COLOMBIA'S COMMENTS ON NICARAGUA'S WRITTEN REPLY TO THE QUESTION PUT BY JUDGE BENNOUNA ON 4 MAY 2012 (AFTERNOON)

1. At the outset, Colombia wishes to reaffirm its position on the matter, as expressed in its written reply to Judge Bennouna's question, transmitted to you under cover of my letter dated 10 May 2012, and orally at the hearings on the merits held from 23 April to 4 May 2012, in particular at the 16th public sitting held on 4 May.[1]

2. Nicaragua's Written Reply must be read in the context of the present case, in which there are no areas of continental shelf lying more than 200 nautical miles from the nearest land territory.[2] In any event, Nicaragua's claim in the present case ignores the Archipelago's own continental shelf entitlements.[3] This is why Colombia's proposed delimitation lies in the area where the respective entitlements of the Parties begin to meet and overlap.[4]

3. Moreover, contrary to what Nicaragua's claim and arguments suggest, there is – to say the least – no rule of customary international law that gives priority to a continental shelf based on geomorphology, as compared with that of a coastal State on the basis of the 200 nm entitlement appertaining to its EEZ and continental shelf by virtue of UNCLOS Article 76(1).[5]

4. Indeed, the reverse is the case as State practice shows (with hardly any exception –none, in fact, in the region concerned in the present proceedings)[6] that a coastal State has no entitlement to the geomorphological extension of its shelf within 200 nm of another eligible coast. This is reflected in the well-known *dictum* of the Court in *Libya/Malta*:

> "The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, *whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims.* This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends

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1 CR 2012/16, pp. 42-3, paras. 38-9 and pp. 43-5, paras. 40-50 (Bundy). See also, CR 2012/17, p. 35, para. 16 (Crawford).

2 CR 2012/11, p. 24, para. 21 (Crawford); CR 2012/16, p. 52, para. 83 (Bundy).

3 CR 2012/11, p. 24, para. 21 (Crawford); CR 2012/12, p. 14, para. 24; p. 15, para. 27; p. 18, para. 42; p. 25, para. 74; p. 48, para. 23; p. 60, para. 76; p. 63, para. 89 (Bundy). Also, CR 2012/13, p. 50, para. 49; p. 53, para. 60 (Crawford); CR 2012/16, p. 15, para. 28 (Londoño); p. 49, para. 68 (Bundy); and CR 2012/17, pp. 22 and ff, paras. 2 and ff. (Bundy), as well as p. 38, para. 28 (4) (Crawford).

4 CR 2012/12, p. 12, para. 13; p. 24, para. 70; pp. 24-5, para. 73; p. 25, para. 75; p. 63, para. 92 (Bundy). Also, CR 2012/13, p. 47, para. 43; p. 49, para. 48 (Crawford); and CR 2012/17, p. 30, para. 32 (Bundy), p. 38, para. 28 (5) (Crawford).

5 CR 2012/11, p. 25, para. 23 and pp. 27-8, para. 34 (Crawford); CR 2012/17, pp. 32-4, paras. 6-14 and p. 38, para. 28 (2) (Crawford).

6 CR 2012/11, p. 24, para. 21 (Crawford); CR 2012/12, pp. 60-1, para. 78 (Bundy); CR 2012/13, p. 53, para. 60 (Crawford); CR 2012/16, p. 52, paras. 83, 85 (Bundy); CR 2012/17, p. 34, para. 14 (Crawford).

> solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial."[7]

5. The relevant State practice in this respect was laid out during oral argument by Mr. Bundy,[8] and the consequential logical considerations by Professor Crawford.[9] It should be stressed that Nicaragua made no attempt at all to respond to Mr. Bundy, and its response to Professor Crawford in the second round of Oral Pleadings was incorrect and unconvincing.[10]

6. As to the substance of Nicaragua's Written Reply, it must be noted that, while Judge Bennouna's question only refers to whether the rules relating to the determination of the outer limits of the continental shelf beyond 200 nautical miles set out in Article 76 of the UNCLOS, i.e., paragraphs (4) to (9), may be considered to possess a customary character, the Written Reply itself and the State practice Nicaragua invokes focus more on "the definition of the continental shelf", than on the determination of its outer limits.

7. Indeed, while Nicaragua's Written Reply accepts the distinction, at the basis of Colombia's position, between conventional obligations and obligations under customary international law, early on it contends that "the definition of the continental shelf set out in article 76 (1)-(7) of the 1982 [UNCLOS] has the status of a rule of customary international law and not only of a rule of treaty law".[11]

8. Nicaragua attempts to justify its basic assumption on the ground that the definition it finds reflected in paragraphs (4)-(7) of article 76 is generally supported in State practice.[12] However, as explained further below, Nicaragua's self-serving recounting of State practice, which is devoted almost exclusively to the practice of States party to the UNCLOS, is highly imprecise and tentative as well as contradictory, to such an extent that it fails to substantiate the assertion it is intended to confirm.

9. While Nicaragua does not deny that Colombia is not a party to the UNCLOS it, nevertheless, points out that Colombia is one of the 119 signatories of the Convention.[13] Obviously, the fact that Colombia signed at the conclusion of the 1982 Montego Bay Conference does not, in and of itself, transform Colombia into a party to the UNCLOS. Oblivious of this basic tenet of the Law of Treaties, Nicaragua persists throughout its Written Reply in assimilating signature to ratification as a means of buttressing its recounting of State practice.[14]

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7 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at 33, para. 33 (emphasis added).

8 CR 2012/12, pp. 60-1, paras. 77-8 (Bundy).

9 CR 2012/13, pp. 27-8, para. 34; CR 2012/17, pp. 32-4, paras. 6-14 (Crawford).

10 CR 2012/9, p. 30, paras. 46-48; CR 2012/15, pp. 23-5, paras. 36-44 (Lowe).

11 Nicaragua's Written Reply (hereafter "Written Reply"), para. 1.

12 Written Reply, para. 10.

13 Written Reply, para. 7.

14 See, e.g., Written Reply, paras. 11, 12, 13.

10. Firstly, it is useful to revisit the commentary of the Court on the conversion of a treaty norm to a rule of customary international law. Several useful pronouncements – demonstrating the difficulty of such a conversion by virtue of State practice and *opinio juris* – were made by the Court in the *North Sea Continental Shelf* cases.[15] The Court said first that whilst such a result is possible, "[a]t the same time this result is not lightly to be regarded as having been attained".[16]

11. Secondly, the Court clearly established that the mere fact that a State has refused to ratify a convention for reasons other than the active disapproval of the norms contained therein does not mean that the State in question approves of these rules. The Court said

> "That non-ratification may sometimes be due to factors other than the active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, the facts remain."[17]

The Court went on the confirm that:

> "As regards those States ... which were not, and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative."[18]

12. Having established that non-ratification for whatever reason, other than the active disapproval of a convention, cannot without more be considered tacit approval of a treaty-based norm, the Court engaged in wider commentary as to the meaning of *opinio juris*, the conviction of a rule's customary nature which alongside State practice suffices to convert a treaty-based norm into a rule of general international law. These must amount to more than just "settled practice". Said the Court:

> "[The acts] 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 existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive neccessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation."[19]

13. In the present context, the following is clear:

a. The transmutation of a treaty-based norm so as to reflect a rule of customary international law is not a common occurrence and ought not to be proclaimed lightly. Thus, Nicaragua was faced with a heavy burden if it was to prove that UNCLOS Article 76 codifies a customary rule of international law, a burden that as shown below, it has failed to discharge.

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15 *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *The Netherlands), Judgment, I.C.J. Reports 1969*, p. 3.

16 Ibid., p. 41, para. 71.

17 Ibid, p. 42, para. 73.

18 Ibid, p. 43-4, para. 76.

19 Ibid., p. 44, para. 77.

b. Colombia's non-ratification of UNCLOS for reasons unconnected to its view of the Convention's merits cannot be taken as tacit approval of their substance. Indeed, for 30 years Colombia has chosen to refrain from ratifying the Convention as its will is not to be bound by some conventional rules such as those in paragraphs (4) to (9) of Article 76.
c. *Opinio juris*, where it is to be identified, must demonstrate a conviction as to the legal character of the norm in question. As explained hereinafter, the information referred to by Nicaragua in its Response does not demonstrate that the rules contained in UNCLOS Article 76(4)-(9) reflect the *opinio juris* of States, particularly non-signatories to UNCLOS.

14. The statistics provided by Nicaragua in its Written Reply with regard to alleged State practice are imprecise and deceptive in that they do not identify by name the States concerned or the contents of the provisions of domestic legislation it deems legally relevant. In this respect, Nicaragua's use of language is most revealing. Nicaragua begins its demonstration by referring to a UN website carrying the legislation of 151 States,[20] without distinguishing which of those States are parties to the UNCLOS and which are not. It then reduces the initial figure to "approximately 90" States, whose legislation it considers relevant. In its words, "the approximation is necessary because some references to the continental shelf are oblique and some laws are not readily available".[21] Nicaragua continues by using expressions such as "those 90 or so States"; "it appears that approximately 50 [States]"; "some [6], [go further], [refer]".[22] In the same vein, in paragraphs 12 and 13 of its Written Reply, Nicaragua repeats its finding that "some [States] or all of them may either have adopted legislation to implement UNCLOS domestically or have a legal system which gives direct effect to treaties".

15. Following a demonstration essentially based on assumptions, Nicaragua concludes that "more than 80 States of the 90 that have continental shelf legislation *appear* to accept the definition in article 76 (4)-(7) either explicitly in their laws or *implicitly* by their acceptance of the UNCLOS".[23] However, Nicaragua's conclusion is disproved by its own analysis. Nowhere in its recounting does Nicaragua mention a single State whose legislation makes specific reference to those four paragraphs as constituting, as a whole, the "definition of the continental shelf".

16. According to paragraph 11 of the Written Reply:

- "some 6 [States] merely provide for delimitation... on the basis of agreements with neighboring States";
- "It appears that approximately 50... [States] adopt in their domestic law a definition...that is in line with 76 (1) UNCLOS";
- "some [States] go further in defining the margin in line with 76 (3) UNCLOS";
- "some [States] refer to the provisions of article 76 in general terms".

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20 Written Reply, para. 10.
21 Ibid.
22 Written Reply, para. 11.
23 Written Reply, para. 14.

And furthermore:

- "A further 19 States adhere to the '200 nm isobath + exploitability' criterion used in article 1 of the 1958 Continental Shelf Convention or simply to an exploitability criterion";[24]
- "A further 16 States limit their assertions of jurisdiction over the continental shelf to 200 nm".[25]

17. The sum total of the States that Nicaragua itself excludes from its list of States expressly accepting that paragraphs (4) - (7) of article 76 encompass the "definition" of the continental shelf, considerably reduces the figure of "more than 80 States" to which Nicaragua arrives at in paragraph 14 of its Written Reply, purported to be that of States that accept that definition.

18. Nicaragua also refers to the practice of two named States, Ecuador and the United States, which are not parties to the UNCLOS. However, as far as Ecuador is concerned, Nicaragua simply mentions without corroboration that country's use of the "detailed criteria" under the provisions of paragraphs (5)-(6).[26] Regarding the United States, Nicaragua quotes a US 1987 statement as proof that the United States has "explicitly accepted the definition".[27] But Nicaragua overlooks the fact that in the quoted statement, the United States clearly differentiates between "the proper definition... as reflected in article 76, paragraphs (1), (2) and (3)" and the "means of delimitation" to be "carried out in accordance with paragraphs (4), (5), (6) and (7)".[28]

19. The United States State Department Bureau of Oceans and International and Scientific Affairs has said that "[o]nly as a party to the Convention can the United States secure its sovereign rights to the vast resources of our continental shelf beyond 200nm from shore."[29]

20. In paragraph 18 of its Written Reply, Nicaragua draws attention to the fact that non-signatories to UNCLOS may submit comments to the Commission on the Limits of the Continental Shelf (CLCS) with respect to submissions made by parties to UNCLOS. This possibility does not mean that such non-signatories consider UNCLOS Article 76 (4)-(7) to be reflective of customary international law; at most, such comments suggest that the submitting State has not complied with its conventional obligations under these paragraphs.

21. In paragraph 19 of its Written Reply, Nicaragua purports to rely on a passage from the *Nicaragua-United States* case.[30] In the first place, the citation provided by Nicaragua is incorrect.[31] In the second, it is inapposite, as it

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24 Written Reply, para. 12.

25 Written Reply, para. 13.

26 Written Reply, para. 11.

27 Written Reply, para. 10.

28 Written Reply, paras. 12 and 13.

29 United States State Department Bureau of Oceans and International and Scientific Affairs, *Fact Sheet: Why the United States Needs to Join the Law of the Sea Convention Now*, 21 March 2012, http://www.State.gov/e/oes/lawofthesea/factsheets/186605.htm [accessed 14 May 2012].

30 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392.

is concerned with extant rules of customary international law which, following their formation as such, were codified in conventional form. It does not apply to situations in which a treaty provision comes to embody a customary rule which did not exist prior to the conclusion of the relevant convention, as Nicaragua argues is the case with respect to UNCLOS Article 76. Thus, there is no question here of prior principles of customary international law ceasing to apply by virtue of UNCLOS.

22. Nicaragua's Written Reply represents one more proof of the distortion of facts which has characterized its approach to litigation in its written and oral pleadings in the instant case. But, as Colombia emphasized in its Written Reply to Judge Bennouna's question, practice that is limited to that of the States party to UNCLOS, regardless of how it may be presented, constitutes evidence only of the application of conventional but not customary international law. As one of Nicaragua's counsel in the present proceedings put it elsewhere at a recent seminar:

> "Could a State that is not a party to the [1982] Convention apply the formula of article 76 as customary international law without going to the [CLCS]?. That would be, to say the least, an unfortunate result... But can the detailed provisions of article 76 be considered to be customary international law? Probably not."[32]

23. In sum, Nicaragua's written reply fails to establish that UNCLOS Articles 76(4)-(9) reflect rules of customary international law.

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31 The correct citation is ibid., p. 424, para. 730: "[Wide ratification of a treaty norm] does not mean that they cease to exist and to apply as principles of customary international law, even as regards countries that are parties [to the treaty in question]."

32 A.G. Oude Elferink, *The outer limits of the continental shelf beyond 200 nautical miles under the framework of Article 76 of the United Nations Convention on the Law of the Sea (LOSC)* , at p. 10. Presentation to the OPRF Seminar on the Establishment of the Outer Limits of the Continental Shelf beyond 200 nautical miles under UNCLOS, Tokyo, 27 February 2008. http://www.sof.or.jp/en/topics/pdf/aba.pdf [accessed 17 May 2012]