DECLARATION OF JUDGE KEITH

1. As my votes indicate, I agree with the conclusions the Court reaches. With one exception, I also agree in general with the reasons the Court gives in support of those conclusions. The exception concerns the law to be applied to the delimitation of the maritime boundary and the application of that law to the facts of this case (Part V of the Judgment).

2. Like the Court, I proceed on the basis that Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea are declaratory of customary international law (Judgment, paras. 138-139). Paragraph 1 of each Article reads as follows:

> "The delimitation of the exclusive economic zone/continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

Since no agreement has been reached, it is for the Court to make the delimitation.

3. The two provisions are striking in their own terms: they do no more than state an aim, they state that aim in broad terms, and they state no criteria for delimitation beyond the general reference to international law. In all respects, they stand in sharp contrast to the only other provision in the Convention concerned with the delimitation of maritime areas between States — Article 15 relating to overlapping territorial seas. That provision states a rule: in the absence of agreement, a median line is to be drawn, except where historic title or other special circumstances requires a different delimitation.

4. The contrasts between those delimitation provisions are the more striking when the evolution of the treaty texts is considered. The two delimitation provisions included in the 1958 Conventions on the Territorial Sea and the Contiguous Zone and on the Continental Shelf provided, in respect of overlapping territorial seas or continental shelves, the same rule: in the absence of agreement, a median or equidistance line with a special circumstances exception (and for the territorial sea also an historical title exception), wording carried over into Article 15 of the 1982 Convention but certainly not into Articles 74 and 83. The International Law Commission, in its 1956 commentary on the draft of the continental shelf provision, which was adopted by the 1958 diplomatic conference without change, said that in that provision it had adopted the same principles as for its draft provisions on overlapping territorial seas. The case for departures from the median line, it said, "may arise fairly

often, so that the rule adopted is fairly elastic" (Annual Report of the ILC, *Yearbook of the International Law Commission*, 1956, Vol. II, p. 300, paragraph 1 of commentary to Article 72).

5. The need for that elasticity, or indeed something more drastic, appeared as early as 1969, in the first case requiring the Court to consider the law concerning the delimitation of the continental shelf — the *North Sea Continental Shelf* cases *(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3. There, too, one of the Parties had not accepted the relevant treaty, the 1958 Continental Shelf Convention, while the other two had, with the consequence that the case was to be decided under customary international law. The Court rejected the argument that the equidistance/median line rule with its qualification in the Convention was, or had become, declaratory of customary international law (see especially para. 101 (A) of the *dispositif, ibid.*, p. 53). Having recalled the history of the development of the 1958 text, it declared that it was clear that at no time was the notion of equidistance seen as an inherent necessity. Current legal thinking, it continued, was governed by two beliefs:

> "first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly, that it should be effected on equitable principles. It was in pursuance of the first of these beliefs that in the draft that emerged as Article 6 of the Geneva Convention, the Commission gave priority to delimitation by agreement, — and in pursuance of the second that it introduced the exception in favour of 'special circumstances'. Yet the record shows that, even with these mitigations, doubts persisted, particularly as to whether the equidistance principle would in all cases prove equitable." (*Ibid.*, p. 36, para. 55.)

Later in the Judgment the Court stated that there was no logical basis for requiring only one method of delimitation to be used; there was no objection, it asserted, to using various methods concurrently (*ibid.*, p. 49, para. 90; see also para. 101 (B) of the *dispositif*, p. 53). Finally, "it is necessary to seek not one method of delimitation but one goal" (*ibid.*, p. 50, para. 92).

6. I do, of course, appreciate that much has happened since that Judgment was delivered, about halfway through the 70 years since the first continental shelf delimitation treaty was concluded, in 1942, between the United Kingdom and Venezuela relating to the submarine areas of the Gulf of Paria (205 *LNTS* 121). The developments include extensive uni-

lateral State practice, relating as well to the exclusive economic zone, a concept which developed rapidly in the 1970s, many bilateral delimitation agreements, international court and tribunal decisions (more than 20 to date) and the major negotiations which led to the 1982 Convention and in particular to Articles 15, 74 and 83 as well as to Part V, Exclusive Economic Zone and Part VI, Continental Shelf. Those negotiations reflected and contributed to that practice and case law. I see the course of those negotiations as significant.

7. According to the Virginia Commentary on the Convention, the protracted negotiations on delimitation revealed the existence of two virtually irreconcilable approaches:

(i) delimitation should be effected by the application of the median line or equidistance line coupled with an exception for special circumstances; and
(ii) delimitation should involve a more emphatic assertion of equitable principles (M. Nordquist, S. Nandan, S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II, p. 954).

That Commentary provides a valuable account of the evolution between 1973 and 1982 of the contest between those two approaches (pp. 948-985)[1]. By the end of those negotiations the present text had emerged with wide support. It put the emphasis on the objective of the process and, so far as the resolution of disputes about delimitation was concerned, provided for negotiations on the basis of international law and the other methods of peaceful settlement set out in Part XV of the Convention. All the efforts to include in the text express requirements that the process of delimitation take into account specified matters such as equidistance as a rule or principle, relevant or special criteria or circumstances, the existence of islands in the area or equitable principles, failed. According to one of the principal negotiators of that final text, speaking at the end of the Conference,

> "[T]he main difficulty arose in connection with setting out the criteria particularly for delimitation in the economic zone or on the

[1] One other important aspect of the negotiations is that in the early stages all three issues of delimitation were included in proposals being considered by a single working group, dealing in exactly the same terms with each of them, but that from 1975 onwards territorial sea delimitation was dealt with separately in drafts based on Article 12 of the 1958 Territorial Sea Convention; see the Virginia Commentary, pp. 136-141.

> continental shelf. And, while there was broad agreement that these should be as determined by relevant international law, several efforts to express that law in a provision failed to command support across the two groups representing most of the directly interested delegations [and supporting one or the other position stated at the beginning of this paragraph]. Finally, this statement [stalemate] was broken by abandoning efforts to express the relevant law substantively and the vast majority of the interested delegations . . . endorsed the provision which now appears in the Convention.
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> This provides that delimitation shall be effected on the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice. We are satisfied that the relevant principles of international law thus referred to are as identified by the International Court of Justice in its decision on the *North Sea* cases in 1969 and as confirmed by subsequent judicial and arbitral decisions."[2]

8. I accept at once that the judicial clarification and development, over the decades, of the law and particularly of the methods to be applied have in significant measure enhanced the objectivity and predictability of the process of delimitation. That is particularly so of the "delimitation methodology" consisting of three stages as laid out most recently in the *Black Sea* case (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 101-103, paras. 115-122). A primary reason for recalling the history of the development of this area of law is to emphasize the role of legal principle. This is not simply a matter of rule or method; rather, the aim of an equitable solution must take centre stage, and the choice of method or methods must be governed by that aim. The Court did indeed recognize in the *Black Sea* case that different methods may be called for if compelling reasons exist, a matter also emphasized by the International Tribunal for the Law of the Sea in its recent Judgment (*Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS, pp. 72-75, paras. 227-235). I have already recalled that the Court in 1969 saw no objection to various methods being used concurrently (para. 5 above).

9. Against that background of the accepted law and its principled and practical development, I now consider the most unusual geographic facts

[2] 186th Plenary Meeting, 6 December 1982, A/CONF-62, Vol. XVII, p. 24, paras. 9-10. For a valuable account and reflection by a participant in the Conference see Philip Allott, "Power Sharing in the Law of the Sea" 77 *AJIL*, (1983), pp. 19-27.

of the present case. The ratio of the relevant coasts is about 8:1 in Nicaragua's favour (Judgment, para. 153). That proportion immediately demonstrates for me the difficulty, or really the impossibility, of beginning with a provisional median line even if it is adjusted or shifted by reference to relevant circumstances. The provisional median line in sketch-map No. 8 (p. 701), for instance, would accord nearly three-quarters of the total maritime area to Colombia or an overall disproportion in its favour of about 20:1. The adjustment or shifting required to address such a gross disproportion could not be achieved simply by a movement of the line in the western part of the shared maritime area. The Court indeed recognizes that by ending the adjusted provisional line north of Santa Catalina and south of Alburquerque Cays with the result that the line now extends only about one-half of the north-south length of the area, in addition to being adjusted by a factor of 3:1. The enclaving of Colombian islands to the north — another method of delimitation — also recognizes that the provisional median line, even when substantially adjusted, is not able by itself to achieve an equitable result (*ibid.*, para. 238; see also para. 197). More is needed to avoid a gross disproportion. The latitudinal lines to the east and the starting-point for the southern one (*ibid.*, para. 236) are similarly justified by the search for an equitable solution. They can find no possible justification in terms of any shifting of a provisional median line lying between the Colombian islands and the Nicaraguan coast. They result from the use of distinct methods to help achieve an equitable solution, particularly given the gross disproportionality which would otherwise result and the need to avoid a cut-off effect for Nicaragua.

10. While I agree essentially with the maritime boundary the Court has drawn, I consider that it can be arrived at more directly by an approach which uses a number of methods. That approach would involve those determining the boundary to focus, from the outset, on the aim of achieving an equitable result, by reference, in the particular circumstances of this case, to the relevant proportions, the need to avoid cut-off effects for each Party and the principle, often repeated in delimitation cases, that the "land dominates the sea" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 51, para. 96). From the north to the south, the Colombian islands extend over about one half of the length of the relevant area (see Judgment, sketch-map No. 7, p. 687). If the very small islands in the north, Quitasueño and Serrana are excluded for the moment, the latter also because of its isolation to the east, the distance from the north to the south of the remaining islands, Providencia, Santa Catalina, San Andrés and Alburquerque Cays, including their territorial seas, is a

little more than a third of the total north-south length of the relevant area. The first three of those islands are each entitled to a continental shelf and exclusive economic zone capable of extending 200 nautical miles in all directions. To the west they face the Nicaraguan coast and coastal islands about 100 nautical miles away. Bearing in mind that distance, the approximately 16:1 ratio between the facing coasts and the north-south extent of the Colombian islands just listed, along with the other matters mentioned at the beginning of this paragraph, I consider that the appropriate step in this western area would be to accord those major islands a maritime zone of 24 nautical miles from their west-facing baselines. The zones, extending at most about a quarter of the way to the Nicaraguan coast and islands, would overlap with one another and, at the south, would extend to the territorial sea of Alburquerque Cays. Given the characteristics of those cays, the relevant proportionalities and the need to avoid any cut-off effect for Nicaragua in this southern region to the areas to the east of the Colombian islands, I do not think that those cays should be accorded more than their territorial sea.

11. I return to the north and to Quitasueño and Serrana. Plainly, the former is entitled to no more than a territorial sea. I consider that that should also be the case for Serrana given its isolation, its small size, considerations of overall proportionality and the need to avoid a cut-off effect in that northern area for Nicaragua.

12. In the area to the east of the Colombian islands in which the entitlements of Colombia to maritime zones based on those islands and on its mainland further to the east overlap in significant part, I agree with the boundaries set by the Court, again for reasons of overall proportionality and avoidance of a cut-off effect for both Parties, with the aim of achieving an equitable result.

13. To repeat, the approach sketched above, employing a number of different methods to achieve an equitable result in this most unusual geographic context, would lead to essentially the same result as that reached by the Court. It would reach that result in a more direct way and would avoid the need to make major modifications in the application of the usual methodology.

(Signed) Kenneth KEITH.