein limits that extend within 200 nautical miles of another State's coast (Judgment, para. 77). This is not a "small number" of States (*ibid.*).

46. The Judgment also ignores the wealth of State practice available. The Court simply refers to the negative practice adduced by the Respondent, as though nothing else existed in the practice of States or even in the record before it. The Court is tasked with ascertaining what the international law is. In the fulfilment of its task, the Court need not confine itself to a consideration of the arguments put forward by the parties, but must research "all precedents, teachings and facts to which it ha[s] access and which might possibly" reveal the existence of the putative customary rule[69]. I regret to say that the Court has not fulfilled its task.

47. The Court ignores the positions taken by States before international courts and tribunals in delimitation cases. These are pleadings in which States either have acknowledged the existence of a grey area, or expressly claimed that, as matter of legal principle, a State's entitlement to a continental shelf beyond 200 nautical miles *may* extend within 200 nautical miles from the baselines of another State[70]. The pleadings of Bangladesh[71], Canada, Côte d'Ivoire[72], Ghana[73], Trinidad and Tobago, the United States or Somalia[74] are illustrative. As mentioned above, the grey area issue has found itself before international courts and tribunals on a number of occasions. The official statements made by Australia in the Timor Sea Conciliation are also relevant[75]. There, Australia claimed an entitlement to a continental shelf beyond 200 nautical miles up to the edge of the Timor Trough that extended within 200 nautical miles from the baselines of Timor-Leste[76].

Relevant contrary practice can also be found in the form of treaties[77].

48. Thus, it may be asked whether there is in fact a general practice?

49. I accept that some inconsistencies and contradictions are not necessarily fatal to a finding of "a general practice". It is not expected that in the practice of States the application of the putative rule "should have been perfect", in the sense that States should have refrained with "complete consistency" from claiming a continental shelf entitlement within 200 nautical miles of another State's baselines[78]. I also accept that, for some States, practice varies and should arguably be given less weight. Nevertheless, it seems reasonable to infer from the foregoing that up to 20 States have accepted — either in their CLCS submissions, preliminary information, or otherwise — that a continental shelf entitlement beyond 200 nautical miles may extend within 200 nautical miles of another State's baselines. This State practice seems capable of seriously calling into question the element of a "general practice". Yet, the Court treats this practice as of no account. The Judgment does not explain why and is content to adopt a very general analysis. It may be asked whether the Court is "so general because the particulars do not withstand analysis"[79].

50. Be that as it may, establishing that a certain practice is sufficiently general does not in itself suffice to find a rule of customary international law. State practice must be accompanied by *opinio juris*. This is true even when some of the practice takes the form of abstentions, which may make the ascertainment of *opinio juris* more difficult[80]. It is to this requirement that I turn next.

B. ACCEPTANCE AS LAW (OPINIO JURIS)

51. The Parties have expressed markedly different views on *opinio juris*. For Nicaragua, it is not enough to show that 30 States or so have refrained from claiming a continental shelf entitlement within 200 nautical miles of another State; it must also be shown that "they did so in the belief that international law gave them no option but to do so. Only that belief could supply the *opinio juris* necessary as the basis of a rule"[81]. In Annex 2 of its written comments on Colombia's reply to the question put to it by a Member of the Court, Nicaragua reviews the CLCS submissions referred to by Colombia. It concludes from this review that not even a single CLCS submission "states directly or·even indirectly" that their conduct is compelled by the law[82].

52. The Judgment is grounded on the assumption that this practice is undertaken with a sense of legal obligation. It assumes that these abstentions *must* be motivated by a sense of obligation and not by extra-legal motives, such as political expediency or convenience, even though States have not framed their abstentions as legally compelled by reason of a rule of customary international law.

There are serious difficulties about this way of looking at things. The Judgment recognizes this, for it states that this practice "may have been motivated in part by considerations other than a sense of legal obligation" (Judgment, para. 77). This is a prudent disclaimer, especially considering that only the executive summaries of CLCS submissions are made public and included in the record before the Court. These summaries contain maps, co-ordinates indicating the outer limits of the continental shelf and baselines, and the indication of which provisions of Article 76 are invoked, but they are of little to no assistance in ascertaining *opinio juris*. They do not explain why States act the way they do. Yet this disclaimer is immediately forgotten when the Court infers that this negative State practice, "given its extent over a long period of time, . . . may be seen as an expression of *opinio juris*" (*ibid.*).

53. According to the Respondent, there is only one explanation for the negative practice of States. As it sees it, it would "strain[] credulity to suggest that 31 States, while believing that they had a legitimate source of title to the seabed and subsoil within [200 nautical miles from the baselines of another State], simply relinquished such title in return for nothing"[83]. The complete answer to this argument is simply that motives vary. A State may refrain from claiming an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the baselines of another State notably *(a)* to put off a diplomatic row[84]; *(b)* to avoid the objection procedure of the CLCS, which would result in blocking or seriously delaying the consideration of its submission; or *(c)* because a given area may not be worth claiming[85]. These motives are not "wild speculations"[86], as the Respondent would have it. They are reflected in the practice of States.

54. Circumstance *(b)* deserves consideration. The delineation procedure at the CLCS must be borne in mind. States have adopted various strategies to avoid the possibility of their submissions being blocked by a neighbour[87]. They may seek assurances of "no objection". They may make a partial submission. They may even amend their submissions to exclude areas that are in dispute[88]. It is not far-fetched to suggest that some States have preferred to relinquish an area of continental shelf entitlement beyond 200 nautical miles; after all, "half a loaf is better than none".

55. Indeed, the Applicant's submission to the CLCS has been blocked for a decade[89].

56. To give only one example of circumstance *(b)*, reference may be made to the 2009 submission of Trinidad and Tobago. It will be recalled that, in the *Barbados* v. *Trinidad and Tobago* case, the parties debated how to delimit an area of overlap (which they referred to as the "intermediate zone"), said to be beyond 200 nautical miles from Trinidad and Tobago but within 200 nautical miles of the coast of Barbados. Trinidad and Tobago was of the view that a State's entitlement to a continental shelf beyond 200 nautical miles may extend within 200 nautical miles from the baselines of another State[90]. Yet, in its 2009 CLCS submission, while maintaining its view on the law, it abstained from claiming a continental shelf within 200 nautical miles of Barbados. Being unable to secure an agreement from Barbados not to object to its CLCS submission, Trinidad and Tobago clearly stated that it decided to submit a submission that was "not dependent on the utilization of maritime space within 200 [nautical miles] of the Barbados coastline"[91].

57. Was it reasonable, then, for the Court to infer *opinio juris* in the way it did? I think not.

58. I accept that, in certain circumstances, State practice may have been motivated by *opinio juris*. And I do not suggest that all 30 or so States that have refrained from claiming a continental shelf beyond 200 nautical miles that extends within 200 nautical miles of another State have done so for extra-legal motives. It may well be that some of them have undertaken this practice with a sense of legal obligation on the basis of the putative rule of customary international law. But is it really reasonable to suppose that all of them did? In my considered view, in light of the circumstances and on the basis of the limited information available in the executive summaries, such an inference is a perilous leap to make. The Court holds no crystal ball into the motives of States. The Judgment fails to explain why, in the circumstances, such an inference is appropriate or even reasonable.

59. Quite apart from this methodological problem, it seems to me that the Court's finding flies in the face of clear *opinio juris* to the contrary. Today's Judgment does not acknowledge the existence of clear expressions of *opinio juris* to the effect that a State's entitlement to a continental shelf beyond 200 nautical miles *may* extend within 200 nautical miles from the baselines of another State.

60. Such expressions can be found, for instance, in Cameroon's preliminary information to the Commission of 11 May 2009, as well as France's Note Verbale dated 17 December 2014 concerning its submission on Saint-Pierre-et-Miquelon. France's submission to the Commission in relation to Saint-Pierre-et-Miquelon appears to include areas that are located within 200 nautical miles from Canada, whereas Cameroon's preliminary information includes areas that are located within 200 nautical miles from Equatorial Guinea. In response to a Note Verbale from Canada, France expressed the view that its claims "do not run counter to [UNCLOS] or any rule of international law"[92]. In its preliminary information, Cameroon explicitly acknowledges that "its resulting legal title beyond 200 nautical miles is, because of the geo-political configuration of the region, called upon to overlap with the partially competing titles that neighbouring States may assert . . . within 200 nautical miles"[93]. A similar expression of *opinio juris* can be found in a Note Verbale of the Republic of Korea dated 23 January 2013[94].

61. To this can be added the positions taken by States in their statements before international courts and tribunals[95] in delimitation cases. As mentioned above, examples include the pleadings of such States as Bangladesh, Canada, Côte d'Ivoire, Ghana, the Maldives, Trinidad and Tobago, the United States, or Somalia. In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, for instance, Canada accepted that its proposed delimitation line would create a small "grey area". It suggested that, in such a situation, the continental shelf could be subject to the jurisdiction of one State, and the water column subject to the other[96]. The United States, for its part, asserted that "[t]he international community long has recognized the existence of the grey area"[97] and that "the Third United Nations Conference on the Law of the Sea . . . never once . . . took up the grey area issue in all the debates about the 200-nautical-mile zone"[98]. Referring to various instances of State practice, it suggested that "the practice of States clearly does not regard the creation of a grey area as a problem to be avoided"[99]. The grey area was depicted in maps annexed to the parties' pleadings.

62. In the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean* case before the Special Chamber of the ITLOS, the question was put to the parties whether the Maldives' entitlement to the continental shelf beyond 200 nautical miles from its baseline can be extended into the 200 nautical miles limit of Mauritius, as indicated in figure 29 of the Maldives' Counter-Memorial and figure 6 of the Maldives' Rejoinder[100], which depicted a grey area. That area was on the Maldives' side of the delimitation line, located beyond 200 nautical miles from the coast of the Maldives but within 200 nautical miles from the baselines of Mauritius. In response, the Maldives "confirm[ed] its position that [its] entitlement to the continental shelf beyond 200 nautical miles from its baseline can be so extended"[101].

63. The present Judgment does not explain how the *opinio juris* supposedly identified by the Court squares with the above examples.

C. ASSESSMENT

64. The Court's finding on a bright-line customary rule is open to serious doubt. This finding rests on a curated selection of State practice, and on little to no analysis of *opinio juris*. The Court's finding also does not comport with the indications furnished by subsidiary means for the determination of rules of law, including the decisions of international courts and tribunals (see above, paragraphs 31-38) and scholarly writings[102]. I regret that the Court's analysis does not demonstrate the existence of the alleged rule.

V. ENTITLEMENT TO THE EXCLUSIVE ECONOMIC ZONE

65. There is another matter which seems to call for comment. So far, the question of the overlap of entitlements has been approached from the perspective of the continental shelf, that is, by asking whether a State's continental shelf entitlement beyond 200 nautical miles may overlap with another State's continental shelf within 200 nautical miles. I have reasoned that the answer is "yes".

66. Another way to approach the issue is from the perspective of the exclusive economic zone. States are entitled to an exclusive economic zone of up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. It may thus be asked whether one State's continental shelf entitlement beyond 200 nautical miles may overlap with another State's exclusive economic zone entitlement. That is: does the entitlement of a coastal State to an exclusive economic zone, encompassing the waters superjacent to the sea-bed, *but also the sea-bed and its subsoil*, "exclude" an entitlement by another State to a continental shelf beyond 200 nautical miles from its baselines that extends into the same area? Colombia has strenuously argued that this is so. Again, this a question of law and it arises at the identification step.

This argument is not new. The Respondent made the same argument in 2012.

67. The Court's Judgment does not squarely engage with this question, and I do not wish to dwell on it. Suffices to note that the *Bay of Bengal* decisions and the Court's Judgment in *Somalia* v. *Kenya*, in so far as they recognized the existence of grey areas, found that an entitlement to a continental shelf beyond 200 nautical miles may extend and overlap with an exclusive economic zone entitlement. That is the correct finding in law. The institutions of the continental shelf and the exclusive economic zone are "different and distinct"[103]. Neither nullifies — or takes "priority" over — the other to prevent an overlap[104]. Again, a feature of maritime entitlements is that they can overlap (see paragraph 12 above). This is true even when the entitlements are of a different nature[105].

68. Paragraphs 68 to 70 of the Judgment are devoted to the relationship between the régime of the exclusive economic zone and that of the continental shelf under customary international law. Presumably, this relationship is seen by the Court as germane to answering the first question. The Court observes that the régime of the exclusive economic zone is the result of a compromise; it notes that this régime confers sovereign rights of exploration, exploitation, conservation and management of natural resources to the coastal State; it recalls that, within the exclusive economic zone, the rights with respect to the sea-bed and subsoil are to be exercised in accordance with the régime of the continental shelf. These observations are on their face unobjectionable, and I could subscribe to the Court's reasoning were it not for the fact that this reasoning seems to carry with it a veiled proposition the implications of which are not teased out in the Judgment but nonetheless significant.

69. In paragraph 70 of the Judgment the Court quotes a passage of its 1985 Judgment in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case. Said passage reads as follows:

> "Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf." (*Judgment, I.C.J. Reports 1985*, p. 33, para. 34.)

The Court does not explain why this passage of the 1985 Judgment is relevant. It draws no conclusion from its reasoning.

70. I find it hard to see the quotation of this passage as a mere happenstance. Throughout the proceedings, the Respondent has relied on this passage of the Court's Judgment in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case to suggest that the Court should avoid "creating" a "huge" grey area in the present case. For Colombia, the existence of a grey area cannot be upheld in this case without calling into question the very notion of the exclusive economic zone, which, it claims, was meant to join all the physical layers of the sea under one national jurisdiction in which the coastal State would exercise sovereign rights over both the living and non-living resources (Judgment, para. 63). Colombia argues that an exclusive economic zone the water column of which is divorced from the sea-bed and subsoil, is no longer an exclusive economic zone (*ibid.*, para. 64). To support this argument, Colombia purports to rely on the Court's "finding" in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, quoted above, that "there cannot be an exclusive economic zone without a corresponding continental shelf"[106].

71. The truncated passage on which Colombia relies does not support its argument. In *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, the Court was merely stating the obvious: continental shelf exists *ipso facto* and *ab initio*[107], whereas an exclusive economic zone has to be proclaimed by the coastal State. An exclusive

economic zone exists only in so far as the coastal State chooses to proclaim such a zone[108]. That is why "[a]lthough there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf". That is all. This passage does not stand for the proposition that "the water column of the exclusive economic zone cannot in principle be divorced from its sea-bed and subsoil"[109]. This is a reading of the 1985 Judgment that its text cannot bear.

72. In any event, the Respondent's concerns against differentiating water-column rights and continental-shelf rights in a given area relate to the achievement of an equitable result. They do not concern the identification step. As mentioned above (see paragraph 19), an area of overlapping entitlements must be distinguished from the *maritime area* that may be established by a court or tribunal on the basis of such overlapping entitlements. It is true that in the *Bay of Bengal* cases, for instance, the tribunals' decisions to delimit the parties' entitlements resulted in maritime areas in which jurisdiction over the water column was adjudicated as appertaining to one State and jurisdiction over the seabed and subsoil to another. As the arbitral tribunal explained in *Bangladesh* v. *India*, "[t]he establishment of a maritime area in which the States concerned have shared rights is not unknown under the Convention"[110]. It is also not unknown in practice. Needless to say, the Court could have arrived at this or at a different solution in its task to find an equitable solution in the present case had it proceeded to the delimitation.

VI. CONCLUSIONS

73. This Judgment asserts a legal principle which is not consistent with the jurisprudence of the Court, the International Tribunal of the Law of the Sea, and an Annex VII arbitral tribunal. I understand that judges and lawyers may feel more at home in the legal sphere than in matters of geomorphology and geology. This, however, cannot justify an approach which avoids dealing with the facts as presented by the parties in a particular case.

74. I have found myself unable to agree with the conclusion reached by the Court on the first legal question it put to the Parties in its Order of 4 October 2022, and with its finding in the operative clause of the Judgment which follows from its conclusion (Judgment, para. 104 (1)). My vote however should not be seen as meaning that I would have necessarily upheld Nicaragua's submission as far as the delimitation line it proposed. The determination of the maritime boundary would have been a matter for adjudication, applying the rules calling for the achievement of an equitable result, had the Court allowed the case to proceed to that stage.

75. I only note that the consequences of today's Judgment lead to an inequitable result.

(Signed) Peter TOMKA.

ENDNOTES

1 Article 60, paragraph 2, of the Rules of Court.

2 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Order of 4 October 2022*, pp. 2-3 (emphasis added).

3 Article 31 of the Rules of Court.

4 Rejoinder of Colombia, paras. 4.11-4.12, 4.60-4.69, 4.71 and pp. 331-332, para. 13; CR 2012/11, pp. 27-28, para. 34 (Crawford); CR 2012/12, pp. 60-61, paras. 77-78 (Bundy); CR 2012/16, p. 52, para. 85 (Bundy). For Nicaragua's arguments, as presented to the Court in 2012, see notably Reply of Nicaragua, paras. 3.47-3.56, 3.67; CR 2012/8, pp. 27-28, paras. 6-7 (Oude Elferink); CR 2012/9, pp. 25, 27, 28-31, 34-35, paras. 21, 30, 38-48, 53, 66-73 (Lowe); CR 2012/15, pp. 23-26, paras. 31-51 (Lowe).

5 In its final submission I (3), Nicaragua requested the Court to decide that "[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties".

6 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 719, para. 251 (3). It will be noted that the Court saw this issue as one of "delimitation".

7 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 132, para. 85 (emphasis added).

8 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Order of 4 October 2022*, pp. 2-3.

9 *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgement, I.C.J. Reports 1974*, p. 9, para. 17, and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Judgment, I.C.J. Reports 1974*, p. 181, para. 18.

10 See *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 89, para. 77.

11 Prosper Weil, "Délimitation maritime et délimitation terrestre" in Yoram Dinstein and Mala Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers 1989), pp. 1021-1023.

12 *(Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 89, para. 77.

13 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 703, para. 215.

14 *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 64, para. 59.

15 I shall avoid the use of the expression "extended continental shelf". Though perhaps convenient as a shorthand expression, it finds no basis in the Convention and can be misleading. Obviously, when a State claims a continental shelf beyond 200 nautical miles, it is not "extending" its continental shelf or claiming something additional to the continental shelf. It is merely asserting the outer limits of an entitlement that international law recognizes exist *ipso facto* and *ab initio*. See paragraph 29 of this opinion.

16 Though it must be stated that, because Nicaragua invokes the distance constraint line in the delineation of the outer limits of the continental shelf in accordance with Article 76, paragraph 5, of the Convention, Nicaragua's coast remains relevant. The distance constraint line submitted by Nicaragua is constructed by arcs at 350 nautical miles' distance from the baselines from which the territorial sea is measured.

17 Rejoinder of Colombia, paras. 6.43-6.81.

18 See *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. III, pp. 214-217, paras. 570-576. See also *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. V, pp. 477-478, paras. 243-245. This appears to be the first time the expression "grey area" was used in this sense in international practice. On this expression and its different uses, see David A. Colson, "The Legal Regime of Maritime Boundary Agreements" in Jonathan I. Charney and Lewis M. Alexander, *International Maritime Boundaries* (Vol. 1) (Martinus Nijhoff 1993), pp. 67-69.

19 *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. VI, pp. 162-164, plaidoirie de M. Weil; *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. VII, pp. 217-220, Rejoinder of Mr Colson.

20 *Arbitration between Barbados and the Republic of Trinidad and Tobago, Award of 11 April 2006*, United Nations, *Reports of International Arbitral Awards (RIAA*), Vol. XXVII, p. 242, para. 367.

21 *Ibid.*, p. 242, para. 368.

22 *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, pp. 119-121, paras. 463-476.

23 *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India), Award of 7 July 2014*, *RIAA*, Vol. XXXII, pp. 155-157, paras. 498-508.

24 *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 277, para. 197.

25 See e.g. Malcom D. Evans, "Delimitation and the Common Maritime Boundary" (1994) 64 (1) *British Yearbook of International Law*, pp. 283-332; Alex G. Oude Elferink, "Does Undisputed Title to a Maritime Zone Always Exclude Its Delimitation: The Grey Area Issue" (1998), *The International Journal of Marine & Coastal Law*, Vol. 13 (2), p. 143; Malcolm D. Evans, "Maritime Boundary Delimitation: Whatever Next?" in Jill Barrett and Richard Barnes (eds.), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016), pp. 70-79; Xuexia Liao, "Is There a Hierarchical Relationship between Natural Prolongation and Distance in the Continental Shelf Delimitation?" (2018), *The International Journal of Marine & Coastal Law*, Vol. 33 (1), p. 79.

26 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 666, para. 118; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 130, para. 78.

27 See Kevin A. Baumert, "The Outer Limits of the Continental Shelf Under Customary International Law" (2017) *American Journal of International Law*, Vol. 111, p. 827.

28 Article 76, paragraph 1, of the Convention (emphasis added).

29 Article 76, paragraph 6, of the Convention.

30 However, there is one restriction on when a State is permitted to use the more favourable constraint (or combination of constraints). According to Article 76, paragraph 6, "submarine ridges" constitute a special case to which only the distance constraint (and not the depth constraint) may be applied.

31 *North Sea Continental Shelf (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands), Judgment, I.C.J. Reports 1969*, p. 51, para. 96.

32 *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 89, para. 77.

33 See United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Definition of the Continental Shelf: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (New York, 1993), p. 6.

34 *North Sea Continental Shelf (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands), Judgment, I.C.J. Reports 1969*, p. 22, para. 19.

35 R. Y. Jennings, "The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment" (1969), *International & Comparative Law Quarterly*, Vol. 18, p. 830.

36 Article 1 of the 1958 Convention on the Continental Shelf.

37 Ted L. McDorman, "An ISA Side Issue: UNCLOS, Article 82 and Revenue Sharing" in Alfonso Ascencio- Herrera and Myron H. Nordquist (eds.), *The United Nations Convention*

on the Law of the Sea, Part XI Regime and the International Seabed Authority: A Twenty-Five Year Journey (Brill | Nijhoff 2022), p. 367.

38 *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 119, para. 463.

39 *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India), Award of 7 July 2014*, *RIAA*, Vol. XXXII, p. 147, para. 498.

40 Malcolm D. Evans, "Maritime Boundary Delimitation: Whatever Next?" in Jill Barrett and Richard Barnes (eds.), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law 2016), p. 74.

41 *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 277, para. 197.

42 *Ibid.*, p. 278.

43 *Ibid.*, p. 220, para. 34.

44 What was referred to as a "possible grey area" in *Somalia* v. *Kenya* has become a reality, for the recommendations issued by the Subcommission of the Commission on the Limits of the Continental Shelf were approved by the Commission itself and seem to confirm that Kenya has an entitlement to a continental shelf beyond 200 nautical miles from its coast. See Summary of recommendations of the CLSC in regard to the Submission made by the Republic of Kenya on 6 May 2009, adopted by the Subcommission on 8 November 2022, approved by the Commission, with amendments, on 7 March 2023, https://www.un.org/depts/los/clcs_new/submissions_files/ken35_09/20230307ComSumRecKen.pdf.

45 *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 277, para. 196.

46 Jin-Hyun Paik, "The Grey Area in the Bay of Bengal Case" in Myron H. Nordquist et al. (eds.), *International Marine Economy: Law and Policy* (Brill | Nijhoff 2017), p. 275.

47 CR 2022/26, p. 46, para. 3 (Palestini).

48 Articles 77 and 83 of UNCLOS.

49 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 428, para. 53.

50 *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, p. 330, para. 3.

51 *North Sea Continental Shelf (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77.

52 Rejoinder of Colombia, para. 3.1.

53 Counter-Memorial of Colombia, para. 3.70.

54 Rejoinder of Colombia, para. 3.38.

55 Counter-Memorial of Colombia, para. 3.70.

56 Counter-Memorial of Colombia, Ann. 50.

57 See e.g. *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* CR 2012/12, p. 60, para. 78 (Bundy). During the oral proceedings, counsel for Colombia referred to some 32 "filings" to the CLCS (18 full submissions, 14 submissions of "Preliminary Information"), suggesting that most States "approach other States 200-mile limits . . . and [avoid] encroaching on the 200-mile limits of other States".

58 Written comments by Nicaragua on the reply of Colombia to the question put to it by Judge Robinson, para. 10.

59 See Submission by the People's Republic of Bangladesh to the Commission on the Limits of the Continental Shelf, Executive Summary, February 2011, p. 11 (in which Bangladesh claimed an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coasts of India and Myanmar. In paragraph 5.1 of its Executive Summary, Bangladesh explained that its maritime entitlements overlap with those of India and Myanmar).

60 See *Demande Préliminaire du Cameroun aux fins de l'extension des limites de son Plateau Continental*, 11 May 2009, p. 4 (in which Cameroon claimed an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coast of Equatorial Guinea).

61 See Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea, p. 7, fig. 2 (in which China claimed an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coast of Japan).

62 See Partial Submission to the Commission on the Limits of the Continental Shelf, pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea in respect of the area of Saint-Pierre-et-Miquelon, Part 1, Executive Summary, p. 5, fig. 2 (in which France claimed an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coast of Canada). See also Pascale Ricard, "Saint-Pierre-et-Miquelon. Les prolongements (sous-marins) d'un arbitrage?" in Alina Miron and Denys-Sacha Robin (eds.), *Atlas des espaces maritimes de la France* (Éditions Pedone 2022), p. 189.

63 See Partial Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea, Executive Summary, p. 9, fig. 1 (in which Korea claimed an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coast of Japan).

64 See Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea, June 2013, Part I: Executive Summary, p. 4, fig. 1.

65 See Submission by the Russian Federation, to the Commission on the Limits of the Continental Shelf, 20 December 2001, Executive Summary, map 2 "Area of the continental shelf of the Russian Federation in the Arctic Ocean beyond 200-nautical-mile zone" (in which Russia claimed an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coast of Norway).

66 See Continental Shelf Submission of the Federal Republic of Somalia, Executive Summary Amended, p. 9, fig. 2 (in which Somalia appears to claim an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coast of Yemen).

67 See Preliminary Information Indicative of the outer limits of the continental shelf and Description of the status of preparation of making a submission to the Commission on the Limits of the Continental Shelf for the United Republic of Tanzania, 7 May 2009, p. 10, fig. 4 (in which Tanzania claimed an entitlement to a continental shelf beyond 200 nautical miles that

extends within 200 nautical miles from the coast of the Seychelles).

68 See Argentine Submission, Outer Limits of the Continental Shelf, p. 23, fig. 7. The outer limits of the continental shelf beyond 200 nautical miles claimed by Argentina in the Tierra del Fuego margin region would appear to extend within 200 nautical miles from Chile's baselines.

69 *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 31.

70 "Conclusions on identification of customary international law, with commentaries", *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, p. 91 (Conclusion 6, para. 5).

71 *ITLOS Pleadings, Minutes of Public Sittings and Documents 2012*, Vol. 17/I, *Delimitation of the maritime boundary in the Bay of Bengal, (Bangladesh/Myanmar)*, Memorial of Bangladesh, p. 143, para. 7.39 (stating that "[t]he proposition that even a sliver of EEZ of State B beyond the outer limit of State A's EEZ puts an end by operation of law to the entitlement that State A would otherwise have under Article 76 of UNCLOS to its outer continental shelf should not be entertained").

72 *ITLOS Pleadings, Minutes of Public Sittings and Documents 2017*, Vol. 26/I, *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/ Côte d'Ivoire)*, Merits, Contre-Mémoire de la Côte d'Ivoire, p. 833, paras. 8.32-8.34 (describing the grey area as "un phénomène connu et bien répertorié" and suggesting that the Special Chamber should delimit the grey area) and fig. 8.3.

73 *Ibid.*, Memorial of Ghana, p. 171, para. 5.82 (recognizing that the use of the bisector method in that case would create a grey area).

74 *I.C.J. Pleadings, Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)*, Memorial of Somalia, p. 113, para. 7.33, and fig. 7.4 (depicting a grey area of 8,875.5 sq km).

75 *In the Matter of the Maritime Boundary between Timor-Leste and Australia (the "Timor Sea Conciliation")*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, PCA Case No 2016-10, para. 234.

76 The fact that Australia has not made a submission to the CLCS in this regard does not reduce the weight of this practice. Australia appears to be of the view that a CLCS submission may not be needed when the area of continental shelf beyond 200 nautical miles claimed falls within 200 nautical miles of the baselines of another State. See Andrew Serdy, "Is There a 400-Mile Rule in UNCLOS Article 76 (8)" (2008), *International & Comparative Law Quarterly*, Vol. 57, p. 948; Victor Prescott, "Resources of the Continental Margin and International Law" in Peter J. Cook and Chris M. Carleton (eds.) *Continental Shelf Limits: The Scientific and Legal Interface* (Oxford University Press 2000), p. 73.

77 See e.g. Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, signed 14 March 1997, not yet in force, *International Legal Materials* (1997) Vol. XXXVI, No. 5, p. 1055.

78 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 98, para. 186 (*mutatis mutandis*).

79 *Continental Shelf (Libyan Arab Jamahiriya* v. *Malta), I.C.J. Reports 1985*, dissenting opinion of Judge Schwebel, p. 186.

80 *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 28.

81 CR 2022/25, p. 40, para. 60 (Lowe).

82 Written comments by Nicaragua on the reply of Colombia to the question put to it by Judge Robinson, para. 15.

83 Rejoinder of Colombia, para. 3.39.

84 See e.g. Jun, Qiu and Zhang Haiwen, "Partial Submission Made by the Republic of Korea to the Commission on the Limits of the Continental Shelf: A Review", *China Oceans Law Review*, Vol. 2013 (18), p. 91.

85 See e.g. Øystein Jensen, "Russia's Revised Arctic Seabed Submission" (2016), *Ocean Development & International Law*, Vol. 47 (1), p. 82.

86 CR 2022/28, p. 15, para. 16 (Wood).

87 See Coalter Lathrop, "Continental Shelf Delimitation Beyond 200 Nautical Miles: Approaches Taken by Coastal States before the Commission on the Limits of the Continental Shelf" in David A. Colson and Robert W. Smith (eds.) *International Maritime Boundaries*, Vol. VI (2011), p. 4147.

88 See e.g. Executive Summary, Partial Amended Submission to the Commission on the Limits of the Continental Shelf in Respect of the North Sea pursuant to Article 76 of the United Nations Convention on the Law of the Sea by the Republic of Palau, 12 October2017, available at https://www.un.org/depts/los/clcs_new/submissions_files/plw41_09/plw 2017executivesummary.pdf.

89 The Submission appears to have made no progress since 2013. See Progress of work in the Commission on the Limits of the Continental Shelf, Statement by the Chair, CLCS/83, 31 March 2014, Item 14, paras. 78-83.

90 See e.g. *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Counter-Memorial of the Republic of Trinidad and Tobago, Volume 1 (1), para. 272 (advancing the view that "the continental shelf of State A can overlap and coexist with the exclusive economic zone of State B").

91 Executive Summary, Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea, Republic of Trinidad and Tobago, 12 May 2009, pp. 17-18.

92 Note Verbale of France dated 17 December 2014, TS/MSM/No. 622, available at https://www.un.org/depts/ los/clcs_new/submissions_files/can70_13/1467831E.pdf.

93 Demande Préliminaire du Cameroun aux fins de l'extension des limites de son Plateau Continental, 11 May 2009, p. 4, available at https://www.un.org/depts/los/clcs_new/submissions_files/preliminary/cmr2009informationpreliminaire.pdf (my translation).

94 Note Verbale of the Republic of Korea dated 23 January 2013, MUN/022/13, available at https://www.un.org/ depts/los/clcs_new/submissions_files/kor65_12/kor_re_jpn_23_01_2013.pdf (stating that UNCLOS "establishe[d] two distinct bases of entitlement in the continental shelf . . . . Neither . . . is afforded priority over the other under the Convention. Japan, therefore, cannot use its entitlement based on the distance criterion to negate Korea's entitlement based on geomorphological considerations").

95 *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*,

p. 135, para. 77 (relying on the positions taken by States to identify *opinio juris*).

96 See *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. VI, p. 163, plaidoirie de M. Weil.

97 *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. VII, p. 218, reply of Mr Colson.

98 *Ibid.*, p. 219.

99 *Ibid.*

100 *Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives)*, *ITLOS Reports 2022-2023*, to be published, para. 57.

101 ITLOS/PV.22C28/4, p. 7 (Sander).

102 The scholarly writings that have examined this issue all conclude that the negative practice of States in the form of CLCS submissions is not accompanied by sufficient *opinio juris*. See e.g. Xuexia Liao, *The Continental Shelf Delimitation beyond 200 Nautical Miles: Towards a Common Approach to Maritime Boundary-making* (Cambridge University Press 2021), p. 81 (stating that "[u]nless more convincing evidence regarding the binding nature of States' behavior is available, it is difficult to establish the *opinio juris* that is necessary for the formation of customary international law").

103 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, para. 34.

104 See *Arbitration between Barbados and the Republic of Trinidad and Tobago, Award of 11 April 2006*, *RIAA*, Vol. XXVII, p. 213, para. 234 (stating that "the continental shelf and the EEZ coexist as separate institutions, as the latter has not absorbed the former (*Libya/Malta*, I.C.J. Reports 1985, p. 13) and as the former does not displace the latter").

105 For instance, in its 2012 Judgment, the Court found an overlap between the territorial sea entitlement of Colombia derived from islands and the entitlement of Nicaragua to a continental shelf and exclusive economic zone. The Court did not accept Colombia's argument that its territorial sea had "priority". See *Territorial and Maritime Dispute (Nicaragua* v. *Colombia) I.C.J. Reports 2012 (II)*, p. 689, para. 174, and p. 690, para. 177.

106 See e.g. Rejoinder of Colombia, paras. 2.20 and 3.21; CR 2022/26, p. 45, para. 1 (Palestini); CR 2022/28, p. 38, para. 13 (Valencia-Ospina).

107 Article 77, paragraph 3, of the Convention.

108 David Joseph Attard, *The Exclusive Economic Zone in International Law* (Oxford University Press 1987), p. 141.

109 CR 2022/26, pp. 48-49, para. 7 (Palestini).

110 *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India), Award of 7 July 2014*, *RIAA*, Vol. XXXII, p. 148, para. 507.

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SEPARATE OPINION OF JUDGE XUE

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1. I have voted in favour of the operative paragraph of the Judgment but on entirely different legal grounds. I have serious reservations about the Court's findings on the applicable law in the present case. The legal ramifications it may exert on the régime of continental shelf are hard to tell. I am obligated to place my position on the record.

I. PROCEDURAL FAIRNESS FOR THE GOOD ADMINISTRATION OF JUSTICE

2. My reservation about the procedural fairness in the organization of oral proceedings has been largely reflected in the joint declaration appended to the Order of 4 October 2022 in.the present case (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Order of 4 October 2022*, joint declaration of Judges Tomka, Xue, Robinson, Nolte and Judge *ad hoc* Skotnikov). With this final decision settling the case, the oral proceedings on the merits were closed and, consequently, the Parties did not have an oral hearing to make their final arguments on all the issues that still divided them and to submit their final submissions to the Court. Procedurally, this practice is unprecedented in the Court's judicial history.

3. According to Article 48 of the Statute, the Court shall make orders for the conduct of the case and decide the form and time in which each party must conclude its arguments. This power, however, must be exercised in accordance with the principle of juridical propriety for the good administration of justice. Article 31 of the Rules of Court provides that "[i]n every case submitted to the Court, the President shall ascertain the views of the parties with regard to questions of procedure". Procedurally, the Court must ensure that each party is free to choose and follow its own judicial strategy and to fully develop all its arguments. In this regard, the Court should exercise great caution when controlling the oral proceedings so as to avoid jeopardizing the rights of the parties (*ibid.*, para. 11, note 3, citing Mohammed Bedjaoui, "The 'Manufacture' of Judgments at the International Court of Justice", *Pace Yearbook of International Law*, 1991, Vol. 3, p. 44; Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", *American Journal of International Law*, 1973, Vol. 67 (1), p. 7).

4. In its final written pleadings, Nicaragua has made three submissions. The first submission concerns maritime delimitation between the continental shelf beyond 200 nautical miles (also referred to as the "extended continental shelf") as claimed by Nicaragua and Colombia's maritime area within 200 nautical miles from Colombia's mainland baselines. The second and third submissions relate to the maritime entitlements of Colombia's maritime features that may overlap with Nicaragua's entitlement to an extended continental shelf. Apparently, Nicaragua's submissions concern both maritime entitlements of the Parties and delimitation. The legal questions posed by the Court in the 4 October 2022 Order primarily address the issue of entitlement. Without hearing the Parties on all the issues, both in law and in fact, and without making the entire case file accessible to the public, the judicial process did not fully run its course. This is particularly questionable when the Applicant has specifically requested the Court to proceed to a hearing on the merits.

5. Procedurally, even supposing that the answers to the legal questions were decisive for the resolution of the whole case, the present approach adopted by the Court at this phase should still be called into question. As the Applicant indicated, the legal questions posed by the Court had already been substantially argued by the Parties in the course of the written proceedings of this case and during the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia*) case.

6. The first legal question posed by the Court initially arose from Nicaragua's submission I (3) in the *Territorial and Maritime Dispute* case, where Nicaragua requested the Court to define "a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties", which means that Nicaragua's claim to a continental shelf extends beyond 200 nautical miles, as the distance between the mainland coasts of the Parties extends more than 400 nautical miles (*Nicaragua* v. *Colombia, Judgment, I.C.J. Reports 2012 (II)* (hereinafter the "2012 Judgment"), p. 636, para. 17). The Court rejected Nicaragua's request for the delimitation of its extended continental shelf with Colombia's maritime entitlements on the ground that Nicaragua had not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast. The Court stated that it was not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua, even using the general formulation proposed by it (*ibid.*, p. 669. para. 129). In this regard, the Court especially mentioned that it saw no need to address the issue raised by the Parties as to whether a delimitation of overlapping entitlements which involves an extended continental shelf of one State can affect a 200-nautical-mile entitlement to the continental shelf of another State (*ibid.*, pp. 669-670, paras. 129-130), a legal question that the Court now considers has been answered by customary international law.

7. Moreover, during the oral proceedings in that case, Judge Bennouna posed the following questions to the Parties:

- "Is the legal régime of the continental shelf for the portion located within the 200-nautical-mile limit different from that for the portion located beyond this limit?"
- "Can the rules laid down in Article 76 of the 1982 United Nations Convention on the Law of the Sea concerning the determination of the outer limit of the continental shelf beyond 200 nautical miles today be considered as rules of customary international law?"

In answering Judge Bennouna's questions, the Parties went some way in answering the first question posed by the Court in the Order of 4 October 2022 and gave their views on the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles.

8. At the preliminary objections phase in the present case, Colombia contended that Nicaragua's first submission was a "reincarnation" of Nicaragua's claim contained in its final submission I (3) in the *Territorial and Maritime Dispute* case, in so far as it concerned delimitation of extended continental shelf. It argued that, by virtue of *res judicata*, the Court was prevented from entertaining it in the present case. The Court rejected Colombia's objections, including its claim based on *res judicata*, and upheld the admissibility of Nicaragua's first submission. During the written proceedings, the Parties significantly developed their arguments on Nicaragua's entitlement to an extended continental shelf and its relationship with Colombia's entitlements within 200 nautical miles.

9. From a procedural point of view, there seems to be no sound reason for the Court to depart from its established practice by holding an oral proceeding to hear the views of the Parties only on two legal questions. The Parties could have addressed them together with the factual and other legal aspects of the case during the oral proceedings on the merits. If the settlement of the dispute between the Parties on Nicaragua's entitlement to an extended continental shelf indeed hinges entirely on the answers to the legal questions, as recalled above, the matter should have been resolved much earlier for the sake of judicial economy. As a judicial organ, the Court is supposed to know the law — *iura novit curia* — and apply it to settle a dispute whenever it is called for. If the Court considers that, under customary international law, maritime entitlements within 200 nautical miles of one State take precedence over an extended continental shelf of another State, it should have decided, either in the 2012 Judgment in the *Territorial and Maritime Dispute* case or

in the Judgment of 17 March 2016 on preliminary objections in the present case (hereinafter the "2016 Judgment"), that, by virtue of customary international law, Nicaragua's claim of an extended continental shelf should be rejected outright because Nicaragua is not entitled to such a claim and consequently no issue of delimitation arises between the Parties. The dispute would thus have been settled there. Having unduly prolonged the judicial process and having left unexamined all the technical and scientific evidence submitted by the Parties, the Court's approach, for whatever reason, cannot be deemed in conformity with the principles of judicial propriety and has doubtfully facilitated judicial economy.

II. SUBSTANTIVE ISSUES IN THE PRESENT CASE

10. I agree with the majority that the negotiation and conclusion of the United Nations Convention on the Law of the Sear (hereinafter "UNCLOS") has, to a large extent, codified and contributed to the progressive development of customary international law of the sea. However, I do not share the reasoning given in the Judgment on the contemporary régime of the continental shelf. The legal issue before the Court ultimately boils down to a question that often arises in continental shelf delimitation, namely, the relationship between the extended continental shelf of one State and maritime entitlements within 200 nautical miles from the baselines of another State. It bears on the fundamental concept of natural prolongation in contemporary customary international law and the "package deal" that was negotiated and eventually worked out at the Third United Nations Conference on the Law of the Sea (hereinafter the "Law of the Sea Conference"). The reasoning of the Judgment on the current state of the law, in my view, is neither persuasive nor reflective of general State practice and *opinio juris*.

A. CONTINENTAL SHELF UNDER CUSTOMARY INTERNATIONAL LAW AS REFLECTED IN ARTICLE 76

11. The first question that the Court posed to the Parties in the Order of 4 October 2022 (hereinafter the "first question") reads as follows:

> "(1) Under customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State?"

This question basically asks an issue of entitlement on the basis of the relationship between two criteria as set forth in Article 76, paragraph 1, of UNCLOS. If the two criteria are of equal applicability, Nicaragua may be *entitled* to an extended continental shelf which overlaps with Colombia's entitlements within 200 nautical miles, provided its physical existence is established. The case then calls for delimitation. If the answer to the question is in the negative, it means that the distance criterion takes precedence over natural prolongation. Colombia's 200-nautical-mile entitlements prevail over Nicaragua's claim; Nicaragua is *not entitled* to an extended continental shelf that extends within 200 nautical miles of Colombia. Consequently, there is no issue of delimitation between the Parties. The answer to the first question apparently has to be found in customary international law.

12. Under customary international law, the continental shelf régime originates from the concept of natural prolongation. The doctrine of the continental shelf was first recalled by the Court in the *North Sea Continental Shelf* cases (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 32-33, para. 47), in which the Court considered that the essential basis of the continental shelf is the extended sovereign rights of the coastal State over the natural prolongation or continuation of its land territory under the sea. Such rights exist *ipso facto* and *ab initio* (*ibid.*, p. 22, para. 19). This pronouncement was reiterated by the Court in subsequent cases. In the *Tunisia/Libyan Arab Jamahiriya* case, for example, the Court stated that

> "[t]he concept of natural prolongation . . . was and remains a concept to be examined within the context of customary law and State practice. While the term 'natural prolongation' may have been novel in 1969, the idea to which it gave expression was already a part of existing customary law as the basis of the title of the coastal State." (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 46, para. 43.)

13. Admittedly, contemporary customary international law on the definition of the continental shelf was much influenced by the negotiations of the Law of the Sea Conference that lasted for nine years. Not long after the Court delivered its Judgment in the *North Sea Continental Shelf* cases, the United Nations General Assembly adopted a resolution in which it was stated

> "that the definition of the continental shelf contained in the Convention on the Continental Shelf of [1958] does not define with sufficient precision the limits of the area over which a coastal State exercises sovereign rights for the purpose of exploration and exploitation of natural resources, and that *customary international law on the subject is inconclusive*" (resolution 2574 (XXIV) of 15 December 1969, adopted with 65 votes in favour, 12 against, and 30 abstentions; emphasis added).

This resolution was adopted against the backdrop of the upcoming negotiations on the law of the sea and growing concern over the prospects of deep sea-bed mining. The definition found in Article 1 of the 1958 Convention did not provide a definitive limit of continental margin, leaving it open to technical exploitability. The relevant article reads as follows:

> "For the purpose of these articles, the term 'continental shelf' is used as referring (*a*) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (*b*) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

Apparently, when the United Nations General Assembly disapproved of this definition as imprecise, the focus of its attention was on *the limits* of the continental shelf but not its foundation; it was feared that by recognizing an exploitability criterion, coastal States may, with the continuous advancement of technology and science, extend their claim unrestrictedly, thus encroaching upon the common area of the deep sea-bed and its resources, which were subsequently proclaimed as the "common heritage of mankind" at the Law of the Sea Conference. It was this common interest that eventually led to the new regulation of the continental shelf régime under Part VI of UNCLOS.

14. The outcome of the negotiations on Part VI of UNCLOS is a balanced solution between the individual interest of coastal States and the common interest of the international community. From the text of Part VI, it is not difficult to observe that the fundamental basis of the continental shelf régime remains intact under the "package deal"; natural prolongation as the physical criterion for the determination of the continental shelf is not replaced by a distance criterion, the criterion applicable to the régime of the exclusive economic zone. There is no basis in customary international law to suggest that restrictions imposed on the extent and use of the continental shelf beyond 200 nautical miles imply that the continental shelf is now under two régimes: the régime of continental shelf within 200 nautical miles and the régime of the extended continental shelf. Either based on the natural prolongation of its land territory or a distance of 200 nautical miles, every coastal State is entitled to a single continental shelf; the substantive rights of the coastal State in the continental shelf within and beyond 200 nautical miles from the baselines are generally the same, which is affirmed by subsequent judicial and arbitral decisions, including the present Judgment (*Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 96, para. 361; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India), Award of 7 July 2014,* United Nations*, Reports of International Arbitral Awards (RIAA)*, Vol. XXXII, p. 38, para. 77; the present Judgment, para. 75).

15. The equal relationship between the two criteria can be further observed from the text of Article 76, paragraph 1, which is considered by the Court as reflective of customary international law (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 666, para. 118).

Article 76, paragraph 1, provides:

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the

> outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".

By virtue of this provision, a distance criterion is added alongside the natural prolongation criterion to the definition of the continental shelf. A coastal State whose continental margin does not extend up to 200 nautical miles may extend its entitlement to 200 nautical miles, irrespective of geological and other geophysical conditions. This entitlement provision, by its ordinary meaning, nowhere indicates that the two criteria apply respectively to two distinct parts of the continental shelf, that is to say, that the distance criterion applies to the continental shelf within 200 nautical miles while natural prolongation criterion is only applicable to the extended continental shelf, as suggested in the Judgment (para. 75). For any single continental shelf, it may be defined by either one of the criteria, depending on the physical circumstances of the continental margin concerned. Between the two criteria, there is neither priority nor precedence (*Delimitation of the maritime boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau), Award of 14 February 1985*, *RIAA*, Vol. XIX, p. 191, para. 116). If the distance criterion were indeed given precedence over natural prolongation within 200 nautical miles, the text of Article 76, paragraph 1, must have been written differently to indicate such a hierarchy, because it would otherwise annul the entitlement to certain extended continental shelves that coastal States enjoy *ipso facto* and *ab initio* and would fundamentally change the basis of continental shelf entitlements under customary international law. Apparently, no such understanding can be found in the text of Article 76.

16. In analysing the terms of the continental shelf under Article 76, the Court infers an assumption of negotiating States from the mechanism established under Article 76, paragraph 8, of UNCLOS that an extended continental shelf would only extend into maritime areas that would otherwise be located in the "Area", hence denying the possibility that an extended continental shelf of one State may extend within 200 nautical miles from the baselines of another State (Judgment, para. 76). In this regard, it refers to Article 82 on payments and contributions to the International Seabed Authority in respect of exploitation of the non-living resources of the extended continental shelf and states that "[s]uch a payment would not serve the purpose of this provision in a situation where the extended continental shelf of one State extended within 200 nautical miles from the baselines of another State". Furthermore, it observes that the issue before the Court with regard to the extended continental shelf of one State extending within 200 nautical miles of another State "was not debated" during the Law of the Sea Conference (Judgment, para. 76).

17. In the present case, Nicaragua's claim obviously does not concern the Area, nor did the Parties refer to it during the proceedings. It is true that the limitation on the continental shelf beyond 200 nautical miles and the Article 82 mechanism are designed to protect the Area and its resources as the common heritage of mankind, but they are irrelevant to the present situation. It is questionable whether an inference could be drawn from this treaty mechanism that the distance criterion was provided as the primary entitlement to a continental shelf within 200 nautical miles to trump an overlapping entitlement based on natural prolongation. The assumption inferred from Articles 76 and 82 of UNCLOS, even if established, does not necessarily lead to the conclusion that the mechanism under Article 82 has the consequential effect of restricting a State's entitlement to an extended continental shelf from extending within 200 nautical miles of another State. What has been agreed by the States in the "package deal" remains in the text of the treaty. What is not included should continue to be governed by customary international law. The absence of discussions of the issue during the negotiations at the Law of the Sea Conference does not reinforce the Court's reasoning. On the contrary, that fact weakens it. The negotiating parties did not debate the issue simply because they saw no need to do so. As is observed,

> "[t]he establishment of a maritime area in which the States concerned have shared rights is not unknown under the Convention. The Convention is replete with provisions that recognize to a greater or lesser degree the rights of one State within the maritime zones of another." (*Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India), Award of 7 July 2014, RIAA*, Vol. XXXII, pp. 148-149, para. 507.)

Overlapping continental shelf entitlements based on different criteria could well have been envisaged when the distance criterion was introduced into Article 76, paragraph 1. Unless otherwise provided, a hierarchical relationship

between the two criteria cannot be construed from the simple fact that there are a very large number of States parties to UNCLOS. Moreover, to what extent the relevant treaty rules have passed into the corpus of customary international law is still a question to be determined under customary international law. In other words, the Court has to ascertain whether there is a general State practice and acceptance of such practice as law (*opinio juris*) that support a customary rule as identified by the Court. In this regard, "two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the evidence of a rule of law requiring it." (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77; see also Conclusions 2 and 9 of the Draft conclusions on identification of customary international law, with commentaries, adopted by the International Law Commission in 2018 (hereinafter "ILC Conclusions", UN doc. A/73/10, pp. 122-156).

18. In determining the existence and content of a customary rule that may have evolved from a treaty rule, the Court in the *North Sea Continental Shelf* cases highlighted an indispensable requirement for the consideration of the State practice under the treaty rule concerned, according to which,

> "State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 43, para. 74).

In assessing the evidence, regard must be had to the overall context, the nature of the rule and the particular circumstances in which the evidence in question is to be found (Conclusion 3 of the ILC Conclusions).

19. In assessing these two constitutive elements for the identification of a customary rule, the Court relies heavily on the relationship of the régimes of the exclusive economic zone and of the continental shelf as provided for in Article 56, paragraph 3, of UNCLOS and on States parties' submissions to the Commission on the Limits of the Continental Shelf (hereinafter the "CLCS" or "Commission"). It is this part of the reasoning that I find most unpersuasive and problematic. It flies in the face of State practice and well-settled jurisprudence of the Court.

B. Relationship between the régimes of the continental shelf and of the exclusive economic zone

20. In recalling the negotiating history of UNCLOS, the Court refers to the relationship between the régimes of the exclusive economic zone and of the continental shelf. In the Court's view, since a coastal State enjoys in the exclusive economic zone, *inter alia*, sovereign rights over the non-living resources in the sea-bed and subsoil within 200 nautical miles and since such rights shall be exercised in accordance with the rules applicable to the continental shelf, the two régimes are interrelated. Based on that link, the Court assumed that the entitlement to an extended continental shelf may not extend within 200 nautical miles because such an extension would encroach on the attendant exclusive economic zone of the coastal State. This inference, in my view, overstates the import of Article 56, paragraph 3.

21. First of all, the interrelationship between the régimes of the exclusive economic zone and of the continental shelf as provided for in Article 56 does not give a prevailing effect to the exclusive economic zone over the continental shelf. While Article 56, paragraph 3, links the two zones, it does not go so far as to say that the two zones are inseparable in maritime delimitation and that maritime entitlements within 200 nautical miles by their very nature shall take precedence over an extended continental shelf entitlement. States' positions as well as their practice are divided on the question whether the two criteria under Article 76, paragraph 1, are of equal applicability or hierarchical in effect. They differ as to whether the water column and the sea-bed within 200 nautical miles may be delimited separately. Among scholars, views on the subject-matter also vary greatly[1]. This is indeed an area that the "package deal" was ambiguous about. On the relationship between the two régimes, one analysis of Article 56, paragraph 3, is pertinent in the present context:

> "The text of Article 56 (3) is a clear indication of the applicable law, which might result from the idea that the continental shelf and the EEZ are essentially dealing with different natural resources. Whereas the continental shelf confers on coastal States exclusive rights over the exploration and exploitation of the non-living resources and sedentary resources in the seabed and subsoil, the EEZ is more concerned with living resources in the water column, in particular fisheries. It is therefore in line with the functional purposes of the two regimes if the continental shelf regime applies to the seabed and subsoil, even if the area is within the reach of the EEZ."[2]

This understanding is consistent with the concept of a single continental shelf. The continental shelf régime applies to the sea-bed and subsoil irrespective of the basis of the entitlement, natural prolongation or distance. While the inclusion of the sovereign rights over the sea-bed and subsoil in the régime of the exclusive economic zone may reinforce the continental shelf entitlement within 200 nautical miles, Article 56, by its own terms, only concerns the content and exercise of substantive rights.

22. Judicial and arbitral decisions generally recognize the autonomy and distinction of the two régimes. In the present case, however, the Court draws a different reading from its 1985 Judgment in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, where the Court observed that, "[a]lthough there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf" (*Judgment, I.C.J. Reports 1985*, p. 33, para. 34). Based on this statement, the Court now considers that, with the distance criterion as the sole basis of entitlement of the coastal State to both the exclusive economic zone and the continental shelf within 200 nautical miles, an extended continental shelf of one State may not extend within 200 nautical miles of another State.

23. This finding, first of all, implies that, with the distance criterion applicable to both régimes, the concept of the continental shelf within 200 nautical miles has been absorbed by that of the exclusive economic zone under the contemporary law of the sea, an implication that the Court categorically rejected in the same Judgment (see *ibid.*, p. 33, para. 33). Following the above statement cited by the Court, the Court in that case went on stating that,

> "for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone; and this quite apart from the provision as to distance in paragraph 1 of Article 76. *This is not to suggest that the idea of natural prolongation is now superseded by that of distance.* What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation . . . is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concepts of natural prolongation and distance are therefore not opposed but complementary; and *both remain essential elements in the juridical concept of the continental shelf*." (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment, I.C.J. Reports 1985*, p. 33, para. 34; emphasis added.)

This statement shows that the interrelationship between the two régimes as defined in Article 56, paragraph 3, is not conclusive on the question that the Court is dealing with in the present case, namely, whether there is priority accorded to the entitlement within 200 nautical miles over an extended continental shelf. Moreover, the factual situation of that case is entirely different from the present one. In the former, the distance between the parties is less than 400 nautical miles, where geographical or geophysical factors could be disregarded, while in the latter, the Applicant's claim to an extended continental shelf depends on the technical and scientific evidence that may establish the existence of the natural prolongation of its land territory. Once the natural prolongation is established, the Applicant is entitled to the extended continental shelf. What the Court stated in the context of the *Libyan Arab Jamahiriya/Malta* case did not address the question of entitlement but of delimitation. At the time of that case, with UNCLOS not yet in force and the customary status of Article 76, paragraph 1, with regard to the distance criterion still in doubt, the Court took the legally permissible extent of the exclusive economic zone appertaining to a given State as "*one of the relevant circumstances to be taken into account for the delimitation of the continental shelf*" of that State (*ibid.*, p. 33, para. 33; emphasis added). By granting greater importance to the element of distance, which is common to both régimes, in the delimitation of continental shelf within 200 nautical miles, the Court only tried to reach an equitable solution but not to pronounce a general rule restricting natural prolongation.

24. Even supposing that the Court's statement in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case did constitute a general legal pronouncement, one may still wonder when the putative rule as identified by the Court in this case formed part of customary international law, because the judicial and arbitral decisions and State practice on the delimitation of continental shelf subsequent to the 1985 Judgment do not support such a proposition.

25. In the *Bay of Bengal* cases, the International Tribunal for the Law of the Sea (ITLOS) and the arbitral tribunal established under Annex VII of UNCLOS respectively delimited the maritime boundary including the extended continental shelf between the parties to each case. The adjustment of the provisional equidistance line resulted in a "grey area" of limited size in both cases, which is located within the 200-nautical-mile limit of the coast of one party but on the other party's side of the line that delimits the parties' continental shelves (*Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment*, *ITLOS Reports 2012*, p. 119, para. 463; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, *Award of 7 July 2014, RIAA*, Vol. XXXII, p. 147, para. 498). The Court dismisses the Applicant's argument based on these cases, which it considers irrelevant for the consideration of the present case, because, in its view, the grey area is "an incidental result" of the adjustment of the provisional equidistance line and the circumstances in those cases are distinct from the situation in the present case (Judgment, para. 72).

26. In *Somalia* v. *Kenya* — a case it has recently adjudicated — the Court observed that if the delimitation line, as determined, continues on the course beyond 200 nautical miles, it might give rise to an area of limited size lying within 200 nautical miles of the coast of Somalia but on the Kenyan side of the boundary, thus resulting in a similar "grey area" as in the *Bay of Bengal* cases (*Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 277, para. 197). The Court again dismisses the relevance of the case, stating that the grey area is merely a possibility and that, therefore, there is no need to take it into account (Judgment, para. 73).

27. This approach taken by the Court appears hasty and evasive. In these three cases, the "grey area", albeit incidental in nature and small in size, is in itself a piece of hard evidence that disproves at least the inseparability of the two zones in the maritime delimitation. Convenient or not, it evinces that the exclusive economic zone does not dictate the delimitation of the continental shelf. As ITLOS observed in the *Bangladesh/Myanmar* case,

> "the legal regime of the continental shelf has always coexisted with another legal regime in the same area. Initially that other regime was that of the high seas and the other States concerned were those exercising high seas freedoms. Under the Convention, as a result of maritime delimitation, there may also be concurrent exclusive economic zone rights of another coastal State." (*Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 121, para. 475.)

Evidently, these judicial and arbitral organs do not consider that there existed a customary rule by which an extended continental shelf of one State may not extend within the exclusive economic zone of another State, as a matter of entitlement. When an overlap of entitlements occurs, the matter is one of delimitation. Article 83 of UNCLOS, on purpose, leaves sufficient room for the relevant circumstances of each case to be considered in the delimitation process.

28. In practice, States not only claim an entitlement to an extended continental shelf that may extend within 200 nautical miles of another State, but also draw maritime boundaries by agreement that delimit the exclusive economic zone and the continental shelf separately. They do it either by separate agreements dealing with different zones, or simply by drawing different boundary lines within the same agreement.

29. Australia and Indonesia, for example, concluded an agreement on the continental shelf boundary in the Timor and Arafura Seas in 1972 (Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain seabed boundaries in the area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971, concluded 9 October 1972, entered into force 8 November 1973, United Nations, *Treaty Series* (*UNTS*), Vol. 974, p. 319). In 1997, the two States concluded another agreement

on the exclusive economic zone boundary and the western extension of the sea-bed boundary (Agreement between the Government of Australia and the Government of the Republic of Indonesia establishing an exclusive economic zone boundary and certain seabed boundaries, concluded 14 March 1997, not yet in force, *International Legal Materials*, 1997, Vol. 36, p. 1053). The latter agreement drew the continental shelf boundary on the basis of the geological and geophysical factors of the Timor Trough, while the boundary of the exclusive economic zone was drawn on the basis of distance; the former line is closer to the Indonesian side. As a result of these two agreements, there are several overlapping areas where Australia's extended continental shelf is subjacent to Indonesia's exclusive economic zone (see illustrative map 1). For the purpose of management, the Agreement contains a specific provision regulating, *inter alia*, the rights and obligations of each party in the areas of overlapping jurisdiction. It affirms Indonesia's sovereign rights of exclusive economic zone in the water column and Australia's sovereign rights of continental shelf in the sea-bed[3]. Although the Agreement has not yet entered into force, it manifests that the parties did not consider there existed a customary rule by which Australia could not, by law, claim its entitlement to an extended continental shelf that extends within Indonesia's 200 nautical miles from its baselines.

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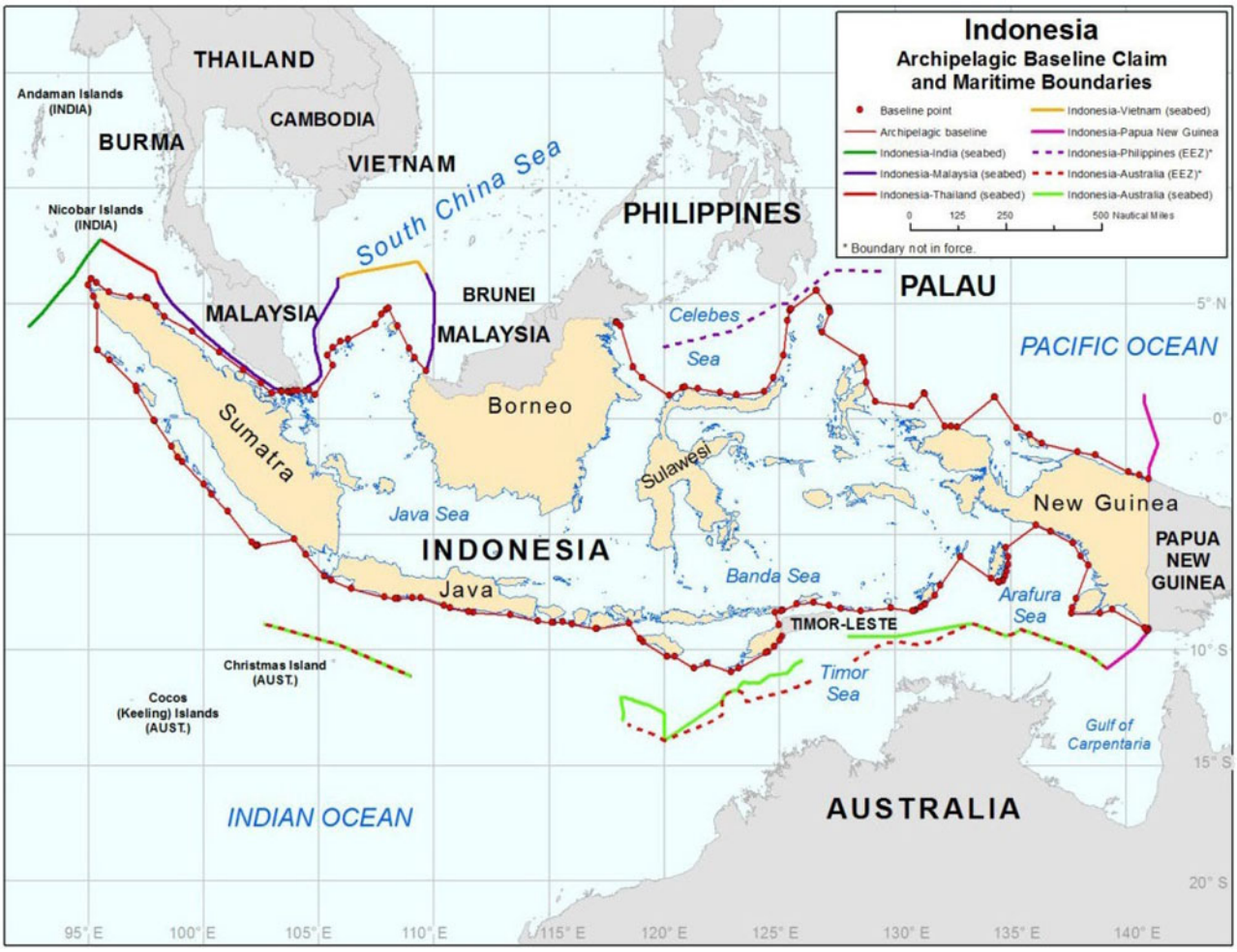
Illustrative map 1
(reproduced from Department of State of the United States of America, "Limits in the Seas (No. 141) — Indonesia: Archipelagic and other Maritime Claims and Boundaries", September 2014[4])



30. The agreement on maritime boundaries concluded between Australia and Papua New Guinea is another example (Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters, concluded 18 December 1978, entered into force 15 February 1985, *UNTS*, Vol. 1429, p. 207). Under

Article 4 of this Treaty, two maritime boundaries are established between the two States. The first line is the continental shelf boundary concerning "seabed jurisdiction", which is defined as "sovereign rights over the continental shelf in accordance with international law, and includes jurisdiction over low-tide elevations, and the right to exercise such jurisdiction in respect of those elevations, in accordance with international law"[5]. The second line is the boundary relating to fisheries jurisdiction, defined as "sovereign rights for the purpose of exploring and exploiting, conserving and managing fisheries resources other than sedentary species"[6]. Based on the co-ordinates of the two boundaries, it is shown that, while the two boundaries in the eastern and western sections coincide, the two boundaries are separate in the middle section in the area known as the Torres Strait (see illustrative map 2). Papua New Guinea, like Indonesia, accepted Australia's position without any reservation. This treaty remains in force to date.

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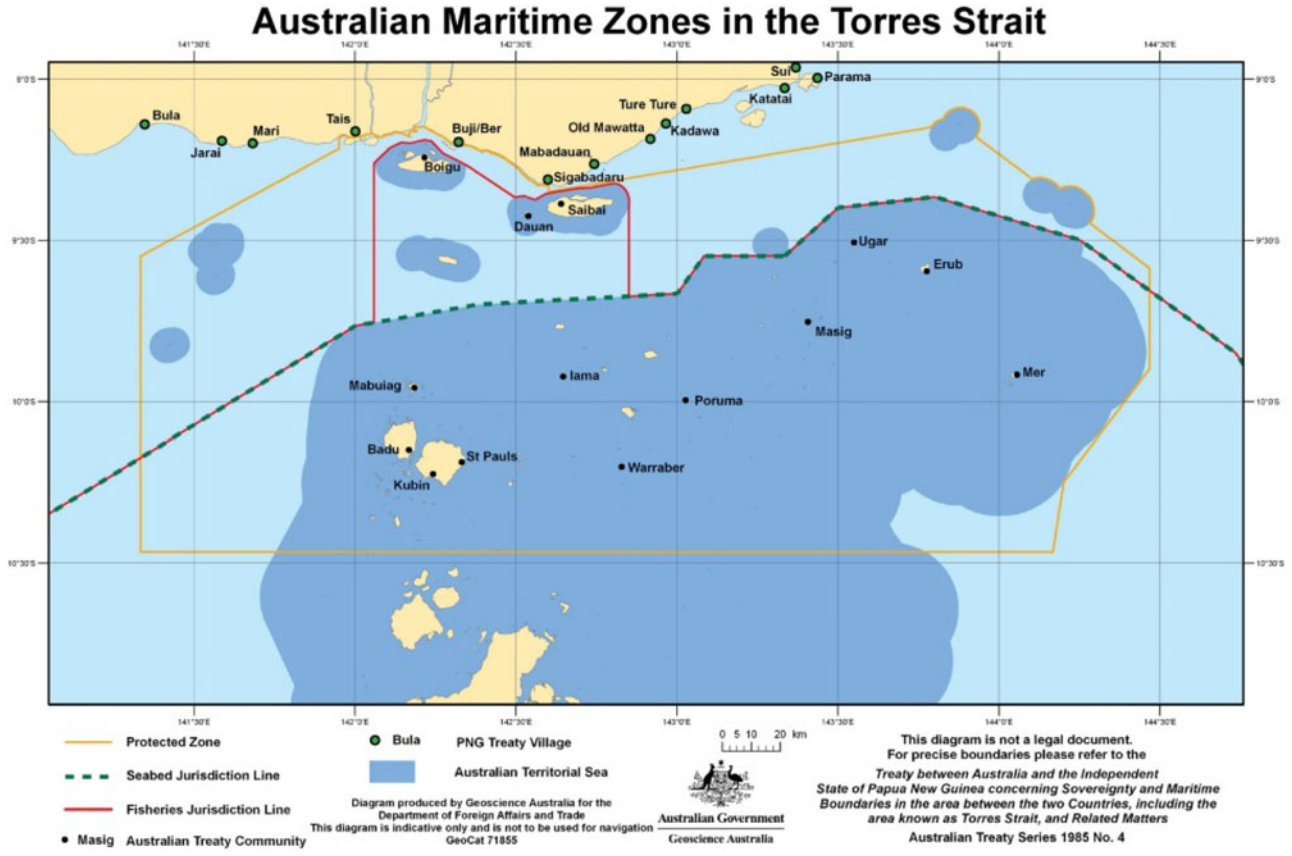
Illustrative map 2
(reproduced from Department of Foreign Affairs and Trade of Australia, "Guidelines for Traditional Visitors Travelling under the Torres Strait Treaty"[7])



31. Australia reiterated its position on the natural prolongation criterion during the *Timor Sea Conciliation* with Timor-Leste on the basis of Article 76, paragraph 1, of UNCLOS in light of the geological and geomorphological situation of the Timor Trough in the Timor Sea (*Timor-Leste* v. *Australia, Permanent Court of Arbitration, Case Number 2016-10, Opening Session Transcript*, 29 August 2016, p. 91). Although the parties ultimately reached a delimitation agreement establishing a single maritime boundary for both the exclusive economic zone and the continental shelf, the Preamble of the Treaty expressly states that "the settlement contained in this Treaty is based on a mutual accommodation between the Parties *without prejudice to their respective legal positions*" (Treaty between the Democratic Republic of Timor-Leste and Australia establishing their maritime boundaries in the Timor Sea, concluded 6 March 2018, entered into force 30 August 2019, [2019] *Australian Treaty Series* 16; emphasis added).

32. A more recent example is the delimitation agreement between Indonesia and the Philippines concerning the delimitation of the exclusive economic zone in the Celebes Sea concluded in 2014 (Agreement between the

Government of the Republic of Indonesia and the Government of the Republic of the Philippines concerning the delimitation of the exclusive economic zone boundary, concluded 23 May 2014, entered into force 1 August 2019, *UNTS*, Vol. 3324, p. 1). The distance between the parties in the area in the Celebes Sea is less than 400 nautical miles. In delimiting the boundary of exclusive economic zones between the two States, the parties took account of the provisions of UNCLOS and the principles applicable to delimitation. The Agreement specifically provides that "[t]his Agreement shall not prejudice any rights or positions of the Contracting Parties with regard to the delimitation of the Continental Shelf boundary"[8]. Apparently, the parties to the Agreement do not consider that the boundary of the exclusive economic zone is decisive for the delimitation of the continental shelf boundary within 200 nautical miles.

33. Similar practice can also be found in other regions. Denmark and the United Kingdom, for instance, reached an agreement on the maritime delimitation in the area between the Faroe Islands and the United Kingdom in 1999 (Agreement between the Government of the Kingdom of Denmark together with the Home Government of the Faroe Islands, on the one hand, and the Government of the United Kingdom of Great Britain and Northern Ireland, on the other hand, relating to the Maritime Delimitation in the area between the Faroe Islands and the United Kingdom, concluded 18 May 1999, entered into force 21 July 1999, *United Kingdom Treaty Series* (*UKTS*), 1999, No. 76). Under the Agreement, the parties delimited the continental shelf in the area and the waters superjacent to the continental shelf in part of the area and established a special régime, called "the Special Area", in the remaining part. The parties made special arrangements for the exercise of fisheries jurisdiction and rights in the Special Area. In a subsequent protocol concluded in 2012 to the Agreement, the parties established exclusive economic zones in the waters as previously delimited and decided to retain the previous boundaries and the Special Area as drawn in the Agreement (*UKTS*, 2014, No. 22). From the maritime boundary shown in illustrative map 3 reproduced below, one can see that the Special Area as a water column is separated from the continental shelf of either party.

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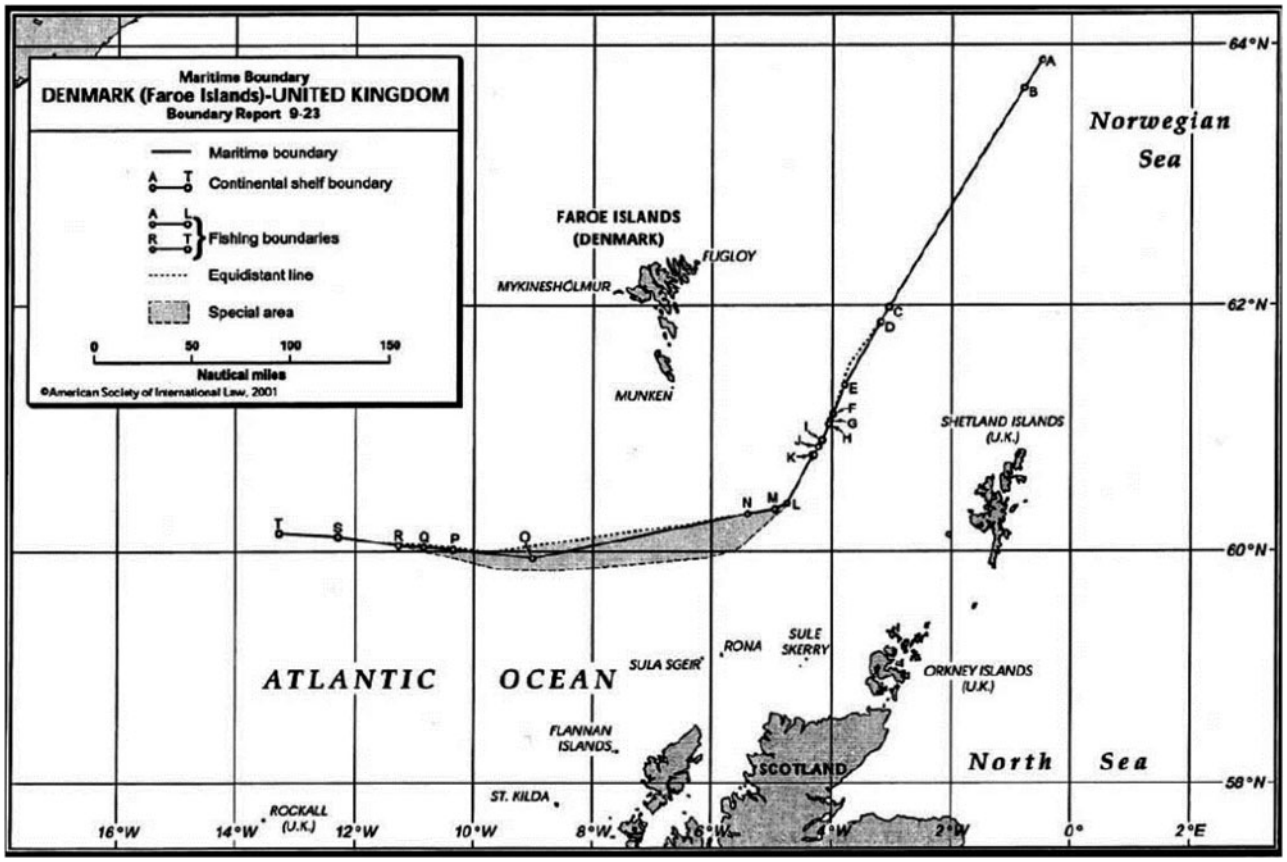
Illustrative map 3
(found in Jonathan I. Charney and Robert W. Smith (eds.), *International Maritime Boundaries,* 2002, Vol. IV, p. 2955)



34. There are other bilateral maritime delimitation agreements, where one party's extended continental shelf overlaps with the exclusive economic zone of another party (see Agreement between the United States of America and the Union of Soviet Socialist Republics on the maritime boundary, concluded 1 June 1990, applied provisionally since 1 June 1990, *Law of the Sea Bulletin*, No. 17, April 1991, p. 15; Treaty between the Kingdom of Norway and the Russian Federation concerning maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean, concluded 15 September 2010, entered into force 7 July 2011, *Law of the Sea Bulletin*, No. 77, 2012, p. 24)[9].

35. In support of its claim, the Respondent refers to Article 2, paragraph 3, of the Treaty between the Federated States of Micronesia and the Republic of Palau concerning maritime boundaries and cooperation on related matters, which provides that "no Party shall claim an extended continental shelf that intrudes into the Exclusive Economic Zone . . . of the other Party" (concluded 16 July 2006, entered into force 16 February 2016, *UNTS*, Vol. 3210, p. 1). This evidence, contrary to the position of the Respondent, proves that these two States do not consider that there is a customary rule that prohibits an extended continental shelf from extending within 200 nautical miles from the coast of another State, because otherwise such a clause would be unnecessary.

36. Admittedly, States may make special arrangements through bilateral agreements, not necessarily guided by generally applicable law. Nonetheless, such practice supports the settled jurisprudence that the régimes of the exclusive economic zone and of the continental shelf, though interrelated, are distinct and may be delimited separately. Although a single maritime boundary is generally preferred for the convenience of management, that rationale for the delimitation does not have a restrictive effect on the entitlement to the extended continental shelf.

C. State practice with regard to CLCS submissions

37. With regard to the submissions of States to the CLCS, the Court notes that the vast majority of States parties to the Convention that have made submissions to the CLCS have chosen not to assert therein limits that extend within 200 nautical miles from the baselines of another State. Without any examination of the submissions of the "vast majority of those States", the Court considers that "the practice of States before the CLCS is indicative of *opinio juris*, even if such practice may have been motivated in part by considerations other than a sense of legal obligation" (Judgment, para. 77). Recalling some inconsistent practice of "a small number of States", the Court takes the view that, "[t]aken as a whole, the practice of States may be considered sufficiently widespread and uniform for the purpose of the identification of customary international law". It further states that, given its extent over a long period of time, this State practice may be seen as an expression of *opinio juris* (Judgment, para. 77). This is a rather loose statement on the practice of States. The Court did not even bother to address exactly what practice amounts to an expression of *opinio juris*.

38. First of all, it is necessary to examine the character of the State submissions to the CLCS. Article 76, paragraph 10, of UNCLOS states that "[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts". Accordingly, the claim that a State has made in its submission to the CLCS may not be final and binding on its position with regard to the questions of entitlement and delimitation; a State may leave out a certain portion of its claim in its submission if it deems it necessary, which does not affect that State's position in the delimitation. This understanding is supported by the terms of the CLCS's mandate and State practice. Pursuant to Rule 46 of the Rules of Procedure of the CLCS and paragraph 5 *(a)* of Annex I to the Rules of Procedure, in the case where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute, unless prior consent is given by all the parties to the dispute. Understandably, in order to have their submissions considered and qualified by the Commission, States may refrain from extending their continental shelf entitlement within 200 nautical miles from the coast of other States with a view to avoiding a dispute. Such restraint may be exercised because of an agreement of the States concerned, a prior unilateral commitment, or a special arrangement. Some States have made several submissions to the CLCS in respect of their separate territorial areas. Their claims to an extended

continental shelf with respect to those areas do not consistently refrain from encroaching upon the 200-nautical-mile entitlement of another State. For instance, France's submissions in respect of the areas of French Guiana and New Caledonia and in respect of French Polynesia stop at 200 nautical miles from the coasts of neighbouring States, but its submission concerning Saint Pierre and Miquelon extends within 200 nautical miles from the coast of Canada. When Canada raised its objection to the latter submission on the ground that the maritime zones of Saint Pierre and Miquelon had been definitely settled by arbitration, France maintained that the arbitral tribunal declared that the question (of an entitlement to a continental shelf beyond 200 nautical miles) did not fall within its competence. It further underscored that "*those claims do not run counter to the United Nations Convention on the Law of the Sea or any rule of international law*" (Note Verbale from the Permanent Mission of France to the United Nations, dated 17 December 2014; emphasis added). Evidently, no consistent State practice can be identified from States' submissions to the CLCS.

39. When the Court affirms the practice of the "vast majority of States parties" for the determination of the customary rule, it primarily relies on the 93 submissions from 73 States and the Cook Islands received by the CLCS so far. According to Colombia, among those 93 submissions, 38 do not reach the 200-nautical-mile limit of another States and, therefore, are irrelevant. Of the remaining 55 submissions, 51 are said by Colombia to have chosen not to extend the continental shelf within 200 nautical miles from the coast of other States; in its view, only four States have made the claim encroaching upon the entitlement within 200 nautical miles of another State[10]. At first sight, this looks overwhelmingly persuasive. For the purpose of the present case, however, that practice obviously needs further scrutiny.

40. Notwithstanding Article 76, paragraph 10, of UNCLOS and the above-mentioned CLCS rules, studies show that the practice of States is not as certain and consistent as is suggested. Individually, almost one third of the States that are said to have chosen not to claim their extended continental shelf within 200 nautical miles of another State have already concluded bilateral agreements with their neighbouring States on maritime delimitation within 200 nautical miles. That fact may have a direct bearing on the States' decision to exercise restraint in their CLCS submissions. Moreover, as mentioned above, some of the said States have indeed claimed an extended continental shelf that extends within 200 nautical miles from the baselines of another State in the delimitation. In this regard, the most illustrative example is the recent case between Mauritius and the Maldives.

41. In the *Mauritius/Maldives* case before an ITLOS Special Chamber, the Maldives claims an extended continental shelf that extends within 200 nautical miles from the baselines of the Chagos Archipelago (Mauritius). While this is not immediately apparent from the publicly available Executive Summary of July 2010 of the Maldives' Submission to the CLCS and the accompanying maps, the ITLOS Special Chamber noted the existence of such an overlap (*Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Judgment of 28 January 2021*, para. 332; *Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives), Judgment of 28 April 2023*, para. 257). The Maldives itself "confirm[ed] its position that the Maldives' entitlement to the continental shelf beyond 200 nautical miles from its baseline can be . . . extended [within the 200-nautical-mile limit of Mauritius]" (ITLOS/PV.22/C.28/4, p. 7). Mauritius claimed that the Maldives cannot extend its continental shelf into the exclusive economic zone of Mauritius, because it had undertaken a specific commitment not to do so (*Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives), Judgment of 28 April 2023*, para. 260). Indeed, Mauritius itself contended that, "if Maldives were entitled to claim an outer continental shelf within 200 Miles of the baselines of Mauritius, so too could Mauritius, correspondingly, claim an outer continental shelf that encroaches within 200 Miles of Maldives" (ITLOS/PV.22/C28/6, p. 29). Ultimately, for reasons concerning the circumstances of that case, the Special Chamber considered that it was

> "not required to address the question whether the Maldives has an entitlement to a continental shelf beyond 200 nm in the relevant area or the question whether the Maldives' entitlement to a continental shelf beyond 200 nm may extend within the 200 nm limit of Mauritius" (*Delimitation of the maritime boundary in the Indian Ocean (Mauritius/Maldives), Judgment of 28 April 2023*, para. 275).

The practice of both Mauritius and the Maldives in relation to the latter's extended continental shelf reduces the weight of the evidence presented by Colombia. The Maldives' "restraint" is not based on a legal obligation derived from a customary rule, nor is Mauritius's objection to the submission of the Maldives to the CLCS based on customary international law.

42. Responses to the submissions of the four States that are said by Colombia to have encroached on the 200-nautical-mile entitlements of other States are also worth noting. In its communications sent to the United Nations in response to the submissions of China and the Republic of Korea to the CLCS, Japan, while objecting to the submissions, emphasized the need for delimitation between the States concerned. With regard to China, Japan states that

> "[t]he distance between the opposite coasts of Japan and the People's Republic of China in the area with regard to the submission is less than 400 nautical miles[.] The delimitation of the continental shelf in this area shall be effected by agreement between the States concerned in accordance with Article 83 of the United Nations Convention on the Law of the Sea (hereinafter referred to as 'the Convention'). It is, thus, indisputable that the People's Republic of China cannot unilaterally establish the outer limits of the continental shelf in this area." (Note Verbale from the Permanent Mission of Japan to the United Nations, dated 28 December 2012.)

43. Japan made a similar response to the submission by the Republic of Korea. In its reply to Japan's objection, the Republic of Korea stated the following:

> "Nothing in the text of the United Nations Convention on the Law of the Sea (hereinafter referred to as 'the Convention') supports the suggestion that the establishment of the outer limits of the continental shelf beyond 200 nautical miles in an area where the distance between States with opposite coasts is less than 400 nautical miles cannot be accomplished under the provisions of the Convention. The Convention establishes two distinct bases of entitlement in the continental shelf: (1) distance from the coast; and (2) the geomorphological criteria stated in paragraph 4 of Article 76. *Neither basis is afforded priority over the other under the Convention.* Japan, therefore, cannot use its entitlement based on the distance criterion to negate Korea's entitlement based on geomorphological considerations, or to block the Commission from issuing recommendations with regard to the existence and limits of the continental shelf in the East China Sea. Accordingly, the Partial Submission of the Government of the Republic of Korea to the Commission constitutes a legitimate undertaking in conformity with and in satisfaction of its obligations under the Convention, as well as the relevant provisions of the Rules of Procedures and the Scientific and Technical Guidelines of the Commission." (Note Verbale from the Permanent Mission of the Republic of Korea to the United Nations, dated 23 January 2013; emphasis added.)

44. In the case of Somalia, Somalia in its 2014 submission claimed that there was an overlap between Somali and Yemeni claims as regards the areas of the continental shelf beyond 200 nautical miles and that the delimitation of the continental shelf between the two countries had not yet been resolved. It indicated that it was ready to enter into consultation with Yemen with a view to reaching an agreement or understanding which would allow the Commission to consider and make recommendations on submissions by each of the two coastal States. In its communication to the Secretary General, Yemen first objected to the consideration by the CLCS of Somalia's submission (Note Verbale from the Permanent Mission of the Republic of Yemen to the United Nations, dated 10 December 2014). Somalia amended its submission in 2015, which resulted in an overlap of its claim with part of Yemen's entitlements within 200 nautical miles from the coast of Yemen. Afterwards, Yemen, while reaffirming that there was no agreement or understanding between the two States regarding the potential overlap of maritime zones beyond 200 nautical miles, indicated that

> "in the interests of advancing the establishments of maritime limits for itself and its neighbours in the Northwest Indian Ocean, it proposes to remove its objection to the Article 76 submission by the Federal Government of Somalia, with immediate effect, provided that a reciprocal obligation was made by Somalia that it no longer has an objection to the Commission on the Limits of the Continental Shelf examining the submissions of The Republic of Yemen." (Note Verbale from the Permanent Mission of the Republic of Yemen, dated 7 August 2019.)

Apparently, Yemen has left the matter for delimitation.

45. Kenya initially objected to Somalia's 2014 submission on the ground that a significant part of Somalia's continental shelf beyond 200 nautical miles "is appurtenant to an EEZ that is under Kenya's jurisdiction". Subsequently, in withdrawing its objection, Kenya states that,

> "as longs [*sic*] as the Commission is aware of the area of overlapping claims, and that, in respect of that area, it gives all due consideration to the submissions made by both States, the Commission may proceed to make recommendations concerning the outer limits of the continental shelf off the coasts of Somalia and Kenya" (Note Verbale from the Permanent Mission of the Republic of Kenya to the United Nations, dated 30 June 2015).

Kenya's statement to the CLCS apparently did not suggest that Somalia was not entitled to the continental shelf but asserted that there was an overlap of entitlements.

46. In the western Caribbean region, Colombia, Costa Rica, Jamaica and Panama, individually or jointly, opposed Nicaragua's submission on the ground that Nicaragua's claim encroached upon their respective maritime areas. They rejected Nicaragua's assertion that its submission is "without prejudice to the delimitation of the continental shelf between Colombia, Costa Rica and Panama" and reaffirmed their respective positions with respect to Nicaragua's submission (Communication from the Ministers for Foreign Affairs of Colombia, Costa Rica and Panama, dated 5 February 2014, referring to the Note Verbale from the Permanent Mission of Nicaragua to the United Nations, dated 20 December 2013). In denying Nicaragua's claim, these States objected to the Commission's consideration and ruling on Nicaragua's submission. Colombia in its response dated 5 February 2014 referred to the existing maritime boundaries that it had agreed with its neighbouring States, asserting that the submarine areas in the Caribbean Sea that Nicaragua claimed in its submission belong to Colombia under international law. As a non-party to UNCLOS, it dismissed the opposability of Nicaragua's submission to Colombia. In none of the above communications did these States explicitly claim that, as a matter of principle, an extended continental shelf may not extend within 200 nautical miles of another State. Colombia's claim is primarily based on an argument of established boundaries and the entitlement of its islands.

47. The above discussion shows that, even though many States parties in their submissions to the CLCS have refrained from claiming a continental shelf that extends within the 200-nautical-mile maritime zones of another State, they have done so for various reasons; there is no consistent practice among those States. The subsequent practice of many of them varies from their position in the submissions, which seriously weakens the evidentiary value of the submissions (Conclusion 7 of the ILC Conclusions). Moreover, the other constitutive element for the identification of the alleged rule — *opinio juris* — must be determined separately (ILC Conclusions, Conclusion 3, comment 7). There is no evidence shown in the Judgment that those States parties, when restricting their claim in the submissions, believed that such restraint was required by a legal obligation or guided by law. The practice of States, particularly those States whose interests are directly or would likely be affected by such practice, is neither widespread nor consistent. More importantly, no single case can be found where a State has explicitly given up its entitlement to an extended continental shelf on the ground that it believes that its continental shelf may not extend within 200 nautical miles of another State under international law. In any event, the 51 submissions, which the Court considers as reflecting "the practice of the vast majority of States parties", in fact, do not truly reflect the positions of the States parties on the issue in question. As discussed above, States such as Australia, Indonesia, Papua New Guinea, France, the

Maldives, and others, whose submissions are included in the 51 submissions, clearly take a different view on the entitlement to an extended continental shelf that encroaches on the 200-nautical-mile limit of another State.

48. Taking into account all the available practice of States and assessing it as a whole, it can be said that there exists neither a general practice nor *opinio juris* that denies the entitlement of a State to an extended continental shelf that extends within 200 nautical miles from the coast of another State. As many States affirm and have done, when such an overlap of entitlements occurs, the matter shall be settled through the delimitation process in accordance with the rule reflected in Article 83 of UNCLOS.

49. The potential impact of the present Judgment on the existing State practice, the stability and security of treaties, the work of the CLCS and States' submissions is unpredictable, particularly in respect of the existing treaties and recommendations of the CLCS that have already accepted the entitlement to an extended continental shelf that extends within 200 nautical miles of another State. The CLCS may thus be placed at a crossroads as to what to do with those "problematic" submissions.

III. NICARAGUA'S SUBMISSIONS ON AN EXTENDED CONTINENTAL SHELF

50. Having considered the state of the law, I am of the view that Nicaragua is entitled to an extended continental shelf, provided the existence and outer limit of its continental margin is proven. As a precondition for delimitation, Nicaragua has to first prove that its continental margin overlaps with the entitlements of Colombia. For that purpose, the technical and scientific evidence adduced by the Parties must first be examined.

51. Procedurally, the expert reports produced by the Parties were not further examined at the oral proceedings because of the way in which the hearing was organized. From the written pleadings, technical and scientific evidence produced by Nicaragua seems to prove that its continental shelf, the Nicaraguan Rise, extends far enough to reach within 200 nautical miles from the mainland coast of Colombia. At the same time, however, Colombia's expert reports, in challenging the information contained in Nicaragua's submission to the CLCS with regard to the edge of the natural prolongation of the Nicaraguan land territory in the Caribbean Sea, also seem technically tenable. Without hearing from the Parties on those reports and without the assistance of experts appointed by the Court, it is difficult to assess the weight of each piece of evidence. This underscores the value and indispensability of the recommendations from the CLCS. In hindsight I believe that, in such a technically complicated case, it is a necessity for the parties to obtain the recommendations of the CLCS before proceeding to delimitation.

52. Notwithstanding my serious reservations regarding the reasoning of the Court, there are two major considerations that led me to vote in favour of the Court's decision.

53. As a technical matter, the Parties are deeply divided over the scientific and technical facts of Nicaragua's extended continental shelf. Nicaragua claims that the Nicaraguan landmass extends eastwards underwater to form the dominant feature in the southwest Caribbean: the Nicaraguan Rise, which is said to stretch over 500 nautical miles from the Nicaraguan landmass in the southwest to Jamaica and Haiti in the northeast. The Nicaraguan Rise, as is shown, is separated from the oceanic abyssal plain of the Colombian Basin to the south by a linear feature: the Hess Escarpment. Its northern edge is formed by the Cayman Trough, a deep ocean trench lying to the north of Honduras, running between Guatemala and the north coast of Jamaica, approximately parallel to the Hess Escarpment. Nicaragua further asserts that the Nicaraguan Rise is divided into two halves: to the north the Nicaraguan Rise proper and — separated from it by the Pedro Bank Fracture Zone — the Lower Nicaraguan Rise to the south. The Nicaraguan Rise is about 150 nautical miles wide (i.e. north-south) and extends from the land territory of Nicaragua in the west to Haiti in the east.

54. Contesting Nicaragua's claim, Colombia's expert reports present the analyses of the scientific evidence collected from public sources and the Colombian Navy on the natural prolongation of the sea-bed and subsoil from

the Nicaraguan land territory into and under the Caribbean Sea. The key finding of the reports which is relevant to the present case is that the edge of the natural prolongation of the Nicaraguan land territory in the Caribbean Sea is not the Hess Escarpment (the southern limit of the Nicaraguan Rise as assumed by the Applicant), but the Pedro Bank Escarpment-Providencia Trough Lineament, which separates the southern edge of the Nicaraguan Rise proper from the Lower Nicaraguan Rise. According to Colombia's experts, the scope of Nicaragua's continental margin is much smaller than Nicaragua's experts suggest and, consequently, Nicaragua's landmass does not extend within 200 nautical miles from the mainland coast of Colombia.

55. The technical characterization of Nicaragua's continental margin must be left to scientific and technical experts. Divergent as they are, the expert reports of the Parties, at the least, inform the Court of some basic facts that are crucial for the consideration of Nicaragua's submissions to the Court for adjudication in the present case.

56. First, the relationship between Nicaragua's continental margin and Colombia's mainland coast remains highly uncertain. Even relying on Nicaragua's evidence, the outer limit of the Lower Nicaraguan Rise in the north-east, as defined by Nicaragua, seems overexpansive. The materials submitted by Nicaragua are not sufficient for the Court to ascertain whether and to what extent Nicaragua's continental shelf extends within 200 nautical miles of Colombia.

57. Additionally, the Court has never dealt with such a case where the delimitation involves the extended continental shelf of only one party. Even assuming that the Nicaraguan Rise is southbound by the Hess Escarpment, as asserted by Nicaragua, and that Nicaragua's entitlement is established and overlaps with Colombia's entitlements within 200 nautical miles from its mainland coast, the question nevertheless remains as to what methodology the Court should adopt to delimit the boundary between the Parties in the area. It seems highly problematic to apply the three-stage delimitation methodology that is usually used for maritime delimitation within 200 nautical miles; the relevant considerations for achieving an equitable solution may be quite different in the present situation.

58. Moreover, the Court should not lose sight of the overall geographical context in which Nicaragua's purported continental shelf is located. As is shown on the maps presented by the Parties, situated on the Nicaraguan Rise, alongside Nicaragua, are Colombia's Archipelago of San Andrés, Providencia and Santa Catalina, Jamaica and Haiti. In the western Caribbean, there is Jamaica to the north and Panama to the south. Notwithstanding the existing delimitation treaties between each of these States and Colombia, which are not opposable to Nicaragua, *res inter alios acta*, the entitlements of those States to a continental shelf within 200 nautical miles would likely overlap with any extended continental shelf Nicaragua may have. Therefore, it is doubtful that any extended continental shelf that Nicaragua might have established could be given its full effect to the extent that Nicaragua claims. As between the Parties, it is Colombia's islands that are situated in the middle of the mainland coasts of the two States that prove crucial for the delimitation between the Parties.

59. In the 2012 Judgment, the Court clearly did not delimit the maritime area eastward beyond the relevant area as identified for the delimitation of the maritime boundary between the Parties within 200 nautical miles from the mainland coast of Nicaragua (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), ICJ Reports 2012 (II)*, p. 683, para. 159). In rejecting Nicaragua's proposal to draw a series of enclaves around each of Colombia's islands, the Court underscored the requirement not to produce cut-off effect in the delimitation. It considered, in particular, that

> "[e]ven if each island were to be given an enclave of 12 nautical miles, and not 3 nautical miles as suggested by Nicaragua, the effect would be to cut off Colombia from the substantial areas to the east of the principal islands, where those islands generate an entitlement to a continental shelf and exclusive economic zone. In addition, the Nicaraguan proposal would produce a disorderly pattern of several distinct Colombian enclaves within a maritime space which otherwise pertained to Nicaragua with unfortunate consequences for the orderly management of maritime resources, policing and the public order of the oceans in general, all of which would be better served by a simpler and more coherent division of the relevant area." (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), ICJ Reports 2012 (II)*, p. 708, para. 230.)

The Court, by implication, recognized that Colombia's islands are entitled to their continental shelves under customary international law. In the present case, should Nicaragua's second and third submissions — similar to the request Nicaragua had made in the *Territorial and Maritime Dispute* case — be upheld, it would produce a cut-off effect between the islands and the mainland of Colombia. Indeed, it would not be conducive to an orderly management of the maritime area and a coherent relationship among the coastal States in the western Caribbean. As Colombia's islands in the east face the mainland coast of Colombia, their entitlements to an exclusive economic zone and continental shelf should be given full effect. Furthermore, they are situated on the landmass constituting part of the continental shelf claimed by Nicaragua. Under the circumstances, it is questionable whether Nicaragua could still make a good case for its claim.

60. Based on the foregoing considerations, I come to the conclusion that Nicaragua's submissions should not be upheld.

(Signed) XUE Hanqin.

ENDNOTES

1 Malcolm D. Evans, "Delimitation and the Common Maritime Boundary", *British Yearbook of International Law*, 1994, Vol. 64 (1), p. 283; Xuexia Liao, "Is There a Hierarchical Relationship between Natural Prolongation and Distance in the Continental Shelf Delimitation?", *The International Journal of Marine and Coastal Law*, 2018, Vol. 33, pp. 105-110.

2 Xuexia Liao, "Is There a Hierarchical Relationship between Natural Prolongation and Distance in the Continental Shelf Delimitation?", *The International Journal of Marine and Coastal Law*, 2018, Vol. 33, pp. 106-107.

3 Article 7 of the Agreement reads as follows: "Areas of overlapping jurisdiction In those areas where the areas of exclusive economic zone adjacent to and appertaining to a Party (the First Party) overlap the areas of seabed adjacent to and appertaining to a Party being the other Party (the Second Party):

(a) the First Party may exercise exclusive economic zone sovereign rights and jurisdiction provided for in the 1982 Convention in relation to the water column;

(b) the Second Party may exercise continental shelf sovereign rights and jurisdiction provided for in the 1982 Convention in relation to the seabed;

(c) the construction of an artificial island shall be subject to the agreement of both Parties. An 'artificial island' for the purposes of this Article is an area of land, surrounded by water, which is above water at high tide by reason of human intervention;

(d) the Second Party shall give the First Party three months notice of the proposed grant of exploration or exploitation rights;

(e) the construction of installations and structures shall be the subject of due notice and a permanent means of giving warning of their presence must be maintained;

(f) (i) any installation or structure which is abandoned or disused shall be removed by the Party which authorised its construction in order to ensure the safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organisation;

(ii) such removal shall also have due regard to fishing and to the protection of the marine environment. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed;

(g) the construction of a fish aggregating device shall be the subject of due notice;

(h) the Party constructing an artificial island, installation, structure or fish aggregating device shall have exclusive jurisdiction over it;

(i) marine scientific research shall be carried out or authorised by a Party in accordance with the 1982 Convention and such research shall be notified to the other Party;

(j) the Parties shall take effective measures as may be necessary to prevent, reduce and control pollution of the marine environment;

(k) each Party shall be liable in accordance with international law for pollution of the marine environment caused by activities under its jurisdiction;

(l) any island within the meaning of Article 121.1 of the 1982 Convention which emerges after the entry into force of this Treaty shall be the subject of consultations between the Parties with a view to determining its status;

(m) neither Party shall exercise its rights and jurisdiction in a manner which unduly inhibits the exercise of the rights and jurisdiction of the other Party; and

(n) the Parties shall cooperate with each other in relation to the exercise of their respective rights and jurisdiction."

4 Available at https://www.state.gov/wp-content/uploads/2020/02/LIS-141.pdf, p. 12.

5 Article 1 (1) (*i*) and Article 4 (1).

6 Article 1 (1) (*b*) and Article 4 (2).

7 Available at https://www.dfat.gov.au/geo/torres-strait/guidelines-for-traditional-visitors-travelling-under-the-torres-strait-treaty.

8 Article 1, paragraph 3, of the Agreement.

9 In the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Delimitation, the boundary line as determined results in two areas, so-called "special areas", in which one party's exclusive economic zone is superjacent to the continental shelf of the other party. Pursuant to Article 3, each party permits the other party to exercise "the sovereign rights and jurisdiction derived from exclusive economic zone jurisdiction" that the other party would otherwise be entitled to exercise under international law. To put it in more simple terms, they transfer their EEZ rights to each other without changing the maritime title of the respective areas. In the Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, the maritime boundary line also produces a "Special Area" which lies within 200 nautical miles of Norway and beyond 200 nautical miles of the Russian Federation. Article 3 of the Treaty provides that the Russian Federation shall be entitled to exercise EEZ rights and jurisdiction that Norway would otherwise be entitled to exercise under international law. It also provides, however, that the Russian Federation's exercise of such rights and jurisdiction "*derives from the agreement of the parties and does not constitute an extension of its exclusive economic zone*" (emphasis added). Legally speaking, therefore, the Russian Federation's extended continental shelf is subjacent to the exclusive economic zone of Norway.

10 These four States include China, the Republic of Korea, Nicaragua and Somalia.

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DECLARATION OF JUDGE BHANDARI

Notion of a "single continental shelf" — Statement by the Court concerning single continental shelf — Unnecessary to include statement.

1. I agree with the Court's Judgment and its reasoning. In particular, I agree with the Court's conclusion that "under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State" (Judgment, para. 79).

2. This conclusion follows, in my view, from the considerations relevant to the régime of the exclusive economic zone and the considerations relevant to the régime of the continental shelf, and the relationship between those respective régimes, as set out in the Court's Judgment.

3. When addressing the régime of the continental shelf, "[t]he Court notes that, in contemporary customary international law, there is a single continental shelf in the sense that the substantive rights of a coastal State over its continental shelf are generally the same within and beyond 200 nautical miles from its baselines" (*ibid.*, para. 75).

4. This notion can be traced to a statement in the 11 April 2006 award in *Barbados* v. *Trinidad and Tobago*. There, the arbitral tribunal, constituted in accordance with Annex VII of the United Nations Convention on the Law of the Sea, stated that "in any event there is in law only a single 'continental shelf' rather than an inner continental shelf and a separate extended or outer continental shelf" (*Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and the continental shelf between them (Barbados* v. *Trinidad and Tobago)*, United Nations, Reports of International Arbitral Awards (*RIAA*), Vol. XXVII, pp. 208-209, para. 213). The International Tribunal for the Law of the Sea (ITLOS) in its 2012 Judgment in the maritime boundary delimitation case between Bangladesh and Myanmar made a statement to the same effect, noting that "Article 76 of the Convention embodies the concept of a single continental shelf" (*Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 96, para. 361; see also *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 136, para. 490).

5. Including the statement in paragraph 75 quoted above — particularly with the words "generally the same" — in the present Judgment was not, in my view, necessary. On the contrary, the implications of the notion of a "single" continental shelf in this sense have been a source of disagreement and confusion in these proceedings (see e.g. CR 2022/25, p. 38, para. 54 (Lowe); CR 2022/26, p. 28, paras. 25-27 (Wood)). Moreover, it is not entirely clear, without further specification of potential differences, what it means to say that the substantive rights of a coastal State are "generally the same" within and beyond 200 nautical miles. The use of the word "generally" in this connection could potentially be read as diluting the notion of a "single continental shelf". Although seemingly innocuous, the word might thus even generate uncertainty for coastal States in future cases.

6. It would have been possible for paragraph 75 of the Judgment simply to begin with the sentence: "The basis for the entitlement to a continental shelf is different within or beyond 200 nautical miles." The bases of entitlement within and beyond 200 nautical miles are the relevant points the Court needed to address in this passage. Introducing this paragraph with a statement that repeats the concept of a "single" continental shelf, together with the use of the word "generally", as quoted above, risks perpetuating uncertainty about the practical consequences of this notion.

(Signed) Dalveer BHANDARI.

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DISSENTING OPINION OF JUDGE ROBINSON

GENERAL CONSIDERATIONS

1. Much of law is about reasonableness. The unreasonableness in the approach of the majority is revealed in their conclusion that "even if a State can demonstrate that it is entitled to an extended continental shelf, that entitlement may not extend within 200 nautical miles from the baselines of another State" (Judgment, para. 81). Thus, even if a State establishes that its outer continental shelf meets the criteria for natural prolongation, according to the majority it cannot benefit from the full extent of its shelf — that is, it cannot extend within 200 nautical miles of the baselines of another State[1]. Ordinarily, a coastal State would benefit from the full extent of such a shelf, subject, of course, to the application of Article 83 on maritime delimitation. The proposition in paragraph 81 is an extraordinary one, and it finds no support in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) or in customary international law; it strikes a jangling, discordant note in the otherwise harmonious relationship between the various maritime zones in the law of the sea. Regrettably, the majority judgment fails to substantiate its proposition, which assumes that a coastal State's 200-nautical-mile exclusive economic zone (EEZ) with its attendant distance-determined continental shelf has priority over another State's outer continental shelf based on natural prolongation. In that regard, it is to be noted that Article 77 of the Convention, which reflects customary international law, in setting out the rights of the State over the continental shelf, does not distinguish between a shelf that is based on natural prolongation and a shelf that is distance-determined. A coastal State enjoys the same sovereign rights in respect of its continental shelf, whether in relation to a natural prolongation-determined shelf or a distance-determined shelf. The relevant provisions of UNCLOS are set out in the Annex to this opinion. It is important to note that these provisions reflect customary international law; they are applicable in the current case because, unlike Nicaragua, Colombia is not a party to UNCLOS.

2. The Judgment does not establish that, under customary international law, there is a hierarchical relationship between continental shelf entitlements based on the criteria of natural prolongation and distance set out in Article 76 (1) of the Convention. The majority's negative response to the first question requires a demonstration that there is an intrinsic, inherent limitation on the extent of a State's continental shelf entitlement based on the criterion of natural prolongation. Under customary international law, there is no inherent limitation on the extent of a State's continental shelf beyond 200 nautical miles such that it cannot extend into a neighbouring coastal State's exclusive economic zone with its attendant continental shelf. In effect, the Judgment has denied a coastal State the full benefit of the natural prolongation criterion in Article 76 (1) of the Convention, which reflects customary international law. The position taken by the majority is all the more strange given that in the *Tunisia/Libya* case, the Court concluded that "[a]ccording to the first part of paragraph 1 the natural prolongation of the land territory is the main criterion" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 48, para. 47). It must be emphasized, however, that, in that case, the Court did not suggest that there was a hierarchy between the criterion of natural prolongation and the criterion of distance.

3. The Judgment fails to identify any quality or element in title to a distance-determined continental shelf that would make it prevail over title to a shelf based on natural prolongation.

4. In *Guinea/Guinea-Bissau*, the question of the relationship between the two criteria in Article 76 was considered. In that case, speaking of the distance criterion in Article 76 (1), the tribunal held that

> "[t]his second rule for determining the continental shelf by reference to distance, without derogating from the rule of natural prolongation, reduces its scope by substituting it in certain circumstances specified in the above-mentioned paragraph of Article 76 of the 1982 Convention, and through the other provisions of that Article". (*Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau), 1985,* United Nations, *RIAA*, Vol. XIX, p. 191, para. 115 (French) and *International Law Reports (ILR)*, Vol. 77, p. 686, para. 115 (English).)

What is significant here is that the tribunal emphasizes that the distance criterion does not derogate from the rule of natural prolongation, and then states that there are "therefore two rules between which there is neither priority nor precedence" (*ibid.*, para. 116). It is, of course, true that this decision did not address the precise circumstances of the present case. However, the statement of law that there is neither priority nor precedence between the two criteria is, in principle, beyond question.

5. Since, under Article 76 of UNCLOS, title to a continental shelf based on natural prolongation is co-equal with title to a continental shelf based on distance, a continental shelf based on natural prolongation that overlaps with a shelf based on distance is as amenable to delimitation as overlapping continental shelves based on natural prolongation or distance. Indeed, there is scholarly writing that Article 83 on the delimitation of the continental shelf "confirms that no distinction is made between the continental shelf within and beyond 200 nautical miles" (see Xuexia Liao, "Is There a Hierarchical Relationship between Natural prolongation and Distance in the Continental Shelf Delimitation?", *International Journal of Marine and Coastal Law*, 2018, Vol. 33 (1), pp. 79-115); certainly, there is nothing in Article 83 to indicate that it is not applicable to the delimitation of the maritime boundary between the continental shelf of a coastal State beyond 200 nautical miles from the relevant baselines and the continental shelf of another State within 200 nautical miles from the relevant baselines. Indeed, the Convention must be seen as proceeding on the basis of co-equality between title to a continental shelf based on natural prolongation and title based on distance. Since there is co-equality, one title cannot extinguish the other title because both titles have the same valency; consequently, there may be an overlap, in which case maritime delimitation under Article 83 comes into play. More generally, this is also true of the relationship between the maritime zone of one State and a similar maritime zone of another State. Thus, the exclusive economic zone of State A has the same valency as the exclusive economic zone of State B, to which it is adjacent or opposite. The law of the sea is so configured that a coastal State benefits from the full extent of its maritime zones — whether territorial sea, exclusive economic zone or continental shelf, to name a few — subject, of course, to maritime delimitation. The principle of co-equality of maritime zones is a necessary feature of the Convention, whose aim is to establish, "with due regard for the sovereignty of all States, a legal order for the seas and oceans" (UNCLOS, preamble). Co-equality of maritime zones, an assumption of the Convention, gives rise to overlapping entitlements which call for maritime delimitation. The approach of the majority is antithetical to maritime delimitation, a tool essential for the "legal order for the seas and oceans", because that approach sees title to the maritime zone of one State extinguishing title to a similar maritime zone of another State.

6. The Judgment in paragraph 58 cites Nicaragua's submission that the decision in the *Bay of Bengal* cases means that a grey area is created in which the two States "must co-operate" (*Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, pp. 64-68, paras. 225-240; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India), Award of 7 July 2014, RIAA*, Vol. XXXII, pp. 104-106, paras. 336-346). It is true that this result is untidy since one State has sovereign rights over the superjacent waters while another State has sovereign rights over the sea-bed. However the obligation to co-operate should not be undervalued. It should not be overlooked that Article 1, paragraph 3, of the Charter of the United Nations provides that one of the purposes of the United Nations is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character". Indeed, in 1945, one of the great hopes of the international community was that after the atrocities of the Second World War, the era of national sovereignty would be replaced by an era of international co-operation.

7. The Judgment refers to Colombia's submissions emphasizing that the EEZ was the result of a compromise reached at the Conference and which took into account proposals by developing Latin American and African countries. Colombia is correct in outlining the general features of the EEZ, which is neither territorial sea nor high sea, but in which the coastal State has exclusive sovereign rights over the living and non-living resources. The Judgment cites Colombia as contending "that an exclusive economic zone the water column of which is divorced from the sea-bed and subsoil is no longer an exclusive economic zone" (para. 64). However, by the same token, it could be said that a continental shelf that may not extend within 200 nautical miles of the baselines of another State, even though it

satisfies the scientific criteria for natural prolongation, is no longer a continental shelf. Moreover, although the concept of the EEZ emanated from developing States, it was not part of the bargain that they would surrender the benefits of an outer continental shelf based on natural prolongation; the bargain was that, in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles, a payment would be made to the International Seabed Authority (ISA) to be distributed to States parties to the Convention, taking into account the needs of developing States, on the basis of equitable sharing criteria (see UNCLOS, Article 82).

8. The majority advance two main arguments for the conclusion that "under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State" (Judgment, para. 79). The first main argument is that, under customary international law, there is a rule prohibiting a State's outer continental shelf from extending within 200 nautical miles from the baselines of another State.

THE FIRST MAIN ARGUMENT: THERE IS A RULE OF CUSTOMARY INTERNATIONAL LAW

9. In the 1969 *North Sea Continental Shelf* cases, the Court held that customary international law had two elements: extensive and virtually uniform practice, and *opinio juris*. The International Law Commission (ILC), the United Nations body charged with the responsibility of the codification and progressive development of international law, has concluded that these two elements must be separately determined (see the ILC's 2018 Draft conclusions on identification of customary international law, Conclusion 3, paragraph 2), no doubt to guard against the temptation of simply snatching *opinio juris* from practice. Paragraph 8 of the ILC's draft Commentary on its Conclusion 3 emphasizes that "the existence of one element may not be deduced merely from the existence of the other"; but, in the circumstances of this case, this is precisely what the Judgment does: it deduces *opinio juris* merely from the existing practice of 39 States.

10. In the *Lotus* case, the Permanent Court of International Justice (PCIJ) found that the practice of abstention was, by itself, not sufficient to constitute customary international law; it was necessary to provide separately evidence of *opinio juris*, that is evidence that the practice was prompted by a sense of legal obligation (see *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 28). In the words of the PCIJ, "for only if such abstention were based on [States] being conscious of having a duty to abstain would it be possible to speak of an international custom" (*ibid.*, p. 28). There can be no presumption that a State's abstention is motivated by a legal obligation. Even if there is such a presumption, it must be one that is rebuttable. In the circumstances of this case, any presumption of *opinio juris* is rebutted by the very clear possibility, as set out below, that the practice of self-constraint may be explained by considerations other than a sense of legal obligation.

11. Against this background, the opinion now proceeds to examine, first, the evidence relating to State practice and, secondly, the evidence relating to *opinio juris*.

12. Article 76, paragraph 7, requires the coastal State to delineate the outer limits of its continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Article 76, paragraph 8, requires the coastal State to submit to the Commission on the Limits of the Continental Shelf (CLCS or the Commission) information on the limits of its continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The evidence before the Court is that 55 submissions have been made to the CLCS in which coastal States could have, on geological or geomorphological grounds, extended their continental shelves within the 200-nautical-mile zones of other States; of that number, 51 submissions made by 39 States refrained from asserting limits that extended within 200 nautical miles of the baselines of another State.

13. It is acknowledged that there is a basis for the Court's conclusion that, "[t]aken as a whole, the practice of States may be considered sufficiently widespread and uniform for the purpose of the identification of customary

international law" (Judgment, para. 77). This is so because the evidence shows that of 43 States that could have claimed an outer continental shelf that extends within 200 nautical miles of the baselines of another State, 39 have chosen not to so extend their shelves. There is therefore practice that can be considered sufficiently widespread and uniform. However, the reasoning in the Judgment completely breaks down in relation to the element of *opinio juris*.

14. The Court found that the practice before the CLCS "is indicative of *opinio juris*, even if such practice may have been motivated in part by considerations other than a sense of legal obligation" (*ibid.*). This conclusion is unsafe, because the possibility that the practice was motivated by considerations other than a sense of legal obligation permeates and infects that practice in its entirety, thereby disabling it from constituting *opinio juris*. The Court has before it very little, if any, specific or direct evidence of *opinio juris*. This element will, as is most usually the case, be determined inferentially from all the relevant circumstances. In the absence of clear evidence to the contrary, it is simply impossible in this case to separate practice that is properly motivated by a sense of legal obligation from practice that is not so motivated. Nicaragua has submitted that the self-constraint of States "is motivated by considerations other than a sense of legal obligation, in particular a desire to avoid the possibility of their submission giving rise to a dispute with the result that the Commission would not consider it" (Judgment, para. 57). Indeed, Nicaragua points out that not even one CLCS submission "states directly or even indirectly that they refrain from encroaching into the EEZ of third States because the EEZ has priority over any claim of an extended continental shelf"[2]. It also points out that, in respect of the protests filed in relation to the CLCS submissions of the four States that claim an outer continental shelf within 200 nautical miles of the baselines of another State, "not a single one of the protests has alleged that there was a rule of customary international law that automatically gave priority to the EEZ or 200 [nautical miles] continental shelf of one [S]tate over the extended continental shelf of another, or extinguished such overlapping extended continental shelf claims"[3].

15. The CLCS procedure set out in paragraph 8 of Article 76 of the Convention has special significance for the coastal State. Under that paragraph, after the Commission has received the information submitted to it by the coastal State, it makes recommendations on matters related to the establishment of the outer limits of the continental shelf. In accordance with the last sentence of paragraph 8, the "limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding". Every coastal State would wish to be in a position to establish limits of the shelf that are final and binding. Every coastal State, therefore, has an incentive to ensure that it does not take any action that would prevent the Commission from making recommendations on the basis of the information that it has submitted to the Commission. One such action that would have that result is addressed by Article 5 *(a)* of Annex I of the Rules of Procedure of the CLCS, which reads: "In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute."

16. It is therefore likely that the reason for the States' self-constraint is the very real possibility that the claim to an outer continental shelf which extends within 200 nautical miles of the baselines of another State would lead to a protest, giving rise to a dispute, thereby preventing the Commission from qualifying or considering the coastal State's submission. We know that this has happened to the four States that have claimed such an extension. There were protests; in accordance with Article 5 *(a)* of Annex 1 of the Rules of Procedure of the CLCS, their submissions would not have been processed[4].

17. The possibility that the self-constraint is explicable by other than legal considerations is, therefore, very live in the circumstances of this case, and it is a possibility that affects every single claim made by the 39 States. It is not confined, as the Judgment claims, to a part of those claims because the entirety of the claims may have been motivated by considerations other than a sense of legal obligation. Moreover, it is notable that in describing Nicaragua's submission, in paragraph 57 of the Judgment, the Court uses the language "*in particular* a desire to avoid the possibility of their submission giving rise to a dispute with the result that the Commission would not consider it" (emphasis added). Thus, there might have been other examples of a situation in which the submission to the CLCS was motivated by considerations other than a sense of legal obligation. Notably, although the Judgment in

paragraph 57 makes reference to Nicaragua's submission, nowhere in its later analysis (see paragraphs 68-79) does it address that submission.

18. The Judgment places great reliance on the *Gulf of Maine* case to support its conclusion that

> "given its extent over a long period of time, this State practice may be seen as an expression of *opinio juris*, which is a constitutive element of customary international law. Indeed, this element may be demonstrated 'by induction based on the analysis of a sufficiently extensive and convincing practice' (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 299, para. 111)." (Judgment, para. 77.)

However, the Judgment does not quote the sentence from the *Gulf of Maine* Judgment in full. The last eight words have been omitted: "and not by deduction from preconceived ideas".

19. The context in which the dictum in *Gulf of Maine* was made is completely different from the present case. *Gulf of Maine w*as decided in 1984, a time when customary rules of the law of the sea were not as developed as they are now. In that case, the Court criticized the parties for adopting positions that reflected an *a priori* and preconceived approach rather than a "convincing demonstration of the existence of the rules that each had hoped to find established by international law" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 298, para. 109). There is nothing novel or startling in the Court's approach in the *Gulf of Maine* case; it is supported by common sense, as an empirical approach is generally to be preferred over one based on *a priori*, preconceived notions. One does not need to have recourse to the *Gulf of Maine* dictum as authority for the proposition that *opinio juris* may be derived from extensive and convincing State practice. The Court's Judgment is open to criticism because in the particular circumstances of this case there is no basis for deriving *opinio juris* from State practice relied upon.

20. If the *Gulf of Maine* dictum is to apply in this case, the State practice relied on will only be seen as an expression of *opinio juris* if it is "sufficiently extensive and convincing". The practice of 39 States, even if sufficiently extensive, will not establish the element of *opinio juris*, for the reason that it is not convincing. Practice which may be motivated by considerations other than a sense of legal obligation, as is the case here, can scarcely be described as convincing. Consequently, the *Gulf of Maine* dictum is not helpful to the majority.

THE SECOND MAIN ARGUMENT: ARTICLE 82 WILL LOSE ITS RAISON D'ÊTRE

21. The second main argument advanced by the majority for its approach is that Article 82 would lose its meaning, if not its raison d'être, if the entitlement of a State to an outer continental shelf were allowed to extend within 200 nautical miles of the baselines of another State (Judgment, para. 76). Article 82 was part of the compromise reached in the UNCLOS negotiations for a definition of the continental shelf that would incorporate continental shelves beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The wide-margin States insisted on such a definition. However, Article 82 reflects the price that was paid by those States for that concession. The title of Article 82 is: "Payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles". Paragraph 1 of Article 82 provides:

> "The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

There is nothing in either the title or in paragraph 1 that prohibits payments in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles when a coastal State's outer continental shelf extends within 200 nautical miles of another State. The only requirement of Article 82 is that the exploitation

must relate to non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. It is incorrect to assert, as the majority does in paragraph 76 of the Judgment, that the payment would not serve the purpose of this provision in a situation where the outer continental shelf of one State extended within 200 nautical miles from the baselines of another State. A plain reading of the title and paragraph 1 of Article 82 makes it clear that the payment is due whenever and *wherever* there is exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; in all such cases, the payments are "made through the Authority, which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them" (UNCLOS, Article 82 (4)).

22. The relationship that the majority finds between Article 82 and the principle of the common heritage of humankind is not shared by the International Seabed Authority in its Technical Study No. 4, which concluded that

> "although Article 82 payments and contributions are for the benefit of States Parties to the Convention, they are not an application of the common heritage principle. This is because the [outer continental shelf] and its resources are subject to the coastal State's sovereign rights and are separate from the common heritage principle." (International Seabed Authority, *Issues Associated with the Implementation of Article 82 of the United Nations Convention on the Law of the Sea*, *ISA Technical Study No. 4*, Kingston, Jamaica, p. 23.)

Thus, the purpose of Article 82, which is to ensure the equitable distribution of the payments to States parties to the Convention, taking into account the needs of developing States, is achievable in a situation where the outer continental shelf extends into the 200-nautical-mile EEZ and continental shelf of another State.

23. In light of the foregoing, the majority has failed to establish that, under customary international law, the outer continental shelf of a State may not extend within 200 nautical miles from the baselines of another State; consequently, the Court should have granted Nicaragua's request for maritime delimitation.

(Signed) Patrick L. ROBINSON.

ANNEX TO THE DISSENTING OPINION OF JUDGE ROBINSON

1. Article 56 of UNCLOS provides:

"1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(iv) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI."

2. Article 76 of UNCLOS provides:

"1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

(ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5. The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with paragraph 4 *(a)* (i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by co-ordinates of latitude and longitude.

8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

9. The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto.

10. The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts."

3. Article 77 of UNCLOS provides:

"1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the

harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil."

ENDNOTES

1 I agree with the point concerning nomenclature made by the arbitral tribunal in the case between Barbados and the Republic of Trinidad and Tobago. The tribunal observed that it is more correct to speak of an "outer continental shelf" than an "extended continental shelf" "since the continental shelf is not being extended". This opinion will therefore use the term "outer continental shelf" (*Arbitration between Barbados and the Republic of Trinidad and Tobago, Award of 11 April 2006*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVII, p. 165, para. 65, fn. 4.

2 See Written comments by Nicaragua on the reply of Colombia to a question put to it by a Member of the Court, p. 3, para. 15.

3 See Written comments by Nicaragua on the reply of Colombia to a question put to it by a Member of the Court, para. 22.

4 The website of the CLCS shows that there have been no recommendations made by the Commission in relation to those four submissions (by China, Somalia, Nicaragua and the Republic of Korea).

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SEPARATE OPINION OF JUDGE IWASAWA

There are important differences with regard to the legal basis for the entitlement to a continental shelf within and beyond 200 nautical miles — Only the distance criterion is relevant for the continental shelf within 200 nautical miles — The régime of the exclusive economic zone, in particular as provided for in Article 56 of UNCLOS, affords a strong basis for the conclusion that the outer continental shelf of a State may not extend within 200 nautical miles of another State — Opinio juris *may be inferred in certain circumstances from the general practice of States — In their submissions to the CLCS, States have refrained from extending an outer continental shelf within 200 nautical miles of the baselines of another State out of a sense of legal obligation —* Opinio juris *is to be sought with respect to both the States engaging in the relevant practice and those in a position to react to it — Nicaragua is not entitled to an outer continental shelf in the area to the east of the 200-nautical-mile line of the Colombian islands of San Andrés, Providencia and Santa Catalina.*

1. I voted in favour of the Court's decisions in the operative paragraph (paragraph 104 of the Judgment) and generally agree with the reasoning set out in the Judgment. The purpose of this opinion is to supplement the reasons underlying the Court's conclusions and to elaborate upon some issues which are not addressed at length in the Judgment.

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2. I agree with the Court that, "under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured may not extend within 200 nautical miles from the baselines of another State" (paragraph 79 of the Judgment).

3. The International Tribunal for the Law of the Sea (ITLOS) and arbitral tribunals have stated in maritime delimitation cases that there is in law a single continental shelf (see e.g. *Arbitration between Barbados and the Republic of Trinidad and Tobago, Award of 11 April 2006,* United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVII, pp. 208-209, para. 213; *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 96, para. 361). It is true that the rights and obligations of the coastal and other States in relation to the continental shelf are largely the same whether within or beyond 200 nautical miles.

4. However, as the Court acknowledges, there are important differences with regard to the legal basis for the entitlement to a continental shelf within and beyond 200 nautical miles (paragraph 75 of the Judgment). In 1969, the Court described the continental shelf by reference to a natural prolongation of the coastal State's land territory into and under the sea (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 22, para. 19). Since that time, however, natural prolongation has been replaced by distance as the criterion used to define the continental shelf within 200 nautical miles. While Article 76, paragraph 1, of UNCLOS refers both to natural prolongation and to the distance of 200 nautical miles, only the distance criterion is relevant for the continental shelf within 200 nautical miles; natural prolongation cannot form the legal basis for the entitlement to the continental shelf within 200 nautical miles. The scientific elements associated with the natural prolongation criterion are set out in the subsequent paragraphs of Article 76, which are relevant only for the continental shelf beyond 200 nautical miles.

5. The Court described this evolution as follows in *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (1985). Up to 200 nautical miles from the coast, "title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf". Thus, within 200 nautical miles, there was "no reason to ascribe any role to geological or geophysical factors", which were "completely immaterial" (*Judgment, I.C.J. Reports 1985*, p. 35, para. 39). Moreover, recalling that the Court had previously ascribed a role to geophysical

or geological factors in delimitation in the *North Sea Continental Shelf* (1969) and *Tunisia/Libyan Arab Jamahiriya* (1982) cases, it explained that this was because it found warrant for doing so in "a régime of the title itself which used to allot those factors a place which *now belongs to the past*, in so far as sea-bed areas less than 200 miles from the coast are concerned" (*ibid.*, p. 36, para. 40; emphasis added).

6. The Court reaffirmed in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (2012) that, in respect of overlapping entitlements within 200 nautical miles of the coasts of States, it had "repeatedly made clear that geological and geomorphological considerations are not relevant" (*Judgment, I.C.J. Reports 2012 (II)*, p. 703, para. 214).

*

7. Up to 200 nautical miles, the rights of the coastal State over the continental shelf derive not only from the régime of the continental shelf but also from the régime of the exclusive economic zone. As the Court acknowledges, the two legal régimes "are interrelated" (paragraph 70 of the Judgment). Referring to Article 56 of UNCLOS, the Court stresses that the régime of the *exclusive* economic zone "confers *exclusively* on the coastal State the *sovereign* rights of exploration, exploitation, conservation and management of natural resources [of the sea-bed and its subsoil] within 200 nautical miles of its coast" (paragraph 69; emphasis added). Thus, the régime of the exclusive economic zone affords a strong basis for the conclusion that the outer continental shelf of a State may not extend within 200 nautical miles of another State.

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8. With regard to the identification of customary international law, the Court has stated that it must be "looked for primarily in the actual practice and *opinio juris* of States" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 29, para. 27).

9. In the present case, the Court observes that "in practice, the vast majority of States parties to the Convention that have made submissions to the CLCS have chosen not to assert, therein, outer limits of their extended continental shelf within 200 nautical miles of the baselines of another State". It points out that only a small number of States have asserted in their submissions outer limits that extend within 200 nautical miles of the baselines of another State, and that "in those instances the States concerned have objected to those submissions". As regards the small number of coastal States that are not States parties to the Convention, the Court notes that it "is not aware of any that has claimed an extended continental shelf that extends within 200 nautical miles of the baselines of another State". The Court thus concludes that, "[t]aken as a whole, the practice of States may be considered sufficiently widespread and uniform", and that "this State practice may be seen as an expression of *opinio juris*" (paragraph 77 of the Judgment).

10. In describing the consistency of State practice, the Court employs the terms widespread and uniform. It has used these terms in previous cases (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 102, para. 205; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 703, para. 141; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 100, para. 296).

11. While the International Law Commission has concluded that "[e]ach of the two constituent elements [general practice and *opinio juris*] is to be separately ascertained"[1], it has accepted that the two elements "may be intertwined in fact" and that in certain circumstances "the same material may be used to ascertain practice and acceptance as law (*opinio juris*)"[2]. In the present case, both Colombia and Nicaragua have explicitly accepted that State practice may be evidence of *opinio juris*. Colombia stated that "it is important to note that practice may sometimes be evidence of acceptance as law (*opinio juris*)", and that "a general practice may, indeed, indicate a conviction as to what the law is, especially when the matter at issue is clearly governed by international law or where the conduct in question is against the interests of the acting State" (CR 2022/26, pp. 29-30, paras. 31-32 (Wood); CR 2022/28, p. 14,

paras. 13-14 (Wood)). Nicaragua embraced these statements by Colombia as a matter of legal principle, declaring that "[State] practice provides ample evidence" to support a belief, and that, "as Sir Michael forcefully asserted, 'it is important to note that practice may sometimes be evidence of acceptance as law (*opinio juris*)'" (CR 2022/27, p. 26, para. 14 (Pellet)). Indeed, *opinio juris* may be inferred in certain circumstances from the general practice of States. The Court accepts this as a matter of principle, stating that, in light of "its extent over a long period of time", State practice may be seen as an expression of *opinio juris* (paragraph 77 of the Judgment).

12. As concerns the practice of States before the CLCS, Nicaragua argues that the practice of refraining from asserting outer limits that extend within 200 nautical miles from the baselines of another State "is motivated by considerations other than a sense of legal obligation, in particular a desire to avoid the possibility of their submission giving rise to a dispute with the result that the CLCS would not consider it" (see paragraph 57 of the Judgment). This is mere speculation which is unsubstantiated. States usually do not curtail themselves when they believe that they have a right. If an issue is regulated by international law and States abstain from certain conduct in a way that is inconsistent with their own interests, it may be presumed that their abstention is motivated by a sense of legal obligation. Nicaragua did not submit any evidence capable of rebutting such a presumption.

13. In fact, this sense of legal obligation has been expressly indicated by some States that have refrained from extending an outer continental shelf within 200 nautical miles of the baselines of another State. For example, Ecuador stated in the executive summary of its submission to the CLCS that "[t]his action was taken with great caution in order to avoid any potential prejudice to the determination of the outer limits of any maritime spaces *under the national jurisdiction* of Perú at a distance of 200 nautical miles" (Ecuador, Submission, 1 March 2022, Executive summary, Section 6, p. 16; emphasis added). Similarly, Costa Rica and Ecuador stated in the executive summary of their joint submission to the CLCS that "[t]his action was taken with great caution in order to avoid any potential prejudice to the determination of the outer limits of any maritime spaces *under the national jurisdiction* of Colombia" (Costa Rica and Ecuador, Joint Submission in the Panama Basin, 16 December 2020, Executive summary, Section 6, p. 18; emphasis added). Furthermore, Indonesia stated in the executive summary of its submission to the CLCS that "[t]he outer limit has taken into consideration the following *constraint*[] namely: . . . [t]he projection of 200 M of the continental shelf of Christmas Island, Australia" (Indonesia, Submission in respect of the Area of South of Java and South of Nusa Tenggara, 11 August 2022, Executive summary, Section 7, p. 5; emphasis added). These examples illustrate that, in their submissions to the CLCS, States have refrained from extending an outer continental shelf within 200 nautical miles of the baselines of another State out of a sense of legal obligation.

14. In addition, the invariable protests of States affected by submissions made to the CLCS by other States seeking to extend an outer continental shelf within 200 nautical miles of the baselines of the former States are also good evidence of *opinio juris* that such an extension is not permissible under international law. Indeed, *opinio juris* "is to be sought with respect to both the States engaging in the relevant practice and those in a position to react to it"[3].

*

15. With regard to the request contained in Nicaragua's second submission, the Court recalls that the Parties agreed in 2012 that San Andrés, Providencia and Santa Catalina "are entitled to a territorial sea, exclusive economic zone and continental shelf" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 686, para. 168). In its 2012 Judgment, the Court then declared that, "[i]n principle, that entitlement is capable of extending up to 200 nautical miles in each direction" and, in particular, that it extends to the east "to an area which lies beyond a line 200 nautical miles from the Nicaraguan baselines" (*ibid.*, pp. 686 and 688, para. 168) (see paragraph 90 of the Judgment).

16. Importantly, the Court also stressed that "San Andrés, Providencia and Santa Catalina should not be cut off from their entitlement to an exclusive economic zone and continental shelf to their east, including in that area which is within 200 nautical miles of their coasts but beyond 200 nautical miles from the Nicaraguan baselines" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 716, para. 244).

*

17. With respect to the request contained in Nicaragua's third submission, the Court sets out two possibilities and points out that, "[i]n either case, as a consequence of the Court's conclusion in relation to the first question . . . , within 200 nautical miles from the baselines of Serranilla and Bajo Nuevo, there can be no area of overlapping entitlement to a continental shelf to be delimited in the present proceedings" (paragraph 99 of the Judgment). The Court therefore concludes that "it does not need to determine the scope of the entitlements of Serranilla and Bajo Nuevo in order to settle the dispute submitted by Nicaragua in its Application" (paragraph 100).

18. The second possibility set out by the Court is that "Serranilla or Bajo Nuevo are not entitled to exclusive economic zones or continental shelves" and thus "do not generate any maritime entitlements in the area in which Nicaragua claims an extended continental shelf". The Court concludes that, in such a case, there can be no area of overlapping entitlement to a continental shelf to be delimited (paragraph 99 of the Judgment).

19. In finalizing its analysis with this conclusion, the Court does not answer the question whether, in such a case, Nicaragua would be entitled to an outer continental shelf in the area to the east of the 200-nautical-mile line of the Colombian islands of San Andrés, Providencia and Santa Catalina. In this area, there is a small maritime space which is outside the 200-nautical-mile entitlements of the Colombian islands, the Colombian mainland, Jamaica, Panama and Haiti (see figure 6.1 of the Reply of Nicaragua).

20. Even though this space is outside the 200-nautical-mile entitlement of any State, Nicaragua cannot legally claim an outer continental shelf there. This conclusion derives from the interpretation of Article 76, paragraph 1, of UNCLOS. This space is entirely disconnected from Nicaragua's coast and from its continental shelf within 200 nautical miles by the continental shelves within 200 nautical miles of other States. The continental shelf in this space cannot be regarded as a natural prolongation of the submerged land territory of Nicaragua and thus cannot constitute an "extended" continental shelf of Nicaragua.

21. Accordingly, regardless of whether Serranilla and Bajo Nuevo are enclaved and granted a territorial sea of 12 nautical miles, Nicaragua has no entitlement in this space. Given the Court's answer to the first question, the request contained in Nicaragua's third submission no longer has any object. It is in this sense that it cannot be upheld (paragraph 102 of the Judgment).

22. In its judgment in *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean*, the Special Chamber of the International Tribunal for the Law of the Sea endorsed the interpretation of Article 76, paragraph 1, of UNCLOS set out above. In that case, Mauritius claimed an extended continental shelf formed by the natural prolongation of certain islands which extended to the foot of the continental slope. The Special Chamber declared that "a coastal State cannot validly claim an entitlement to a continental shelf beyond 200 [nautical miles] based on the natural prolongation through another State's uncontested continental shelf", and concluded that,

> "[a]s the . . . route presented by Mauritius passes within the continental shelf of the Maldives within 200 [nautical miles] that is uncontested by Mauritius, it cannot form a basis for Mauritius' natural prolongation to the critical foot of slope point and thus for its entitlement to the continental shelf beyond 200 [nautical miles]".

The Special Chamber based its conclusion on Article 76, paragraph 1, of UNCLOS and paragraph 2.2.3 of the Scientific and Technical Guidelines of the CLCS. It clearly stated that Mauritius' claim was "impermissible on legal grounds under article 76 of the Convention" (*Judgment, 28 April 2023*, paras. 442-444, 449).

(Signed) IWASAWA Yuji.

ENDNOTES

1 Report of the International Law Commission on the work of its seventieth session, *Yearbook of the International Law Commission (YILC)*, 2018, Vol. II, Part Two, p. 90, Conclusion 3, para. 2.

2 *Ibid.*, p. 96, paras. 6 and 8 of the commentary to Conclusion 3.

3 *YILC*, 2018, Vol. II, Part Two, pp. 102-103, para. 5 of the commentary to Conclusion 9. See also *ibid.*, p. 96, para. 7 of the commentary to Conclusion 3.

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SEPARATE OPINION OF JUDGE NOLTE

1. I wish to explain why I voted against the Court's rejection of Nicaragua's third submission (I) and to make a remark regarding the reasoning which underlies the Court's decisions on Nicaragua's first and second submissions (II).

I. Nicaragua's third submission

2. The Court interprets Nicaragua's third submission "as seeking a specific finding regarding the effect, if any, that the maritime entitlements of Serranilla [and] Bajo Nuevo . . . would have on any maritime delimitation between the Parties" (Judgment, para. 97). Reiterating that a State's extended continental shelf cannot overlap with the area of continental shelf within 200 nautical miles from the baselines of another State, the Court points out that there is "no area of overlapping entitlement . . . to be delimited", regardless of whether Serranilla and Bajo Nuevo are entitled to a maritime zone of 200 nautical miles (Judgment, para. 99). On that basis, the Court "considers that it does not need to determine the scope of the entitlements of Serranilla and Bajo Nuevo in order to settle the dispute submitted by Nicaragua in its Application" (Judgment, para. 100).

3. It is true that, regardless of whether Serranilla and Bajo Nuevo generate a maritime zone of 200 nautical miles, their entitlements cannot, pursuant to the Court's decisions on the first and the second submissions, overlap with any possible entitlement to an extended continental shelf generated by Nicaragua's mainland coast. However, "the dispute submitted by Nicaragua in its Application" is not limited to requesting a delimitation of overlapping entitlements.

4. In its Application, Nicaragua requested the Court "to adjudge and declare . . . [t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them"[1]. In its Memorial and its Reply, Nicaragua specified this request, asking the Court to declare that "Serranilla and Bajo Nuevo are enclaved and granted a territorial sea of twelve nautical miles"[2]. Thus, by requesting the Court to determine the "precise course of the maritime boundary", Nicaragua asks about the effect, if any, that the maritime entitlements of Serranilla and Bajo Nuevo would have on the course of the relevant part of the maritime boundary. However, the Court does not respond to this request and leaves the Parties in the dark about the "precise course" of the maritime boundary. Contrary to its statement in paragraph 100 of the Judgment, the Court does not "settle the dispute submitted by Nicaragua in its Application".

5. The pleadings of the Parties confirm that the delimitation of overlapping entitlements does not exhaust the subject-matter of the present dispute. Nicaragua specified that the dispute before the Court encompassed the question of the scope of the entitlements of Serranilla and Bajo Nuevo as far as this was necessary for determining "the precise course of the boundary"[3]. Colombia did not contest the Court's jurisdiction to decide on this matter, nor did it argue that Nicaragua's third submission was inadmissible. Rather, Colombia engaged with Nicaragua's arguments in substance and thereby confirmed that the question of the entitlements of Serranilla and Bajo Nuevo formed part of the dispute before the Court[4]. As the Court held in *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, "[t]he subject-matter of a dispute brought before the Court is delimited by the claims submitted to it by the parties"[5]. At no point did the Parties take the position that their dispute was restricted to the delimitation of overlapping entitlements. I do not doubt that the determination whether there are overlapping entitlements is "[a]n essential step" and "the first step in any maritime delimitation" (Judgment, para. 42). But I can see no reason — either procedural or substantive — why this should preclude the Court from adjudicating a dispute concerning the existence of an entitlement when it is necessary to do so to determine "the precise course" of a maritime boundary.

6. Nicaragua claims that it is entitled to an extended continental shelf in the area east of the maritime zones generated by Colombia's islands of San Andrés and Providencia and west of the maritime zones generated by Colombia's mainland coast[6]. This claim would be well founded if, first, Serranilla and Bajo Nuevo were merely

entitled to a territorial sea of 12 nautical miles; second, Nicaragua proved that a natural prolongation of its landmass exists in the area east of the 200-nautical-mile zones of San Andrés and Providencia; and, third, a State's entitlement to an extended continental shelf could pass through ("leapfrog over" or "tunnel under") another State's 200-nautical-mile entitlement. Had the Court upheld Nicaragua's claim, the part of the maritime boundary between the two States which is relevant for the third submission would start in the north where the limit of the 200-nautical-mile zone generated by the Colombian islands of San Andrés and Providencia meets the point where the rights of third States might be affected. From there, the boundary would follow the limit of the 200-nautical-mile zones of San Andrés and Providencia to the south, until it intersected the limit of the 200-nautical-mile zone generated by Colombia's mainland coast. It would then continue north-east along the 200-nautical-mile limit of Colombia's mainland coast until it again reached the point where the rights of third States might be affected.

7. Colombia, in turn, maintains that Serranilla and Bajo Nuevo are each entitled to an EEZ with its attendant continental shelf[7] and that any claim of Nicaragua to an extended continental shelf within that area is excluded[8]. Had the Court upheld Colombia's claim, the maritime boundary between the two Parties would start, in the north, where the limit of the 200-nautical-mile zone generated by Nicaragua's mainland coast meets the point where rights of third States might be affected, and would run south until it intersected the starting-point of the boundary established by the Court in its 2012 Judgment (see Judgment, p. 16, point A on sketch-map No. 2). It would then follow that boundary until the endpoint (*ibid*., Point B on sketch-map No. 2), from where it would continue south along the limit of the 200-nautical-mile zone generated by Nicaragua's mainland coast, to the point where the rights of third States might be affected.

8. Ascertaining whether the three conditions mentioned in paragraph 6 above have been fulfilled is thus a precondition for determining the precise course of the maritime boundary between Nicaragua and Colombia. This is true even if Nicaragua were only able to prove that the natural prolongation of its land territory covers just a part of the relevant area which it claims — assuming that Serranilla and Bajo Nuevo are enclaved and that a State's entitlement to an extended continental shelf may pass through another State's 200-nautical-mile entitlement. In that case, the maritime boundary would still follow the 200-nautical-mile limit of the zones generated by the coasts of San Andrés and Providencia.

9. For these reasons, I do not think that the Court should have rejected Nicaragua's third submission at this stage of the proceedings. The Court should rather have given the Parties the opportunity to present their case and to argue whether Serranilla and Bajo Nuevo generate a maritime zone of 200 nautical miles, whether Nicaragua can prove that the natural prolongation of its coast actually extends to the area around the territorial sea of Serranilla and Bajo Nuevo (a question which might have required the Court to seek the help of experts or assessors), and whether a State's entitlement to an extended continental shelf can pass through the 200-nautical-mile zone of another State.

10. In particular, the Court should have given the Parties the opportunity to present oral arguments on the latter question. In their written pleadings, the Parties took opposing views on the possibility of "tunnelling" under or "leapfrogging" over a 200-nautical-mile zone, here the 200-nautical-mile zones generated by San Andrés and Providencia[9]. The Court could then have clarified whether such "tunnelling" or "leapfrogging" is possible under customary international law. This question was touched upon briefly by an ITLOS Special Chamber in a judgment rendered after the hearings in the present case in December 2022[10]. However, the judgment of the ITLOS Special Chamber does not relieve this Court of its obligation to hear the Parties on the disputed questions.

11. Had the Court addressed Nicaragua's third submission in a further phase of the proceedings, it might have found itself again faced with the question whether it should declare one or more of the legal questions raised by this submission to be preliminary, to be dealt with in yet another separate phase of the proceedings[11].

12. In conclusion, I think that "[o]nce the Court has been regularly seised, the Court must exercise its powers"[12]. Indeed, the Court "must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent"[13]. Otherwise, the Court is adjudicating *infra petita*.

II. Nicaragua's first and second submissions

13. I doubt that UNCLOS can be interpreted as originally implying a rule according to which the extended continental shelf of one State may not extend within the 200-nautical-mile zone of another. I also doubt that such a rule was part of the original crystallization of the customary international law régimes governing the exclusive economic zone and the continental shelf. However, I have come to the conclusion that such a rule has subsequently emerged as a rule of customary international law. This is why I find paragraph 77 of the present Judgment to be particularly important. The fact that the Court, in its reasoning, has not described and evaluated the relevant practice and the accompanying attitudes of States in more detail does not mean that its Judgment rests on a mere assertion.

(Signed) Georg NOLTE.

ENDNOTES

1 AN, para. 12.

2 RN, submissions, para. 3; see also MN, submissions, para. 3.

3 MN, paras. 3.80, 4.39-4.43; RN, Chap. 4, pp. 101-157. See also CR 2022/27, p. 23, para. 3 (Pellet).

4 CMC, Chap. 4, pp. 174-288; RC, Chap. 4, pp. 104-147.

5 *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 117, para. 39.

6 See RN, p. 157, fig. 4.4.

7 RC, para. 4.18.

8 CR 2022/28, pp. 41-42, para. 23 (Valencia-Ospina).

9 See RN, para. 4.11; RC, para. 4.6.; see also CR 2022/25, p. 26, paras. 42-44 (Argüello Gómez); CR 2022/28, pp. 40-42, para. 23 (Valencia-Ospina).

10 *Delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, ITLOS, Judgment of 28 April 2023, paras. 444 and 449.

11 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Order of 4 October 2022* and joint declaration of Judges Tomka, Xue, Robinson, Nolte and Judge *ad hoc* Skotnikov.

12 *Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122.

13 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 23, para. 19.

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DISSENTING OPINION OF JUDGE CHARLESWORTH

Explanation of the negative vote — Distinction between maritime entitlements and maritime delimitation — Factors pertinent for the determination of maritime entitlements — The first question as a question of maritime entitlement.

Interpretation of customary international law — Methodological approach.

Extended continental shelf — Interpretation of UNCLOS.

Relationship between exclusive economic zone and continental shelf — The Court's Judgment in Continental Shelf (Libyan Arab Jamahiriya/Malta) — Bay of Bengal *cases.*

Relevance of the practice of States — Executive summaries of submissions to the Commission on the Limits of the Continental Shelf — Generality of practice — Opinio juris *— Evaluation of the practice — Legal conviction as to an equitable delimitation.*

I. INTRODUCTION

1. This opinion explains why I have voted against all subparagraphs of the operative clause of today's Judgment. The questions that the Court had set out to address in the present phase of the proceedings were cast in abstract terms, detached from the specific facts of the case before the Court (see paragraph 14 of the Judgment). This was the reason I supported the Order of 4 October 2022. In my view, however, the Court's reasoning allows considerations specific to this case to colour its discussion of abstract principles.

II. THE FIRST QUESTION

2. The first question was worded as follows:

> "Under customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State?" (*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Order of 4 October 2022*.)

A. Maritime entitlements and maritime delimitation

3. The first question concerns the determination of a maritime entitlement — specifically, a coastal State's maritime entitlement to a continental shelf beyond 200 nautical miles from its baselines ("extended continental shelf")[1]. This question is distinct from, albeit complementary to, the question of maritime delimitation[2]. The two questions are governed by different legal rules, and they can give rise to separate disputes[3].

4. As the Judgment affirms (Judgment, para. 42), the determination of maritime entitlements is the first step in any maritime delimitation. In that step, the question is whether, under international law, a coastal State may claim to exercise jurisdiction over a maritime area. Where, however, multiple coastal States may lay claim to exercise jurisdiction over the same maritime area, this jurisdiction may not be exercised concurrently by all coastal States, at least not without their consent. It is in such circumstances that maritime delimitation is employed to resolve situations of multiple entitlements over the same maritime area. The process of maritime delimitation determines the spatial ambit

of each coastal State's jurisdiction over part of that common maritime area[4], and thereby sanctions the exercise of coastal State jurisdiction as recognized by international law.

5. The object of any maritime delimitation is to achieve an equitable solution[5]. In a situation in which multiple coastal States have entitlements over the same area, therefore, the delimitation process will almost inevitably result in each coastal State sacrificing part of its maritime entitlement and exercising jurisdiction over a maritime area that is less than its full entitlement[6]. For example, where the coasts of two States are 100 nautical miles apart, either State is in theory entitled to a continental shelf that reaches the other State's shores. However, this does not mean that either State may exercise continental shelf jurisdiction on the basis of this entitlement to its full extent. It is left to the process of maritime delimitation to determine the areas over which each coastal State may exercise the jurisdiction to which it is entitled under international law.

6. Whether a coastal State is entitled under international law to exercise sovereign rights for the exploration and exploitation of the continental shelf's natural resources is a question of maritime entitlement. What parts of the continental shelf should be found to appertain to this coastal State where another coastal State is also entitled to sovereign rights over the same continental shelf is a question of maritime delimitation and its effects.

B. The determination of maritime entitlements in the Court's jurisprudence

7. The Court has a considerable jurisprudence on maritime entitlements. In *Anglo-Norwegian Fisheries*, the Court explained that "[i]t is the land which confers upon the coastal State a right to the waters off its coasts"[7]. This point was affirmed with respect to a State's entitlement to a continental shelf in *Black Sea*[8]. The International Tribunal for the Law of the Sea concurs, having held that "[a] coastal State's entitlement to the continental shelf exists by the sole fact that the basis of entitlement, namely, sovereignty over the land territory, is present"[9]. This is not necessarily to say that maritime entitlements are contingent on the presence or on the integrity of the land territory in perpetuity. The legal conception of maritime entitlements may well need to adapt to modern challenges[10]. It simply means that, under customary international law, entitlements at sea are derivative of the title to land.

8. As a result, when determining a coastal State's entitlement to maritime areas, the Court refers only to the question of whether the State has sovereignty over the relevant land territory, as well as to the characteristics of that land territory (because, for example, not all maritime features generate an entitlement to a continental shelf)[11]. No other factors have been found to inform the question of a coastal State's entitlement to a maritime area — certainly not factors pertaining to other coastal States' maritime entitlements in the vicinity. The logic of determining each State's maritime entitlements in isolation can also be seen in the constraints applicable to the establishment of the outer edge of the continental margin under Article 76 of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or the "Convention"), leaving aside the question of whether these constraints form part of customary international law. None of these constraints contemplates the presence of other States.

9. The maritime entitlements of other States will of course inform the question of delimitation. This point is illustrated in the Court's Judgment in *Territorial and Maritime Dispute* with respect to the relationship between a State's entitlement to a territorial sea and another State's entitlement to a continental shelf[12]. In that Judgment, the Court discussed "the *overlap* . . . between the territorial sea *entitlement* of Colombia derived from each island and the *entitlement* of Nicaragua to a continental shelf and exclusive economic zone"[13]. The Court's point of departure was that a State's entitlement to a continental shelf (in that case, Nicaragua's) may well extend into — and thus overlap with — another State's entitlement to a territorial sea (in that case, Colombia's). However, the Court clarified that, in such a situation, the former State's entitlement would not be given *effect*, namely, that the former State be allowed to exercise jurisdiction over a continental shelf that extends within the latter State's territorial sea[14].

10. By contrast, today's Judgment holds that, in a specific maritime area (the area within 200 nautical miles from a coastal State's baselines), a specific type of competing maritime entitlement (the entitlement to an extended continental shelf) is precluded (Judgment, para. 79). Other maritime entitlements in the same area — for example, a

third State's maritime entitlement to an exclusive economic zone, or a fourth State's entitlement to a territorial sea — are legally valid, and the ensuing overlap is to be resolved through maritime delimitation. The entitlement to an extended continental shelf, however, is not. On that basis, the Court does not proceed to maritime delimitation (Judgment, paras. 86 and 91).

C. Methodological approach

11. The Court's task in this case is essentially an interpretative one: it consists in identifying the contours of the entitlement to an extended continental shelf under customary international law. There is no doubt that UNCLOS reflects many aspects of the customary international law of the sea: some of its provisions codify pre-existing rules of customary international law, others crystallize then-emerging rules, and yet others have since given rise to a general practice accepted as law, generating new customary rules[15]. For that reason, I share the Court's view that recourse to the Convention can assist in the interpretation of the rules of customary international law that are reflected in it. At the same time, the methods of treaty interpretation are not fully transposable to the context of the interpretation of customary international law, and not all interpretative methods apply with equal force in the two processes[16]. The interpreter must keep in mind that custom is neither generated, nor modified, nor extinguished in the same manner as a treaty.

12. The majority bases its conclusion on two sets of considerations: first, considerations pertaining to the relationship between the régime of the exclusive economic zone and that of the continental shelf and, second, considerations pertaining to the régime of the extended continental shelf (Judgment, paras. 68 and 74; see also *ibid.*, para. 78). In the following sections, I will explain why, in my view, these factors do not support the Court's reasoning. I will start with the concept of the extended continental shelf (section D), before turning to its relationship with the exclusive economic zone (section E). I will then set out my misgivings about the Court's discussion of the practice of States (section F).

D. The concept of the extended continental shelf under customary international law

13. In my view, the conclusion of the Judgment is not supported by the terms of the definition of the continental shelf under customary international law, as reflected in Article 76, paragraph 1, of UNCLOS[17]. This provision establishes two methods to determine the limit of the entitlement to a continental shelf: the outer edge of the continental margin, or the distance of 200 nautical miles where that outer edge lies within that distance. The provision does not compel any coastal State to use one method over the other when determining the outer limits of its continental shelf. Customary international law stipulates that a coastal State's minimum entitlement to a continental shelf extends up to 200 nautical miles from its baselines[18], and it recognizes a broader continental shelf where the outer edge of the continental margin extends beyond that distance[19].

14. The rule reflected in Article 76, paragraph 1, of the Convention, being a rule of maritime entitlement, is not concerned with the maritime entitlements of other coastal States or with the method through which the outer limits of those entitlements are themselves determined. Therefore, this rule allows an overlap in the same maritime area when two coastal States have used different methods to determine the limits of their maritime entitlements. This is not undermined by the fact that only one of the two methods requires the application of "scientific and technical criteria" (Judgment, para. 75). These criteria are in practice, if not in theory, more difficult to apply than the criterion of distance. It does not follow, however, that the burden of meeting the scientific and technical criteria somehow tarnishes the maritime entitlement thus determined, compared to a maritime entitlement determined with reference to distance.

15. May treaty provisions that have not themselves been affirmed as reflecting custom serve as context for the interpretation of provisions that do reflect custom? The Judgment invokes Article 82, paragraph 1, of UNCLOS — a provision with a doubtful status under customary international law. In essence, the Court relies on the broad text of that provision, which does not indicate any exceptions or qualifications, to offer an interpretation that prevents its

application in situations in which a coastal State encroaches upon the 200-nautical-mile zone of another State. This, in turn, is used as context to interpret the definition of the continental shelf under Article 76, paragraph 1, of the Convention. I have some doubts about the Court's interpretation of Article 82. Whether the purpose of this provision can be served in the situation envisaged by the Court depends, in part, on the interpretation of the "equitable sharing criteria" that will guide the distribution of payments in such a situation, pursuant to Article 82, paragraph 4, of the Convention.

16. Moreover, I am reluctant to attach significance to the fact that the substantive and procedural conditions for determining the outer limits of the extended continental shelf — namely, those enshrined in Article 76, paragraphs 4 to 9 — were the result of a compromise (Judgment, para. 76). Leaving the definition of the continental shelf to one side, the Court has refrained from pronouncing on the status under customary international law of Article 76 of UNCLOS (see Judgment, paragraph 82)[20]. If the criteria for determining the outer limits of the extended continental shelf are reflective of custom, then the fact that they emerged out of a compromise seems inconsequential. If they are not reflective of custom, then the pertinence of the compromise seems even more limited.

17. The preparatory work of UNCLOS assumes importance in today's Judgment. As the Judgment acknowledges, however, the question now before the Court was not debated during the Third United Nations Conference on the Law of the Sea (Judgment, para. 76). On other occasions, in situations where the preparatory work evidences little or no discussion of a topic, the Court avoided drawing any inferences for the purposes of treaty interpretation[21]. In my view, the Court should proceed with even greater caution where customary international law is in question.

E. THE SIGNIFICANCE OF THE EXCLUSIVE ECONOMIC ZONE

18. The Judgment places weight on the fact that the institutions of the exclusive economic zone and the continental shelf are integrated (Judgment, para. 49) and that their legal régimes are interrelated (Judgment, para. 70). In this regard, two points are worth making.

19. First, while linked, the institutions of the exclusive economic zone and of the continental shelf remain legally distinct, and the continental shelf up to 200 nautical miles has not been absorbed by the exclusive economic zone[22]. The separate character of the two institutions is illustrated by the fact that, in the context of maritime delimitation, the Court maintains the distinction between the delimitation of the exclusive economic zone and the delimitation of the continental shelf even where it draws a single maritime boundary, despite the fact that the rights accruing in the continental shelf are, in the main, included among the exclusive economic zone rights[23]. A coastal State's entitlement to an exclusive economic zone is distinct from its entitlement to a continental shelf (even if the latter only extends up to 200 nautical miles), and indeed a State may enjoy sovereign rights over a continental shelf up to 200 nautical miles even where it has not proclaimed an exclusive economic zone, or where its exclusive economic zone is narrower than 200 nautical miles[24].

20. Second, the interrelated character of the exclusive economic zone and the continental shelf is potentially relevant where the two institutions attach to the same coastal State. This was the situation in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*. In that case, Libya had argued that the discontinuity in Malta's natural prolongation nullified *Malta's* own entitlement to a continental shelf on the basis of distance[25]. Libya's argument was effectively that Malta was not entitled to a continental shelf of up to 200 nautical miles unless it could prove that this shelf was the natural prolongation of its land territory. In emphasizing the importance of the criterion of distance, the Court rejected Libya's contention that Malta's continental shelf was terminated in the absence of natural prolongation in the geomorphological sense[26]. By contrast, the Court did not address the question of whether Malta's continental shelf entitlement could somehow counter *Libya's* continental shelf entitlement. That question, as discussed, is a question of delimitation.

21. The fact that a coastal State's entitlement to an exclusive economic zone does not nullify *a priori* another coastal State's entitlement to an extended continental shelf is also reflected in international jurisprudence on maritime delimitation beyond 200 nautical miles. This includes the two *Bay of Bengal* cases[27] and the case of *Maritime Delimitation in the Indian Ocean*[28]. In all three cases, at least one coastal State claimed an entitlement to an extended continental shelf lying within another State's 200-nautical-mile limit. In the cases, three different international courts and tribunals proceeded with the delimitation of the maritime area, and in fact held that the entitlement to an extended continental shelf should be given some effect through the creation of a "grey area"[29]. While the modalities may vary in each grey area, the upshot is that the coastal State entitled to an extended continental shelf and the coastal State with maritime entitlements up to 200 nautical miles both exercise a degree of jurisdiction in the same maritime area. Following the reasoning adopted by the Court in the present case, the coastal State's claim to an extended continental shelf should have been declared inadmissible in so far as it lay within 200 nautical miles from the other State's baselines, and no maritime delimitation would have been possible in that area (see Judgment, paras. 86 and 91). Yet the three courts and tribunals did not declare Bangladesh's or Kenya's claims inadmissible in so far as they lay within 200 nautical miles from Myanmar, India or Somalia. Nor did they readjust the delimitation line beyond 200 nautical miles from Bangladesh or Kenya, so that it respects the 200-nautical-mile limit from Myanmar, India or Somalia.

22. Today's Judgment notes that, in those cases, the grey areas were of limited size and arose as an incidental result, or as a consequence, of maritime delimitation (Judgment, paras. 71-72). This observation, however, overlooks the precedential value of the cases in the context of answering the question of determining maritime entitlements. For the purposes of the abstract question now before the Court, what matters is that the presence of grey areas at the conclusion of maritime delimitation presupposes, before that process, the existence of a maritime area where a State's entitlement to an extended continental shelf overlaps with another State's maritime entitlements up to 200 nautical miles from its coasts. If the latter maritime entitlements displaced the former, then maritime delimitation beyond 200 nautical miles in those cases would have been barred altogether, and no grey area would have been possible. The questions of whether grey areas — in the sense of areas of overlapping jurisdiction — should be recognized sparingly, whether they should cover a limited size, or whether they should be avoided altogether, would only come at play at the stage of delimitation.

23. The insistence that the jurisprudence of *Bay of Bengal* should be distinguished from the present case (Judgment, para. 72) illustrates, in my view, the Court's oscillation between abstract questions of law and the circumstances of the present case. The only difference between those cases and the case at hand that might be relevant for answering the abstract question before the Court concerns the coastal configuration of the States involved. As the Judgment notes, the previous cases involved States with adjacent coasts (Judgment, paras. 71-72). This, however, does not reduce their relevance to the present case. The distinction between opposite and adjacent coasts[30] is not always clear. Within the same case, the Court commonly finds that the coasts of the litigant parties shift from adjacent to opposite or vice versa[31] regardless of whether the coastal States share a land boundary or not, or that they fit in both categories[32], or indeed in neither[33]. But even if the criterion of adjacency could be applied in a sufficiently predictable manner, it is not clear how it could inform a coastal State's maritime entitlements, which are identified on the basis of the rule reflected in Article 76, paragraph 1, of UNCLOS.

F. THE PRACTICE OF STATES

24. The practice of States provides the strongest support for the Court's conclusion (Judgment, para. 77).

1. Identifying practice

25. There is extensive practice whereby coastal States refrain from claiming that they are entitled to an extended continental shelf that intrudes within 200 nautical miles from another coastal State's baselines[34]. This practice is drawn primarily from the executive summaries of submissions to the Commission on the Limits of the Continental Shelf (hereinafter "CLCS") of States party to UNCLOS under Article 76, paragraph 8, of the Convention.

26. This practice appears to be a general one. The generality of the practice is not necessarily to be ascertained with reference to the totality of States, but rather with reference to the States that are concerned with, or in a position to contribute to the formation of, the putative rule[35]. The relevant States in this context are those that, as a matter of geomorphology, are capable of sustaining a claim to an extended continental shelf intruding within 200 nautical miles from another State's baselines. Within that pool of coastal States, there appears to be a clear trend among States from several regions. In the International Law Commission's terminology, therefore, the practice is "sufficiently widespread and representative, as well as consistent"[36].

27. I am also prepared to accept that this practice is supported by legal conviction (*opinio juris*). Identifying the subjective element of custom might be arduous when the relevant practice consists of abstentions, as was the case in *Lotus*[37]. By contrast, in this case the Court is presented with an abundance of States expressly limiting their claims at the 200-nautical-mile mark from other States' baselines. Moreover, the field in question — maritime entitlements — is governed by customary international law, in the sense that customary international law clearly regulates States' behaviour in the field, even if the precise contours of that regulation may need to be ascertained. In the face of a clearly identifiable pattern of conduct on the part of States, it is reasonable to infer that States conform to a rule of customary international law. The Court in similar situations has accepted that the general practice was accompanied by *opinio juris*[38].

28. This practice cannot be dismissed simply because it emanates from States party to UNCLOS. It is true that the conduct of States that emerges from the executive summaries of their submissions to the CLCS could be attributed to an intention to comply with conventional obligations, rather than with customary law[39]. But there is nothing in these executive summaries nor in the relevant provisions of the Convention that would suggest that this conduct is peculiar to or triggered by the specific terms of those provisions. In fact, some States party to UNCLOS refrain from claiming an entitlement to areas within 200 nautical miles from the baselines of third States, non-parties of the Convention, which could only accrue benefits from customary international law rather than from the Convention[40].

2. Evaluating practice

29. More complicated is the determination of the content of the putative rule of customary international law to which the practice conforms. Here, and elsewhere, *opinio juris* manifests itself in a partial way. In the publicly available documents, most States simply place their claimed outer limit of their extended continental shelf at the 200-nautical-mile mark of another State, without revealing the reasons behind their choice[41]. Similarly, there is little information as to the legal grounds put forward by States objecting to claims by another State to an extended continental shelf that intrudes within 200 nautical miles from their baselines[42]. In view of the States' silence, it is the Court's task to articulate the legal rule to which the general practice conforms. Practice will inevitably be susceptible to multiple interpretations; in this case, there are several possible rules that would explain the practice. The Court should then identify a legal rule that accommodates the broadest variety of practice, that conforms to the established principles concerning the relevant legal field (here, maritime entitlements), and that is in harmony with international jurisprudence, including the jurisprudence of this Court.

30. On this analysis, it is difficult to conclude that States, in stopping at the 200-nautical-mile limit in their submissions to the CLCS, consider that their entitlement to an extended continental shelf is somehow limited by a neighbouring State's own maritime entitlement. Such a legal conviction would be in tension with the principles governing the establishment of maritime entitlements, including entitlements to an extended continental shelf, as well as with the international practice of maritime delimitations involving an extended continental shelf on the one hand and, on the other, a 200-nautical-mile maritime zone.

31. The most likely explanation for the abundant State practice is, in my view, a legal conviction that, under the applicable rules on maritime delimitation, an entitlement to an extended continental shelf in principle shall be given no effect in so far as it overlaps with another State's entitlement to a 200-nautical-mile zone. This can be understood as a manifestation of the goal to achieve "an equitable solution", which, as noted, is the paramount consideration in

any delimitation exercise[43]. The Court recently affirmed that "the achievement of an equitable solution requires that, so far as possible, the line of delimitation should allow the coasts of the Parties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way"[44].

32. The goal of ensuring an equitable solution has been translated into what the Court refers to as the "usual" three-stage methodology[45]. While not mandatory, this methodology is based on objective geographical criteria, and it has brought predictability and consistency in maritime delimitation[46].

33. The first step towards achieving an equitable solution under the three-stage methodology is to draw a provisional equidistance line. It is reported that an overwhelming majority of maritime delimitation agreements involving States with opposite coasts or with coasts of a hybrid character employs an equidistance line[47]. In *Territorial and Maritime Dispute*, the provisional equidistance line was defined as "a line each point on which is an equal distance from the nearest points on the two relevant coasts" of the parties[48]. When applied to States with opposite coasts lying further than 400 nautical miles apart, the provisional equidistance line ensures that each coastal State is granted a continental shelf of at least 200 nautical miles. It is not obvious why the provisional equidistance line should be drawn differently in a situation involving entitlements to an extended continental shelf[49], including those of States with opposite coasts. Even if the provisional equidistance line is drawn with reference to the outer limits of the coastal States' respective continental shelf entitlements[50], the fact that one of them is entitled to a 200-nautical-mile zone in the relevant area under delimitation may constitute a relevant circumstance warranting the adjustment of the provisional equidistance line at the 200-nautical-mile limit[51]. In either case, at the end of the maritime delimitation process, the area of the continental shelf up to 200 nautical miles of a coastal State will in principle be found to appertain to that coastal State, and not to another State that may be entitled to an extended continental shelf in the same area. While a State's entitlement to an extended continental shelf remains intact in the abstract, in practice it will likely be subordinated to the neighbouring State's entitlement to a 200-nautical-mile zone by virtue of the goal of achieving an equitable solution.

34. The executive summaries of States' submissions to the CLCS should be assessed against this legal background. It then becomes clear that coastal States refrain from claiming an extended continental shelf within 200 nautical miles from their neighbours' coasts because they hold the legal conviction that principles of maritime delimitation would eventually prevent them from exercising the sovereign rights over that maritime area. Of course, a State cannot unilaterally implement any delimitation through its submission to the CLCS[52], nor does the CLCS have any role in the delimitation process[53]. Nonetheless, a State understandably considers it futile — or indeed inequitable — to claim before the CLCS an area over which, under the governing principles of delimitation that will eventually apply, it will never exercise continental shelf rights. There is little incentive to enter into a costly and lengthy process of establishing one's entitlement in an area over which one is unlikely ever to exercise jurisdiction.

35. Of course, exceptional situations might call for the adoption of a different outcome. The relevant circumstances of a specific case might justify a delimitation line that does not merely reach the 200-nautical mile limit but exceeds it. One can imagine, for example, a situation where State A has a particularly narrow coastal front but is entitled to an extended continental shelf, whereas State B, lying opposite, has an exceptionally wide coastal front, over which it is entitled to a continental shelf only up to 200 nautical miles. In such a situation, it is conceivable that, in the course of a delimitation, the narrow continental shelf projection of State A's coastal front be allowed to intrude within State B's continental shelf entitlement. Exceptional circumstances might also justify the position taken by the few States the submissions of which to the CLCS stand in contrast with the rest.

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36. In sum, a coastal State's entitlement to an extended continental shelf is not curtailed because of another coastal State's entitlement to 200-nautical-mile zones in the same maritime area. Consequently, any overlap between the two entitlements must be resolved through the process of maritime delimitation. In that context, I am persuaded that a coastal State's entitlement to an extended continental shelf will in principle be sacrificed in

order to give effect to another coastal State's entitlement to 200-nautical-mile zones. This rule ought to be applied with regard to the specific facts of each case, including the case before the Court.

III. CONCLUSION

37. For the reasons set out above, I think that the Court is not in a position today to reject the submissions that Nicaragua made in its written pleadings. In my view, the Court should have responded to both questions formulated in the Order of 4 October 2022, and it should have proceeded to hold oral proceedings to decide the remaining issues dividing the Parties in this case. In voting against the rejection of Nicaragua's proposed delimitation lines, I do not necessarily endorse Nicaragua's position on the question of maritime delimitation. Rather, I express my reservations about the Court's rejection of Nicaragua's position on the question of maritime delimitation without the benefit of oral argument.

38. My reservations remain regardless of the Court's answer to the first question. As the term suggests, and as Article 60, paragraph 2, of the Rules indicates, a party's final submissions are its final word in a case. By contrast, each party is free to amend the submissions it presents in its written pleadings, provided that it remains within the confines of the dispute as presented in the application[54]. At the end of its oral argument in the present phase of the proceedings in this case, Nicaragua formally reserved its right to complete its final submissions[55].

39. The Judgment shifts its focus from the final submissions presented by Nicaragua at the oral proceedings to the submissions that it had presented in its written pleadings. Those written submissions were formulated at a time before the Court's decision to direct the Parties to specific questions, and they address issues extending beyond the Court's focus at the current stage of the proceedings. This fact in itself justifies allowing the Parties to revise their positions on these issues in light of today's Judgment.

(Signed) Hilary CHARLESWORTH.

ENDNOTES

1 I use the term "baselines" as a shorthand for "baselines from which the breadth of the territorial sea is measured", and I treat it as synonymous to "coast". I use the term "extended continental shelf" to denote the continental shelf extending to the outer edge of the continental margin, where that edge extends beyond 200 nautical miles from the coastal State's baselines.

2 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 30, para. 27.

3 *South China Sea Arbitration (Republic of the Philippines* v. *People's Republic of China), Jurisdiction and Admissibility, Award of 29 October 2015*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXXIII, p. 65, para. 156.

4 Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (2nd edn., Oxford: Hart 2019), p. 6; see also Prosper Weil, *The law of maritime delimitation — Reflections* (transl. Maureen MacGlashan, Cambridge: Grotius Publications 1989), p. 3.

5 *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 59, para. 48; see also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 59, para. 70; *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 67, para. 235.

6 *Delimitation of maritime areas between Canada and France, Decision of 10 June 1992*, *RIAA*, Vol. XXI, p. 289, para. 67; *ibid.*, dissenting opinion of Prosper Weil, p. 307, para. 17.

7 *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 133.

8 *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 89, para. 77: "The title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts." That Judgment also cites from *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*: "the land is the legal source of the power which a State may exercise over territorial extensions to seaward" (*Judgment, I.C.J. Reports 1969*, p. 51, para. 96). See also *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 36, para. 86: "continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State".

9 *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 107, para. 409.

10 See, for example, "Sea-level rise in relation to international law: Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law", UN doc. A/CN.4/761 (13 February 2023), para. 155; see also "Resolution 5/2018: Committee on International law and sea level rise", *International Law Association Reports of Conferences*, Vol. 78 (2018), p. 29.

11 Article 121, paragraph 3, of UNCLOS, which forms part of customary international law: *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 674, para. 139.

12 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 690, paras. 177-178.

13 *Ibid.*, p. 690, para. 177 (emphasis added).

14 *Ibid.*, pp. 690-691, paras. 178-180; see also *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 51, para. 169, which refers to a process of "giving more weight" to one coastal State's entitlement than the other's.

15 See, with respect to the Convention on the Continental Shelf, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 37, para. 60; see also "Conclusions on identification of customary international law, with commentaries", *Yearbook of the International Law Commission (YILC), 2018*, Vol. II, Part Two, p. 91 (Conclusion 11, para. 1).

16 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 95, para. 178.

17 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 666, para. 118.

18 See *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, para. 34: "natural prolongation . . . is in part defined by distance from the shore".

19 Furthermore, at least under UNCLOS, a maximal limit is established in relation to the outer edge of the continental margin; see Article 76, paragraphs 5 and 6, of UNCLOS.

20 See also *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 666, para. 118.

21 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 129-130, para. 147; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Judgment, I.C.J. Reports 2020*, p. 323, para. 70; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 22, para. 41.

22 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, paras. 33-34.

23 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 719, para. 251, subpara. 4; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 760-763, para. 321, subparas. 2-3.

24 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 33, para. 34.

25 *Ibid.*, p. 34, para. 36:

> "it is Libya's case that the natural prolongation, in the physical sense, of the land territory into and under the sea is still a primary basis of title to continental shelf. For Libya, as a first step each Party has to prove that the physical natural prolongation of its land territory extends into the area in which the delimitation is to be effected; if there exists a fundamental discontinuity between the shelf area adjacent to one Party and the shelf area adjacent to the other, then the boundary, it is contended, should lie along the general line of that fundamental discontinuity."

26 *Ibid.*, p. 35, para. 39:

> "It follows that, since the distance between the coasts of the Parties is less than 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as the 'rift zone' *cannot* constitute a fundamental discontinuity *terminating* the southward extension of the *Maltese* shelf and the northward extension of the Libyan as if it were some natural boundary." (Emphasis added.)

27 *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4; *The Bay of Bengal Maritime Boundary Arbitration (People's Republic of Bangladesh* v. *Republic of India), Award of 7 July 2014*, *RIAA*, Vol. XXXII, p. 1.

28 *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 206.

29 *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 120, para. 471; *The Bay of Bengal Maritime Boundary Arbitration (People's Republic of Bangladesh* v. *Republic of India), Award of 7 July 2014, RIAA*, Vol. XXXII, p. 147, para. 498; *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 277, para. 197.

30 International Hydrographic Organization, "Manual on technical aspects of the United Nations Convention on the Law of the Sea — 1982 (TALOS)" (6th edn., 2020), Appendix 1 (Glossary), para. 1: "Adjacent coasts: The coasts lying either side of a land boundary between two adjoining States". See also *ibid.*, para. 69: "Opposite coasts: The geographical relationship of the coasts of two States facing each other".

31 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 91, para. 170.

32 *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 93, para. 88.

33 *North Sea Continental Shelf (Federal Republic of Germany/ Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 28, para. 36.

34 For example, France, "Partial Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea in respect of the areas of French Guiana and New Caledonia: Part 1: Executive Summary" (May 2007), p. 3, https://www.un.org/depts/los/clcs_new/ submissions_files/fra07/ fra_executivesummary_2007.pdf (visited 30 June 2023): "The extension is limited to the west by the area under Australian jurisdiction (EEZ)"; Ghana, "Submission for the Establishment of the Outer Limits of the Continental Shelf of Ghana pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea: Executive Summary" (April 2009), p. 5, para. 6.2, https://www.un.org/depts/los/clcs_new/submissions_files/gha26_09/ gha_2009execsummary.pdf (visited 30 June 2023): "1 (Point OL-GHA-5) [marking the outer limit] is a point where the outer limit line joins to the 200 [nautical miles] from Nigeria's territorial sea baseline"; Federated States of Micronesia, Papua New Guinea and the Solomon Islands, "Joint submission to the Commission on the Limits of the Continental Shelf concerning the Ontong Java Plateau: Executive Summary" (May 2009), p. 11, para. 6.5, https://www.un.org/depts/ los/ clcs_new/submissions_files/fmpgsb32_09/exsumdocs/ fmpgsb2009executivesummary.pdf (visited 30 June 2023): "1 point (OJP-ECS-004) [marking the outer limit], where the 60 [nautical mile] formula line (Article 76, paragraph 4 (a) (ii) of the Convention) that defines the outer limit of the extended continental shelf intersects the line 200 [nautical miles] from the territorial sea baseline of Nauru"; Mozambique, "Submission to the Commission on the Limits of the Continental Shelf of the Outer Limits of the Extended Continental Shelf of the Republic of Mozambique under the Provisions of Article 76 of the United Nations Convention on the Law of the Sea, 1982: Executive Summary" (June 2010), p. 6, https://www.un.org/depts/los/clcs_new/submissions_-files/moz52_10/moz_2010_es.pdf (visited 30 June 2023): "Point MOZ-OL-92 [marking the outer limit] is located on the 200 [nautical mile] line measured from the territorial sea baseline of South Africa"; Kiribati, "Submission to the Commission on the Limits of the Continental Shelf: Executive Summary" (December 2012), p. 5, para. 6.3, https://www.un.org/depts/los/clcs_new/submissions_files/kir64_2012/kir_-es_doc.pdf (visited 30 June 2023): "The Western Platform Area (FP_001 to FP_081), defined by 78 fixed points on the Hedberg line, one fixed point on the 200 [nautical mile] line measured from the Kiribati Territorial Sea baseline and one fixed point on the 200 [nautical mile] line of another coastal State"; Canada, "Partial submission to the Commission on the Limits of the Continental Shelf regarding its continental shelf in the Atlantic Ocean: Executive Summary" (December 2013), pp. 6-7, https://www.un.org/depts/los/clcs_new/submissions_files/can70_13/es_can_en.pdf (visited 30 June 2023):

> "The outer limits of the continental shelf in the Labrador Sea region are defined by 47 fixed points (LS-ECS-001 through LS-ECS-047). These fixed points are either formula points established in accordance with article 76 (4) (a) (i) or (ii), points on the distance or depth constraint lines established in accordance with article 76(5), or a point on the intersection of the line delineating the outer edge of the continental margin and the 200 [nautical mile] limit of the Kingdom of Denmark."

35 "Conclusions on identification of customary international law, with commentaries", *YILC (2018)*, Vol. II, Part Two, pp. 100-101 (Commentary to Conclusion 8, paras. 3-4).

36 *Ibid.*, p. 91 (Conclusion 8, para. 1).

37 *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 28.

38 For example, *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 40.

39 See "Conclusions on identification of customary international law, with commentaries", *YILC (2018)*, Vol. II, Part Two, p. 102 (Commentary to Conclusion 9, para. 4).

40 For example, Costa Rica and Ecuador, "Joint Partial Submission of Data and Information on the Outer Limits of the Continental Shelf in Panama Basin pursuant to Part VI of and Annex II to the United Nations Convention on the Law of the Sea: Part I: Executive Summary" (December 2020), p. 18, para. 6, https://www.un.org/depts/los/clcs_new/ submissions_files/criecu_86_2020/PART-I%20(secured).pdf (visited 30 June 2023), with respect to Colombia; Ecuador, "A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf in the Southern Region of the Carnegie Ridge pursuant to Part VI of and Annex II to the United Nations Convention on the Law of the Sea: Part I: Executive Summary" (March 2022), p. 16, para. 6, https://www.un.org/depts/los/clcs_new/submissions_files/ ecu90_2022/ PartI.pdf (visited 30 June 2023), with respect to Peru.

41 For example, Cook Islands, "Revised Submission to the Commission on the Limits of the Continental Shelf concerning the Manihiki Plateau: Executive Summary" (December 2021), p. 6, para. 21, https://www.un.org/depts/los/ clcs_new/submissions_files/cok23_09/CKI_REV_ES_DOC.pdf (visited 30 June 2023): "5 are points [marking the outer limits of the extended continental shelf] located on the 200 [nautical mile] line of an opposite or adjacent coastal State"; Denmark, "Partial Submission to the Commission on the Limits of the Continental Shelf: The Continental Shelf North of the Faroe Islands: Executive Summary" (April 2009), p. 12, https://www.un.org/depts/los/clcs_new/submissions_files/ dnk28_09/dnk2009executivesummary.pdf (visited 30 June 2023): "To the west, north-west, and south-east, the outer limits of the continental shelf are delineated by the 200 nautical mile limits of Iceland, Jan Mayen and the mainland of Norway, respectively"; Sri Lanka, "Submission made in accordance with the Statement of Understanding adopted by the Third United Nations Conference on the Law of the Sea, on 29 August 1980, contained in Annex II to the Final Act of the Conference, and under paragraph 8 of article 76 of the United Nations Convention of the Law of the Sea and article 3 of Annex II of the Convention: Part I: Executive Summary" (May 2009), p. 9, para. 4.1, https://www.un.org/depts/los/clcs_new/submissions_files/lka43_09/

lka2009executivesummary.pdf (visited 30 June 2023): "Point B . . . [marking the outer limit of the extended continental shelf is] where the outer limits of the extended continental shelf joins the approximate position of another coastal State's 200 [nautical mile] line"; Bahamas, "Submission to the Commission on the Limits of the Continental Shelf: Executive Summary" (February 2014), p. 4, para. 6.3, https://www.un.org/depts/los/clcs_new/ submissions_files/bhs71_14/BHS-ES-DOC.pdf (visited 30 June 2023): "FP 1 [a point marking the outer limit of the extended continental shelf] marks the location of the intersection of the 350 [nautical mile] constraint line with the 200 [nautical mile] line measured from the territorial sea baselines of the United States of America"; Oman, "Submission to the Commission on the Limits of the Continental Shelf pursuant to article 76 (8) of the United Nations Convention on the Law of the Sea: Executive Summary" (October 2017), p. 6, para. 7.0.2, https://www.un.org/depts/los/clcs_new/ submissions_files/omn78_17/omn_es.pdf (visited 30 June 2023): "1 point [marking the outer limit of the extended continental shelf] on the line 200 nautical miles from the territorial sea baseline of India".

42 For example, Japan, Letter to the Secretary-General of the United Nations (28 December 2012), https://www.un.org/depts/los/clcs_new/submissions_files/chn63_12/jpn_re_chn_28_12_2012.pdf (visited 30 June 2023); Colombia, Costa Rica and Panama, Letter to the Secretary-General of the United Nations (5 February 2014), https://www.un.org/depts/los/clcs_new/submissions_files/nic66_13/col_cri_pan_re_nic_2014_02_05_e.pdf (visited 30 June 2023).

43 See para. 5 above.

44 *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 250, para. 124, citing *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 703, para. 215; see also *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 53, para. 101, subpara. (C) (1), *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 43, para. 37, and *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 127, para. 201.

45 *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 252, para. 131.

46 *Ibid.*, p. 251, para. 128.

47 Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (2nd edn., Oxford: Hart 2019), p. 191, with further references therein.

48 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 695, para. 191; see also Art. 6, para. 1, of the Convention on the Continental Shelf (concluded 29 April 1958; entered into force 10 June 1964), United Nations, *Treaty Series*, Vol. 499, p. 311.

49 See *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 117, para. 455; *The Bay of Bengal Maritime Boundary Arbitration (People's Republic of Bangladesh* v. *Republic of India), Award of 7 July 2014*, *RIAA*, p. 139, para. 464; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 142, para. 526; *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, pp. 276-277, para. 195.

50 As argued by Nicaragua: see Judgment, para. 29.

51 See *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, para. 33: "one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State."

52 See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 299, para. 112 (1).

53 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 137, para. 112.

54 For that final point, see *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69, citing *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173; see also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Judgment of 21 April 2022*, para. 44.

55 CR 2023/27, p. 39, para. 29 (Argüello Gómez).

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DISSENTING OPINION OF JUDGE *AD HOC* SKOTNIKOV

Procedural issues

1. The range of procedural deficiencies and abnormalities in and of itself calls into question the credibility of any substantive findings of the Court, whatever they might be.

2. The Court does not deal with the present case as envisioned in its Statute (see Article 38, paragraph 1; Article 43, paragraphs 1 and 5; and Article 54, paragraph 1) and its Rules (see Article 31; Article 49, paragraph 4; Article 58, paragraph 1; Article 60, paragraph 1; and Article 61).

3. Article 43, paragraph 1, of the Statute provides that "[t]he procedure shall consist of two parts: written and oral". In contrast, the oral proceedings in this case have been restricted to the discussion of two questions of pure law formulated by the Court.

4. Indeed, Article 61, paragraph 1, of the Rules indicates the approach that the Court ought to take where there are particular issues "it would like the parties specially to address" or when "it considers that there has been sufficient argument" on certain points. However, such possibilities stand in contrast to the present case, where the Court ordered the Parties to "exclusively" consider certain questions (Judgment, para. 14) without allowing for argument on any other points, including Nicaragua's second and third submissions.

5. Thus, the Parties were deprived of the opportunity to complete their respective presentations of the case, which is inconsistent with Article 54, paragraph 1, of the Statute. This is made even clearer in the French text, which provides for the presentation by agents, counsel, and advocates of "tous les moyens qu'ils jugent utiles".

6. The incompatibility between the absence of full oral proceedings and the Statute of the Court is further reflected in Article 43, paragraph 5, which requires the proceedings to include the hearing of experts, whom the Parties had engaged in this case but who were left unable to present their positions to the Court (see also Article 58, paragraph 1, of the Rules of Court).

7. Despite Article 60 of the Rules of Court, the Parties were not permitted to make oral statements to cover "what is requisite for the adequate presentation of that party's contentions". Indeed, the arguments did not cover all the issues that still divide the Parties. Instead, they were required to repeat arguments that had been prepared in written proceedings and in oral proceedings in an earlier case between them.

8. No final submissions relating to the substance of the case, which in accordance with Article 60, paragraph 2, of the Rules of Court ought to be presented at the end of the oral phase, were allowed. Yet, the Court rules on these issues in the operative clause (Judgment, para. 104), including the issue manifestly unrelated to the questions of pure law formulated by the Court (*ibid*., para. 104 (3)). The only oral submissions at the end of the hearings made by Nicaragua concerned these two questions and the "fix[ing of] a timetable to hear and decide upon all of the outstanding request in Nicaragua's pleadings". This latter submission was rejected by the Court.

9. The source of all the irregularities mentioned above is the Court's unprecedented Order of 4 October 2022, which was adopted in departure from Article 31 of the Rules of the Court without consultation of the Parties (see the joint declaration of Judges Tomka, Xue, Robinson, Nolte and Judge *ad hoc* Skotnikov).

Substantive issues

10. The position taken by the Court in its Judgment of 19 November 2012 in.the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* case (hereinafter the "2012 Judgment") and in the Judgment of 17 March 2016 on preliminary objections in the present case (hereinafter the "2016 Judgment"), when read together, leaves no doubt that the Court was ready to consider delimitation once Nicaragua had made full submissions to the Commission on the Limits to the Continental Shelf (hereinafter "CLCS"); all other issues raised by the Parties would have been dealt with in the course of the delimitation process.

11. In its 2016 Judgment, the Court clarified the content and scope of subparagraph 3 of the operative clause of the 2012 Judgment, taking into account the differing views expressed by the Parties on the subject:

> "It has found that delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast *was conditional on* the submission by Nicaragua of information on the limits of its continental shelf beyond 200 nautical miles, provided for in paragraph 8 of Article 76 of UNCLOS, to the CLCS. The Court thus did not settle the question of delimitation in 2012 because it was not, at that time, in a position to do so."[1]

That was the only condition set forth by the Court for proceeding to delimitation. Incidentally, such delimitation would not necessarily affect Colombia's 200-nautical-mile continental shelf entitlement (see paragraph 19 below).

12. In its Judgment of 25 July 1974 in.the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case, the Court made it clear that,

> "as an international judicial organ, [it] is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court."[2]

13. The Court's approach in the 2012 and 2016 Judgments was consistent with that dictum, which cannot be said of its Order of 4 October 2022 and the present Judgment.

14. The discussion of the questions of pure law formulated by the Court shows that there is nothing in the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), its *travaux préparatoires* or the circumstances surrounding its conclusion specifically dealing with the possibility or impossibility of delimitation between one State's extended continental shelf and the 200-nautical-mile continental shelf of another State. The Court's finding of a "suggest[ion] that the States participating in the negotiations assumed" a certain position concerning the extended continental shelf based on certain UNCLOS provisions (Judgment, para. 76) seems a tenuous basis for a legal determination, to say the least. The same is true about the characterization of UNCLOS as a "package deal" (*ibid*., para. 48). There is nothing in this "package" relating to the question to which the Court tries to find an answer. Accordingly, there is nothing therein that could support the Court's conclusion on this matter.

15. The Court seems to rely on the importance of the role of the CLCS in the protection of the common heritage of mankind (Judgment, para. 76). However, that is not the sole mission of the CLCS (see paragraph 11 above). Relatedly, payments and contributions in respect of the exploitation of the extended continental shelf are irrelevant in the present case. Curiously, the Court here focuses its reasoning on the provisions of UNCLOS, which are manifestly not part of the applicable law in the present case, i.e. customary international law.

16. To support its conclusion, the Court refers to the submissions to the CLCS of States parties to UNCLOS (Judgment, para. 77). However, States, in their CLCS submissions, do not consistently refrain from extending a claim within 200 nautical miles from the baselines of another State. Even when they do, this practice is generally unaccompanied by *opinio juris*, which cannot be simply inferred from practice. In contrast to what the Court suggests in the present case, "[t]he frequency . . . of the acts is not in itself enough" for the identification of *opinio juris* (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77; see also International Law Commission, Draft conclusions on identification of customary international law, UN doc A/73/10, p. 129 (Conclusion 3, comment 7)). The Court does not have "authority to ascribe to States legal views which they do not themselves advance" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 109, para. 207). Indeed, for those submissions which do refrain from extending within 200 nautical miles from the baselines of another State, there are other, more plausible motivations, perhaps most notably the desire to avoid a dispute, since a dispute would preclude the CLCS from making recommendations[3]. In any event, it must be recalled that these submissions are made by States parties to UNCLOS within the specific treaty régime.

17. The existing jurisprudence does not support the Court's conclusions either: in its 2021 Judgment in the *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)* case, the Court referred to a "possible grey area" (*Judgment, I.C.J. Reports 2021*, p. 277, para. 197), while ITLOS and an arbitral tribunal have both accepted the existence of such "grey areas" (*Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award of 7 July 2014*, United Nations, *Reports of International Arbitral Awards* (*RIAA*), Vol. XXXII, p. 147, para. 498; *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 119, para. 463). More recently, in *Mauritius/Maldives*, the ITLOS Special Chamber did not question the possibility of a grey area (*Delimitation of the Maritime Boundary in the Indian Ocean (Mauritius/Maldives), Judgment, 28 April 2023*, para. 275). The Court itself, ITLOS, and an UNCLOS Annex VII tribunal have thus all accepted the possibility of different jurisdictions dealing with the sea-bed and subsoil, on the one hand, and the water column, on the other. Moreover, another arbitral tribunal has held that there is neither priority nor hierarchy between the rule of distance and the rule of natural prolongation as regards an entitlement to a continental shelf (*Delimitation of the Maritime Boundary between Guinea and Guinea Bissau, Decision of 14 February 1985*, *RIAA*, Vol. XIX, p. 191, para. 116). Even more importantly, the present Judgment directly contradicts the 2012 and 2016 Judgments.

18. Hence, the Court's finding that a State's entitlement to a continental shelf throughout the natural prolongation of its land territory to the outer edge of the continental margin may not extend within 200 nautical miles from the baselines of another State is not in accordance with existing rules of international law. In its attempt to legislate instead of interpreting and applying the existing law, the Court has disregarded its function, as provided in Article 38, paragraph 1, of the Statute. Indeed, it has ignored the fundamental principle, according to which "the Court, as a court of law, cannot render judgment *sub specie legis ferendae*"[4].

19. The only legally sound conclusion that the Court should have drawn is that both UNCLOS and customary international law provide for an equitable solution as the guiding principle in maritime delimitations, which allows, *inter alia*, for consideration of delimitation of one State's extended continental shelf and the continental shelf of another State to a distance of 200 nautical miles from the baselines from which the breadth of its territorial sea is measured. The Court should have continued with the case in order to implement this principle.

(Signed) Leonid SKOTNIKOV.

ENDNOTES

1 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 132, para. 85 (emphasis added).

2 *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 9, para. 17.

3 Paragraph 5 *(a)* of Annex I of the Rules of Procedure of the Commission on the Limits of the Continental Shelf, 17 April 2008, UN doc. CLCS/40/Rev.1.

4 *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 192, para. 45.