DECLARATION OF JUDGE *AD HOC* MENSAH

Agrees with decision not to uphold Nicaragua's final submission I (3) — Disagrees with reliance on statement from Nicaragua *v.* Honduras *regarding continental shelf claims beyond 200 nautical miles — Does not accept argument that Nicaragua needs to establish outer limits of continental shelf pursuant to UNCLOS Article 76 for purposes of delimitation vis-à-vis non-parties to UNCLOS — Coastal States have entitlements to continental shelf beyond 200 nautical miles under customary international law — Rights over continental shelf do not depend on occupation or express proclamation — UNCLOS does not impose obligations on parties vis-à-vis non-parties — Nicaragua's evidence on its entitlement to continental shelf beyond 200 nautical miles was inadequate — Evidence not sufficient for the Commission on the Limits of the Continental Shelf also not adequate for the Court — Court lacks sufficient basis to accede to Nicaragua's delimitation request — No automatic bar for courts and tribunals to delimit the continental shelf beyond 200 nautical miles where outer limits have not been established pursuant to Article 76 — Article 59 may not be adequate to protect third States that are affected by the Judgment.*

1. I agree with the conclusion of the Court that Nicaragua's final submission I (3), which requests the Court to effect the delimitation between the respective continental shelves of Nicaragua and Colombia beyond 200 nautical miles, cannot be upheld. As I see it, the correct (and sufficient) reason for this conclusion is as indicated in paragraph 129 of the Judgment, namely, that Nicaragua has failed to "establish" that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to a continental shelf.

2. I do not believe that the reason given in paragraph 126 of the Judgment for rejecting Nicaragua's request is correct in the circumstances of this case. In particular, I do not consider that the reference to the Court's statement in the case of *Nicaragua* v. *Honduras*, to the effect that "any claim to continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder", is either appropriate or necessary (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 759, para. 319). That statement might have been valid and unobjectionable in the circumstances of the *Nicaragua* v. *Honduras* case, since both the Parties in the case were States parties to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS").

However, it is neither correct nor relevant in the present case, given that one of the Parties is not a State party to UNCLOS. In this connection, I find a trifle implausible the suggestion in the Judgment that the expression "any claim" in the *Nicaragua* v. *Honduras* Judgment was intended to mean "any claim *by a State party to UNCLOS*". In the context of that case, the qualification to the Court's statement (assuming that any such qualification had in fact been intended) would and should go further to refer to "any claim by a State party to UNCLOS as against another State party".

3. As indicated in paragraph 118, the Court has determined that, since Colombia is not a party to UNCLOS, the law applicable to the case is "customary international law". Although both Nicaragua and Colombia agree that some provisions of Article 76 reflect customary international law, they disagree on which provisions fall into this category. Specifically, Colombia denies that paragraphs 4 to 9 of Article 76 can be considered to be rules of customary international law; and the Court itself has stated that it does not need to decide as to which provisions of Article 76 of UNCLOS, other than paragraph 1, form part of customary international law. Accordingly, it is reasonable to operate on the assumption that other provisions of Article 76 of UNCLOS (and certainly paragraphs 4 to 9 to which Colombia objects) are not included in the provisions deemed to be applicable in this case.

4. In spite of this, the Judgment seeks to justify the reference to the *Nicaragua* v. *Honduras* Judgment on the ground that, although in the present case one of the Parties (Colombia) is not a State party to UNCLOS, the Court's statement in *Nicaragua* v. *Honduras* is still relevant because, in the view of the Court, the fact that Colombia is not a party to UNCLOS does not relieve Nicaragua "of its obligations under Article 76 of that Convention" (Judgment, para. 126). This would seem to suggest that Nicaragua is obliged to follow the procedure set forth under Article 76 of UNCLOS if it seeks to establish outer limits for its continental shelf beyond 200 nautical miles that are "final and binding", even as against Colombia. Although I find this argument interesting, I do not consider that it is sustainable.

5. In the first place, Nicaragua does not seek to establish final and binding outer limits for its continental shelf beyond 200 nautical miles; nor does it request the Court to establish or pronounce on such an outer limit. As the Court pertinently notes in paragraph 128, Nicaragua in the second round of oral argument stated that it was "not asking [the Court] for a definitive ruling on the precise location of the outer limit of Nicaragua's continental shelf", but was rather "asking [the Court] to say that Nicaragua's continental shelf entitlement is divided from Colombia's continental shelf entitlement by a delimitation line which has a defined course". The Court's response to this request (*ibid.*, para. 129), with which

I fully agree, is that it is not in a position to delimit a continental shelf boundary between the Parties, "even using the general formulation proposed [by Nicaragua]".

6. In my view this conclusion of the Court does not justify the reference to the statement in the *Nicaragua* v. *Honduras* case, or the argument in paragraph 126. That argument, taken to its logical conclusion, suggests that a State which is a party to UNCLOS can only assert its right to a continental shelf beyond 200 nautical miles, as against a State which is not a party to the Convention, if it follows the procedure in paragraphs 8 and 9 of Article 76 of UNCLOS. Furthermore, placing emphasis on the procedure set out in Article 76 of UNCLOS (including the role of the Commission on the Limits of the Continental Shelf (the "Commission")) appears to leave little or no room for a State which is not a party to UNCLOS to assert its right to a continental shelf beyond 200 nautical miles vis-à-vis third States, whether or not such third States are parties to UNCLOS, since it is at least arguable that this procedure is not available (certainly not as of right) to non-parties to UNCLOS.

7. Thus, while in the context of the *Nicaragua* v. *Honduras* case the statement quoted might have been correct and pertinent, I do not think it is correct or helpful in the present case. In my view, the use of the statement in this context would appear to suggest that the Court's decision in *Nicaragua* v. *Honduras* (and by implication its decision in this case) puts in doubt the possibility that a State which is not a party to UNCLOS may assert a right to a continental shelf beyond 200 nautical miles or, alternatively, that the claim of such a State to a continental shelf beyond 200 nautical miles may never be opposable vis-à-vis third States. This would in effect mean that a State which is not a party to UNCLOS may not be able to establish rights to a continental shelf beyond the limits of its exclusive economic zone. In my view, there is no legal justification for such a proposition. In this connection, it is important to note that Article 77 of UNCLOS (which clearly reflects customary international law) categorically states that the rights of the coastal State over the continental shelf do not depend on occupation or express proclamation. Accordingly, it can plausibly be argued that the entitlement of a coastal State to a continental shelf beyond 200 nautical miles arises *ipso facto* and *ab initio* under customary international law, whether or not the State is a party to UNCLOS. The procedure by which a non-UNCLOS State can assert its right may be different, but the ability to assert it should be recognized where the necessary conditions exist.

8. I emphasize that I do not wish or intend in any way to detract from or diminish the obligations which Article 76, paragraphs 8 and 9, of UNCLOS impose on States parties that seek to establish "final and binding" outer limits of their continental shelves beyond 200 nautical miles.

And I certainly do not question or underestimate the clear object and purpose of UNCLOS to establish "a legal order for the seas and oceans" or the need and desirability for universal application of the UNCLOS régime. But I do not believe or agree that the special character of UNCLOS, as set out in its Preamble, makes the rights and obligations of States parties to UNCLOS fundamentally different from the rights and obligations of State parties under other treaties. Specifically, I do not subscribe to the view that the "object and purpose of UNCLOS, as stipulated in its Preamble", in and by themselves, impose on parties to the Convention obligations vis-à-vis other States which have taken a conscious decision not to agree to be bound by that Convention. Whilst it is true that "the fact that Colombia is not a party [to UNCLOS] does not relieve Nicaragua of its obligations under Article 76 of that Convention", there is nothing in the Preamble or any provision of UNCLOS that can legitimately be interpreted to mean that the obligations under that Convention are owed also to States that are not parties thereto. In my opinion, the obligations under Article 76, paragraphs 8 and 9, are "treaty obligations" that apply only as between States that have expressed their consent to be bound by the UNCLOS treaty. Those provisions cannot be considered as imposing mandatory obligations on all States under customary international law. As such they only apply where all the States concerned are parties to UNCLOS.

9. In any event, I would have preferred the Judgment to make it clear that the evidence submitted by Nicaragua to the Court was considered to be inadequate, not because the required information has not been submitted to the Commission on the Limits of the Continental Shelf, or because the Commission has not made recommendations pursuant to Article 76, paragraph 8, of UNCLOS. Rather it is because the information presented does not provide a sufficient basis to enable the Court to proceed to the delimitation of a continental shelf beyond 200 nautical miles of the coast of Nicaragua. In my view, it is not appropriate to conclude that the evidence is inadequate merely because Nicaragua has failed to satisfy the procedural requirements for obtaining a positive recommendation from the Commission under Article 76, paragraph 8, of UNCLOS. As previously pointed out, these requirements are only applicable where the States concerned are all parties to UNCLOS.

10. If it were considered necessary or useful to explain further the nature of the evidence that would have satisfied the Court, it would have been enough to note that the information so far provided by Nicaragua is, by Nicaragua's own admission, only "preliminary" and thus would not be sufficient to satisfy the Court, just as it would not be sufficient to satisfy the Commission. In this connection, it is worth pointing out that the submission of "preliminary" data to the Commission is not for the pur-

pose of enabling the Commission to make recommendations. Rather it is to "buy time" for the coastal State concerned.

11. While a full submission to the Commission should not necessarily be required in every case to enable a court or tribunal to delimit a continental shelf beyond 200 miles, information that would satisfy the Commission should normally also be sufficient to serve as a basis for the court or tribunal to delimit a continental shelf, in cases where (as in the present case) submission to the Commission is not mandatory. In this regard, it is pertinent to recall that in the *Bangladesh/Myanmar* case, the conclusion of the International Tribunal for the Law of the Sea that both Bangladesh and Myanmar have entitlements to a continental shelf beyond 200 nautical miles from their coasts was stated to be based partly on "uncontested scientific information" that had been submitted during the proceedings, and partly on information that the two States had submitted to the Commission, even though the Commission had not pronounced itself on those submissions (*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. 129-131, paras. 443-449).

12. My concern is that the present Judgment might be interpreted to suggest that a court or tribunal should, in every case, automatically rule that it is not able to decide on a dispute relating to the delimitation of the continental shelf beyond 200 nautical miles whenever one of the Parties to the dispute has not followed, or is unable to follow, the procedure set out in Article 76 of UNCLOS. Rather, I think the possibility should be left open that, in principle, a court or tribunal may be able and willing to adjudicate on a dispute relating to delimitation of the continental shelf beyond 200 nautical miles depending on the information presented to it on the geology and geomorphology of the area in which delimitation is sought. In particular, it should be made clear that, in a case of the delimitation of the continental shelf beyond 200 nautical miles involving two States, neither of which is a State party to UNCLOS, the court or tribunal is not obliged to declare itself unable to adjudicate over the dispute solely on the ground that one or the other of the States concerned has not followed the procedure mandated in Article 76 of UNCLOS. Where the States concerned are not States parties to UNCLOS, the procedure under Article 76 of UNCLOS should not apply as between them and may, in any event, not be available to them. In any case, as previously stated, I consider that paragraph 126 of the Judgment is unnecessary. It does not add anything substantive to the reasoning of the Court, but could have implications that I consider to be both wrong and unhelpful.

13. With regard to the actual delimitation effected by the Court, I share the view of Judge *ad hoc* Cot that the rights and interests of third States are affected by the Judgment. In particular, I do not think that enough weight has been given to the effect and significance of bilateral agreements concluded in the area. I, too, consider that these agreements constitute an informal multilateral framework for the management of the

Western Caribbean Sea, and are intended to have significant implications for the "public order of the oceans". As the Court rightly notes in referring to the judgment of the Arbitral Tribunal in the *Barbados/Trinidad and Tobago* case, a delimitation that contributes to such a public order should be "both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirements of achieving a stable legal outcome" (*Award of 11 April 2006, RIAA*, Vol. XXVII, p. 215, para. 244; *ILR*, Vol. 139, p. 524). I am not sure that reliance on Article 59 of the Court's Statute alone would offer adequate protection for the rights of third States, and achieve the objective of stability and practicability, in this case.

(Signed) Thomas A. MENSAH.