SEPARATE OPINION OF JUDGE DONOGHUE

Agrees with decision not to uphold Nicaragua's claim to continental shelf beyond 200 nautical miles of its coast — Nicaragua did not adduce sufficient evidence to support the claim — Misgivings about suggestion that the Court will not delimit continental shelf beyond 200 nautical miles before outer limits are established under Article 76 — Delimitation and delineation are distinct exercises — Nicaragua's methodology requires delineation as a step in delimitation of the boundary — Delimitation of continental shelf beyond 200 nautical miles before outer limits are established may be appropriate in some cases — Restates view that Costa Rica and Honduras met criteria for Article 62 intervention as non-parties.

1. I have voted not to uphold the Republic of Nicaragua's claim to continental shelf in the area beyond 200 nautical miles of its coast. The Judgment states that "Nicaragua, in the present proceedings, has 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" (Judgment, para. 129). I agree with this conclusion because Nicaragua did not provide a sufficient factual basis to permit the Court to conclude that continental shelf exists beyond 200 nautical miles of Nicaragua's coast or to specify with the necessary precision the outer limits of any such shelf, which the Court would need to do in order to apply the delimitation methodology proposed by Nicaragua.

2. In this separate opinion, I first explain why I believe that Nicaragua's claim to continental shelf in the area beyond 200 nautical miles of its coast fails on the evidence. Next, I express my misgivings about the reasons given by the Court for its rejection of this Nicaraguan submission ("submission I (3)"), which suggest that the Court will not delimit continental shelf beyond 200 nautical miles of the coast of any State party to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS") before the outer limits of such continental shelf have been established by that State in accordance with Article 76 of UNCLOS. Delimitation of maritime boundaries and delineation of the outer limits of the continental shelf are distinct exercises. The methodology proposed by Nicaragua blurs this distinction, because it uses the delineation of the outer limits of the continental shelf as a step in delimitation of the boundary. Nonetheless, in other circumstances, it may be appropriate to delimit an area of continental shelf beyond 200 nautical miles of a State's coast before the

outer limits of the continental shelf have been established. It is better to leave open the door to such an outcome, so that the Court and the Commission on the Limits of the Continental Shelf (the "Commission") may proceed in parallel to contribute to the public order of the oceans and the peaceful resolution of maritime boundary disputes.

I also recall in this separate opinion that I dissented from the Court's decision not to permit Costa Rica and Honduras to intervene in this case and explain why I continue to believe that those States should have been permitted to intervene as non-parties.

I. The Factual Inadequacy of Nicaragua's Evidence relating to the Outer Limits of Its Continental Shelf Claim

3. It is well established that coastal States have an entitlement to continental shelf within 200 nautical miles of the baselines from which the territorial sea is measured (see *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, para. 34). This entitlement, which is sometimes referred to as the "distance criterion", is reflected in Article 76, paragraph 1, of UNCLOS. Article 76, paragraph 1, also provides that a coastal State has an entitlement to continental shelf in the area beyond 200 nautical miles of its baselines on the basis of the natural prolongation of its land territory to the outer edge of the continental margin (see also *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 22, para. 19). I agree with the Court that Article 76, paragraph 1, forms part of customary international law.

4. Unlike the existence of an entitlement to continental shelf based on the distance criterion, the existence of continental shelf beyond 200 nautical miles is a question of fact that turns on geology and geomorphology. It is therefore important to understand what facts Nicaragua asked the Court to find pursuant to submission I (3).

5. Nicaragua claims that an extensive area of continental shelf exists in the area beyond 200 nautical miles of its coast. The submission contained in its Reply asked the Court to delimit a boundary in the area beyond 200 nautical miles of Nicaragua's coast using specific co-ordinates. In submission I (3), however, Nicaragua framed its request more generally, asking the Court to declare that the appropriate form of delimitation is an equal division of the overlapping entitlements to continental shelf of both Parties.

6. In its final form, Nicaragua's submission regarding continental shelf beyond 200 nautical miles is less precise than the submission contained in

its Reply and appears to be amenable to at least two possible variations. In the first variation, the Court would effect a precise delimitation, using the methodology advanced in submission I (3). To do this, the Court would divide in half the area of the Parties' overlapping entitlements in the area beyond 200 nautical miles of Nicaragua's coast. In a second variation (suggested by Nicaragua's counsel during oral proceedings), the Court would not specify the location of a maritime boundary between the Parties in the area more than 200 nautical miles from Nicaragua's coast, but instead would instruct the Parties to divide the overlapping entitlements in that area into equal parts after Nicaragua has established the outer limits of its continental shelf in accordance with UNCLOS Article 76. I address these two variations in turn.

7. To effect the delimitation called for by the first variation of submission I (3), the Court would first have to determine the area of continental shelf beyond 200 nautical miles of Nicaragua's coast. This step would require the Court to find that continental shelf exists in the area beyond the 200-nautical-mile limit and to decide on the location of the outer limits of such continental shelf. The Court would also have to determine the co-ordinates of Colombia's entitlement (which Nicaragua would limit to the entitlement projecting 200 nautical miles from Colombia's mainland coast). After deciding on these facts, the Court would measure and determine the co-ordinates of the area of overlap and then would divide it equally between the Parties.

8. The Court has repeatedly made clear that it is the duty of a party asserting certain facts to establish the existence of those facts (*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 668, para. 72; *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68). Thus, to prevail with respect to the first variation of submission I (3), Nicaragua bears, at a minimum, the burden of establishing both the existence and the outer limits of any continental margin extending beyond 200 nautical miles of its coast.

9. To support its claim that continental shelf exists beyond 200 nautical miles, Nicaragua referred to the "Nicaraguan Rise", which it described as "a shallow area of continental crust extending from Nicaragua to Jamaica" that represents the natural prolongation of Nicaragua's mainland territory. As to the location of the outer limits of its continental shelf, Nicaragua provided the Court with a list of co-ordinates. According to Nicaragua, those co-ordinates were determined by using public domain datasets containing bathymetric data to locate the foot of the continental slope. Nicaragua asserts that it then located the outer limits of its continental shelf, in accordance with Article 76, paragraph 4, of UNCLOS, by drawing a line 60 nautical miles from five foot-of-slope points. To support its position, Nicaragua annexed technical information providing what it described as "[p]reliminary information indicative of the outer limits" of its continental shelf and referred the Court to the

"Preliminary Information" that it had filed with the Commission on the Limits of the Continental Shelf, set up under Annex II to the 1982 Convention. As Nicaragua explained, the purpose of filing Preliminary Information is to toll the deadline by which coastal States must make their submissions to the Commission; the Preliminary Information itself will not be considered by the Commission.

10. Given Nicaragua's responsibility to prove to the Court the existence and extent of any entitlement to continental shelf beyond 200 nautical miles of its coast, it was not incumbent on Colombia to offer a competing understanding of the geological and geomorphological facts or to propose an alternative set of geographic co-ordinates setting forth the outer limits of Nicaragua's continental shelf. And, indeed, Colombia did not do so. Instead, Colombia attacked the sufficiency of the evidence presented by Nicaragua as "woefully deficient". As Colombia's counsel stated, Nicaragua asked the Court to proceed to a delimitation "based on rudimentary and incomplete technical information" that would not satisfy the requirements of the Commission. Among other criticisms of Nicaragua's data, Colombia asserted that the foot-of-slope points used by Nicaragua did not comply with the Commission's guidelines because they were not supported by the requisite data, and therefore were unsubstantiated.

11. It is telling that, by Nicaragua's own admission, the information that it furnished to the Court, drawn from the information that it provided to the Commission in the form of Preliminary Information, does not include data and information that the Commission requires of the submissions that it reviews. In a technical annex that Nicaragua provided to the Court, Nicaragua acknowledged "issues with the data quality" that would be corrected as necessary in the final submission to the Commission. It also noted that the choice of foot-of-slope points presented in the technical document — the points from which Nicaragua derives the outer limits that it asks the Court to accept — "should be treated as indicative only".

12. Thus, this first variation of submission I (3) (like the submission in Nicaragua's Reply) would require the Court to reach factual conclusions about the outer limits of Nicaragua's continental shelf beyond 200 nautical miles of its coast on the basis of data that are "indicative" and that will be revised or more fully supported in a final submission to the Commission. Nicaragua failed to explain why the absence of certain supporting data required by the Commission, a body of technical experts, should not concern the Court. If the information falls short of what is needed to permit factual conclusions by expert scientists, surely it cannot be a sufficient basis for the Members of this Court to reach factual conclusions about the location of the outer limits of the continental shelf beyond 200 nautical miles of Nicaragua's coast.

13. It also is notable that Nicaragua proposed only to credit Colombia with a 200-nautical-mile entitlement projecting from its mainland coast. Without explanation, it excluded from consideration the continental shelf entitlements generated by the Colombian islands of San Andrés, Providencia, and Santa Catalina (which the Parties agreed generate continental shelf entitlements) in the area beyond 200 nautical miles of Nicaragua's coast.

14. Thus, to the extent that submission I (3) calls upon the Court to delimit a specific continental shelf boundary in the area beyond 200 nautical miles, I believe the Court was correct in not upholding the submission.

15. The second variation of submission I (3), suggested by Nicaragua's counsel in the oral proceedings, would call upon the Court not to effect a precise delimitation, but rather to specify that the boundary between the Parties is the median line between the outer limit of Colombia's 200-nautical-mile zone and the outer limits of Nicaragua's continental shelf fixed in accordance with UNCLOS Article 76. The Court was wise not to accept this invitation. The Court has not been presented with sufficient evidence in these proceedings to conclude that there is an area of continental shelf beyond 200 nautical miles of Nicaragua's coasts. Moreover, the suggestion by Nicaragua is, in essence, a request that the Court delimit any area of overlap solely on the basis of the first step of the Court's established three-step process — the construction of a provisional median line — without an appreciation of the size of the area to be delimited and without a factual basis to consider any circumstances calling for adjustment of the median line or disproportionality. As the Court stated in its most recent maritime delimitation case "[t]he object of delimitation is to achieve a delimitation that is equitable, not an equal apportionment of maritime areas" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 100, para. 111). The Court therefore could not have upheld Nicaragua's submission I (3) without simply assuming that an equal division of the Parties' overlapping entitlements would be equitable. Such an assumption would be on shaky ground so long as the extent of any Nicaraguan entitlement to continental shelf beyond 200 nautical miles of its coast remains unsupported by sufficient evidence.

16. Under either of these two variations, the Court lacks a sufficient factual basis to embrace Nicaragua's proposed methodology. Thus, Nicaragua's submission I (3) could not be upheld.

II. Misgivings about the Court's Rationale for Deciding not to Uphold Nicaragua's Submission relating to Continental Shelf beyond 200 Nautical Miles

17. The Judgment states the Court's conclusion that Nicaragua has not established in these proceedings that it has a continental margin that extends far enough to overlap with the 200-nautical-mile entitlement extending from Colombia's mainland coast, but the Court does not lay out the factual inadequacies summarized above. I regret that it did not do so, because those inadequacies provide a clear and case-specific rationale for the Court's rejection of Nicaragua's submission I (3).

18. The Judgment alludes to legal and institutional reasons for rejecting Nicaragua's submission I (3). As discussed below, I agree with the Court that those considerations counsel against delimitation in the area beyond 200 nautical miles of Nicaragua's coast, because the delimitation methodology proposed by Nicaragua would require delineation of the outer limits as the first step in the delimitation. To the extent that the Judgment suggests a more general bar on the delimitation of entitlements to continental shelf in areas beyond 200 nautical miles of coastal baselines, however, I respectfully disagree.

19. Delimitation of a maritime boundary is an exercise that is distinct from the delineation of the outer limits of continental shelf. UNCLOS makes clear that the Commission's role in making recommendations to coastal States regarding the establishment of the outer limits of the continental shelf is "without prejudice" to the delimitation of continental shelf (Art. 76, para. 10). The International Tribunal for the Law of the Sea affirmed this distinction in *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS, p. 120, para. 410), stating that:

> "[T]he fact that the outer limits of the continental shelf beyond 200 nautical miles have not been established does not imply that the Tribunal must refrain from determining the existence of entitlement to the continental shelf and delimiting the continental shelf between the parties concerned."

20. The Judgment recalls the Tribunal's conclusion that scientific evidence was not in dispute in that case and emphasizes that the case before the Tribunal differed from the present case because Bangladesh and Myanmar were both UNCLOS States parties and both had made submissions to the Commission (although the Commission had made no recom-

mendations). The Tribunal also noted that the area to be delimited was far from the outer edge of the continental margin, such that delimitation by the Tribunal could not prejudice the interests of third States in the sea bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (Judgment of 14 March 2012, p. 115, para. 368).

21. Under these circumstances, the Tribunal rejected the contention that it should not delimit in the area beyond 200 nautical miles of the parties' coasts. While the Tribunal cautioned that it would have been hesitant to proceed with delimitation had there been uncertainty about the existence of continental margin in the area in question (*ibid.*, pp. 135-136, para. 443), it made clear that "the absence of established outer limits of a maritime zone does not preclude delimitation of that zone" (*ibid.*, p. 115, para. 370).

22. The distinction between delimitation of a maritime boundary and delineation of the outer limits of the continental shelf is also evident in the practice of some States (including UNCLOS States parties) that have entered into agreements delimiting continental shelf in an area more than 200 nautical miles from their coasts before the outer limits have been established (see David A. Colson, "The Delimitation of the Outer Continental Shelf between Neighboring States", 97 *American Journal of International Law* (2003), p. 91). If the geography permits, it is possible for two States to delimit overlapping entitlements to continental shelf in an area more than 200 nautical miles from their coasts without specifying the outer limits of their respective continental shelf entitlements, through techniques such as the use of a directional arrow that extends the agreed line of delimitation to the outer limits of the continental shelf, without specifying the precise location of those limits. Such a delimitation would not prejudice the interests of third States in the area beyond national jurisdiction.

23. As noted above, Nicaragua's proposed delimitation methodology blurs the usual distinction between delimitation of a maritime boundary and delineation of the outer limits of the continental shelf, because it requires delineation as an initial step in delimitation. If the Court did so before Nicaragua had established the outer limits of its continental shelf based on the Commission's recommendations (pursuant to the first variation discussed above), a variety of institutional and legal difficulties could emerge in the future. For example, the Court's conclusions regarding the location of the outer limits, in a judgment that is binding on the parties, might differ from recommendations that later emerge from the Commission. This possibility is a consequence of the particular delimitation methodology requested by Nicaragua and it militates in favour of the Court's decision not to uphold Nicaragua's submission I (3).

24. Today's Judgment does not call attention to the particular complications caused by Nicaragua's proposed methodology. Instead, the Court relies on a statement that it made in the Judgment rendered in 2007 in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*. In that case, the Court stated that the maritime boundary between the two States (both of which are States parties to UNCLOS) should not be interpreted as extending more than 200 nautical miles from the baselines because "any claim of continental shelf rights beyond 200 [nautical] miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf" (*ibid.*, p. 759, para. 319).

25. I have been puzzled by the quoted statement from the Court's 2007 Judgment. I regret that the Court reaffirms that statement today without acknowledging that delimitation is not precluded in every case in which an UNCLOS State party seeks delimitation of continental shelf beyond 200 nautical miles before having established the outer limits of such continental shelf. Each such case must be considered in light of the particular facts and circumstances. The general abstention from delimitation that the Court suggested in 2007 would go too far. The *Bangladesh/Myanmar* case illustrates that where the existence of continental shelf in the relevant area is not in dispute and the methodology and geography do not require a court or tribunal to make any factual finding regarding the outer limits of the continental shelf, the "distinct" exercises of delimitation and delineation of the outer limits of the continental shelf may proceed in parallel, regardless of whether a State has established the outer limits of its continental shelf. That is quite a different situation from the one the Court faces in the present case, in which the proposed delimitation methodology would require the Court to reach conclusions about the same question of fact that the technical experts comprising the Commission would also address after receiving a complete submission from Nicaragua.

26. I am also troubled that the Court today extends the reasoning of the 2007 *Nicaragua* v. *Honduras* Judgment to the present case, despite the fact that Colombia is not an UNCLOS State party and customary international law thus governs. The Court today appears to suggest that it will not entertain a proposed delimitation of continental shelf beyond 200 nautical miles of the coast of a State party to UNCLOS unless the procedures contemplated in UNCLOS Article 76 have been completed, even if the second State involved in the delimitation is not an UNCLOS State party. The stated rationale is that Nicaragua has obligations to other UNCLOS States parties. Nicaragua has obligations to its treaty partners, of course, but the Court offers scant explanation for its conclusion that those obligations preclude delimitation in this case.

27. The Commission's expectation that decades will elapse before it will complete the work resulting from the submissions that it has received to date makes it especially unfortunate that the Court has extended its statement from the 2007 *Nicaragua* v. *Honduras* Judgment to apply not only to a proposed delimitation between two States parties to UNCLOS, but also to a proposed delimitation as between one UNCLOS State party and one State that is not a party to UNCLOS.

28. The Court does not address the situation of two States, neither of which is a party to UNCLOS, which seek to delimit their respective entitlements to continental shelf in an area beyond 200 nautical miles of their coasts. It goes without saying that such States have no duty to make submissions to the Commission, so the Court's observations regarding Nicaragua's obligations to States parties to UNCLOS cannot be extended to them.

29. I do not mean to suggest here that the Court should be indifferent to interests other than those of the two Parties to a proposed delimitation. In the Western Caribbean, for example, the crowded geography means that a delimitation methodology that is based on the location of the outer limits of the continental shelf has potential implications for third States with 200-nautical-mile entitlements that are opposable to a claim to continental shelf beyond 200 nautical miles. The Court must take account of such interests of non-party States regardless of whether a State asserting an entitlement to continental shelf beyond 200 nautical miles of its coast is an UNCLOS State party.

30. The relationship between the Commission's role under Article 76 of UNCLOS and that of an international court or tribunal asked to delimit continental shelf beyond 200 nautical miles of a State's coast is not a tidy one. The Commission has decided that it will not consider submissions that relate to areas in which the boundary is in dispute unless it has the consent of the affected States. If the Court's 2007 pronouncement is understood to apply broadly, this Court can be expected to shy away from the delimitation of boundaries in respect of continental shelf that is beyond the 200-nautical-mile limit whenever the outer limits of the continental shelf claimed by an UNCLOS State party have not been established on the basis of Commission recommendations. This would leave some UNCLOS States parties in an unsatisfactory situation. If an area is not delimited and therefore remains the subject of a dispute, the Commission will not make recommendations about the outer limits (absent the consent of all involved States). And if the outer limits have not been established on the basis of Commission recommendations, the Court's 2007 statement suggests that it will not proceed with a delimitation. In effect, each institution holds the door open and waits for the other to walk through it. This outcome should be avoided where possible, as it constricts the ways in which this Court and the Commission can contribute to the public order of the oceans and the peaceful resolution of maritime boundary disputes.

III. A Postscript regarding the Failed Efforts by Costa Rica and Honduras to Intervene in This Case

31. I have voted for each of the dispositive paragraphs of the Judgment and concur largely with the Court's reasoning, except for the discussion of the delimitation of the continental shelf in the area beyond 200 nautical miles of Nicaragua's coast. Thus, I agree that Colombia, not Nicaragua, has sovereignty over the features in dispute and I concur both with the delimitation effected by the Court and with the rejection of Nicaragua's submission II in dispositive paragraph (6).

32. As the Court notes, pursuant to Article 59 of the Statute of the Court, its Judgment binds only the Parties. In addition, the Judgment indicates that the Court has taken account of the interests of neighbouring third States. No other third-State interests were presented to the Court.

33. The interests of the Republic of Costa Rica and the Republic of Honduras deserve additional comment, because those States filed Applications to intervene in this case on the basis of Article 62 of the Statute of the Court. The Court rejected those Applications. I disagreed with the decision to reject the Applications of Costa Rica and Honduras to intervene as non-parties and set forth my reasons in two dissenting opinions.

34. The Judgment takes account of the interests of these two States, but this does not change my view that both Costa Rica and Honduras met the criteria for intervention under Article 62.

35. I illustrate this point with one example. As I described in my dissenting opinion to the Court's Judgment rejecting the Application of Honduras *(Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II))*, the Court's Judgment on the merits of this case had the potential to affect at least one interest of a legal nature pertaining to Honduras. That interest stemmed directly from the case referred to above — the Court's 2007 Judgment in the case between Nicaragua and Honduras *(Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II))*. In that decision, the Court delimited the maritime boundary between Nicaragua and Honduras by deciding that from a final turning point, the line should continue along a particular azimuth "until it reaches the area where the rights of third States may be affected" (*ibid.*, p. 763, para. 321 (3)). As I explained in my dissent, if the maritime boundary drawn by the Court in the present case were to intersect with the Nicaragua/Honduras boundary, the point of intersection would be a *de facto* endpoint to the 2007 line defining the Nicaragua/Honduras boundary (see my dissenting opinion in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 436,

para. 49). This possibility can be seen in the map that accompanies the Court's Judgment rejecting the intervention application, which shows Colombia's proposed median line, which was before the Court when it was considering whether Honduras had an "interest of a legal nature which may be affected" by the Judgment. (Sketch-map No. 3 in today's Judgment, p. 672, again shows Colombia's proposed median line.)

36. The steps that the Court followed in arriving at the final boundary illustrate why the Court should have concluded that Honduras had demonstrated an interest of a legal nature that might have been affected by the Judgment, thus meeting the requirements of Article 62. The boundary line that was proposed by Colombia differs from the provisional median line constructed by the Court today (sketch-map No. 8, p. 701). When the sketch-map accompanying the Judgment of 4 May 2011 on intervention is compared with sketch-map No. 8 in today's Judgment, it can be seen that the provisional median line drawn by the Court in today's decision veers further to the east than does the median line proposed by Colombia and considered by the Court in the intervention proceedings. The two lines proceed on different courses because the Court did not make use of base points on either Serrana or Quitasueño to construct the provisional median line. As a result, the Court's provisional median line does not intersect with the boundary between Nicaragua and Honduras established by the 2007 Judgment.

37. The fact that one Party proposed a boundary line proceeding to a point of intersection with the Honduras/Nicaragua boundary line meant that Honduras had a concrete interest of a legal nature that may have been affected by the Court's Judgment. If the Court had placed a base point on either Serrana or Quitasueño (as Colombia proposed), the position and angle of the Court's provisional median line could have caused it to proceed in a more northerly direction and thus to intersect with the Nicaragua/Honduras boundary line (like the boundary line proposed by Colombia). Had such a provisional median line not been modified (which could not have been foreseen at the intervention phase), this would have created the *de facto* endpoint to the Nicaragua/Honduras boundary. Thus, the selection of base points had the potential to affect Honduras's interest of a legal nature, justifying its intervention as a non-party.

(*Signed*) Joan E. DONOGHUE.