DECLARATION OF JUDGE ROBINSON

As set out in joint dissent, Colombia's third preliminary objection should be upheld — Declaration elaborates on a particular point of concern — The majority's interpretation results in the application of law in a way that overrides an elementary principle of the Law of Treaties — Rights and obligations under a treaty apply only in relation to other States parties unless also part of customary international law — Application of a treaty between a State party and a non-State party compromises the principles of sovereignty and equality — 2012 Judgment clear that customary international law applied between the Parties — Article 76 (8) of UNCLOS sets up a régime that is special, contractual and confined to States parties to UNCLOS — Majority invents a "condition" which results in application of treaty obligations between a State party and a non-State party — Incompatible with régime envisaged by Law of Treaties.

1. I have signed the joint dissent because, for the reasons set out therein, I am of the opinion that Colombia's third preliminary objection should be upheld. The Court "has already adjudicated" Nicaragua's request in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (*Judgment, I.C.J. Reports 2012 (II)*, p. 624, hereinafter referred to as the "2012 Judgment") (see paragraph 47 of the Judgment) and Nicaragua's request is thus *res judicata*.

2. I write this declaration to elaborate further upon a particular concern that arises from today's Judgment, in which the majority embraces and applies dicta contained within the 2012 Judgment in such a way as to override an elementary principle of the Law of Treaties.

3. It is a foundational principle of the Law of Treaties that the rights and obligations under a treaty arise and apply only in relation to other States parties[1]. The obligations and rights do not apply to non-States parties unless either, the States parties intend this to be the case and the

[1] Sir Gerald Fitzmaurice in his Draft Report on Article 3 *(pacta tertiis nec nocent nec prosunt)* of the proposed Convention on the Law of Treaties said as follows: "1. By virtue of the principles *pacta tertiis nec nocent nec prosunt* and *res inter alios acta*, and also of the principle of the legal equality of all sovereign independent States . . . a State cannot in respect of a treaty to which it is not a party: *(a)* [i]ncur obligations or enjoy rights under the treaty . . .", Part II of the proposed second chapter (effects of treaties) on the effects of treaties in relation to third States with commentaries. Fifth Report of the Special Rapporteur, Sir Gerald Fitzmaurice, (12th session of the ILC, 1960), A/CN.4/130, *Yearbook of the International Law Commission*, 1960, Vol. II, pp. 75-76.

non-States parties consent[2], or the relevant rights and obligations also form part of customary international law[3].

4. Treaties are binding on States because they have so consented. This consent is an expression of the principles of sovereignty and equality of States[4]. In giving their consent, States agree to respect the obligations, and benefit from the corollary rights, vis-à-vis other States parties to the treaty. The Permanent Court of International Justice emphasized that: "[a] treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States"[5]. Therefore to apply a treaty between a State party and a non-State party compromises the principles of sovereignty and equality of States. The State party has not agreed to be bound by the treaty in its relationship with a non-State party.

5. This principle seems to have been overlooked in today's Judgment, where the majority reads the 2012 Judgment as imposing a "prerequisite" or a "condition", pursuant to Article 76 (8) of UNCLOS, for the delimitation of extended continental shelf entitlements between Nicaragua and Colombia.

6. In its analysis of the 2012 Judgment, paragraph 82 of today's Judgment reads:

> "[Paragraph 129 of the 2012 Judgment] must be read in the light of those preceding it in the reasoning of the 2012 Judgment
>
> . . . . . .
>
> Thirdly, what the Court did emphasize was the obligation on

[2] See, e.g., Articles 34-36 of the Vienna Convention on the Law of Treaties (VCLT). Article 34 emphasizes that "[a] treaty does not create either obligations or rights for a third State [a State not party to the treaty] without its consent". Article 35 states: "An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing." Article 36 states:

> "(1) A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.
>
> (2) A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty."

[3] Article 38 of the VCLT states: "Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

[4] *S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 25: "the right of entering into international engagements is an attribute of State sovereignty".

[5] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 29. The French version reads: "Un traité *ne fait droit* qu'entre les Etats qui y sont parties; dans le doute, des droits n'en découlent pas en faveur d'autres Etats." (Emphasis added.)

> Nicaragua, as a party to UNCLOS, to submit information on the limits of the continental shelf it claims beyond 200 nautical miles, in accordance with Article 76, paragraph 8, of UNCLOS, to the CLCS. It is because, at the time of the 2012 Judgment, Nicaragua had not yet submitted such information that the Court concluded, in paragraph 129 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'."

Paragraph 84 of today's Judgment continues:

> "It therefore follows that while the Court decided, in subparagraph 3 of the operative clause of the 2012 Judgment, that Nicaragua's claim could not be upheld, it did so because the latter had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS."

And at paragraph 105:

> "Nicaragua was under an obligation, pursuant to paragraph 8 of Article 76 of UNCLOS, to submit information on the limits of the continental shelf it claims beyond 200 nautical miles to the CLCS. The Court held, in its 2012 Judgment, that Nicaragua had to submit such information as a prerequisite for the delimitation of the continental shelf beyond 200 nautical miles by the Court."

7. As set out in the joint dissent, I believe that this conclusion misconstrues the relevant paragraphs of the 2012 Judgment. The majority interprets the Court's findings in paragraphs 126 and 127 of the 2012 Judgment in such a way as to result in the application of law that is, in fact, inapplicable between the two Parties.

8. The Court stated quite directly in paragraph 118 of the 2012 Judgment that the applicable law in the case was customary international law, as Colombia was not a State party to UNCLOS. The Court then noted that it considered that the definition of the continental shelf set out in UNCLOS Article 76 (1) formed part of customary international law, and that, it "d[id] not need to decide whether other provisions of Article 76 of UNCLOS form[ed] part of customary international law".

9. Yet, in paragraph 126 of the 2012 Judgment, the Court seemed to forget its earlier determination that only customary international law applied in the case, when it discussed its dictum in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* that, "any claim of continental shelf rights

beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder" (*I.C.J. Reports 2007 (II)*, p. 759, para. 319).

Judge Donoghue, in her separate opinion to the 2012 Judgment, noted that she was "troubled that the Court . . . extend[ed] 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"[6].

10. In paragraph 126 of the 2012 Judgment, the Court went on to "recall" that "UNCLOS, according to its Preamble, is intended to establish 'a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources'". In the same paragraph, the Court went on to state that "[g]iven the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention".

11. There is a flaw in this reasoning: Article 76 (8) of UNCLOS and the Commission's procedure in Annex 2 are obviously special, contractual and confined to States parties to UNCLOS. As noted by Judge *ad hoc* Cot in his declaration to the 2012 Judgment, Article 76 (8) institutes a specific procedure that is not accessible by non-States parties to UNCLOS and it is thus "difficult" to view Article 76 (8) as an expression of customary international law[7]. Many other treaties reflect a similar approach, whereby provisions contained in the treaty may mirror norms of customary international law, but particular procedural mechanisms established in respect of those provisions are peculiar to the treaty and States parties to that treaty; for example, generally, the rights set out in the International Covenant on Civil and Political Rights to which persons are entitled and the procedure by which persons may petition the Human Rights Committee alleging a breach of those rights[8]. Mark Villiger makes an interesting argument in this regard. He contends that customary international law rules must be "of an abstract nature, that is potentially regulatory of an abstract number of situations rather than concerning a

[6] *I.C.J. Reports 2012 (II)*, separate opinion of Judge Donoghue, p. 758, para. 26.

[7] *Ibid.*, declaration of Judge *ad hoc* Cot, p. 771, para. 19.

[8] For the procedure see the Optional Protocol to the International Covenant on Civil and Political Rights. See also the petition procedures established under other human rights treaties, for example, Article 44 of the American Convention on Human Rights, Article 34 of the European Convention on Human Rights ("The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High

concrete situation"[9]. Villiger argues that norms of an organization directed at the workings of a specific body could not therefore become rules of customary international law. Such procedural rules are too "concrete". Though one may question whether Villiger's analysis is fully reflective of the range of potential characteristics of a rule of customary international law, there can be no doubt that the provision in Article 76 (8) of UNCLOS establishes a procedure that is only open to States parties to UNCLOS.

12. Further, the importance attached by the Court in paragraph 126 of the 2012 Judgment to the phrase it cites from the Preamble of UNCLOS is problematic. While it is true that the Preamble to a treaty forms part of the context for the purpose of the interpretation of that treaty, the Preamble of UNCLOS cannot, by itself, serve to override the principle that the provisions of a treaty are *res inter alios acta* for a non-State party unless they constitute customary international law. In other words, the rights and obligations under UNCLOS cannot be applied so as to benefit or adversely affect a non-State party. Therefore, obligations under UNCLOS are not opposable to Nicaragua in its relationship with Colombia, a non-State party, unless they form part of customary international law. Judge *ad hoc* Mensah also made this point in his declaration to the 2012 Judgment[10]:

> "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 States 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."

13. It is noteworthy that the aim set out in the Preamble of UNCLOS — to create a world legal order for the seas and oceans — is *expressly* to be achieved with "due regard for the sovereignty of all States", a phrase omitted from paragraph 126 of the 2012 Judgment. The noble and laud-

---

Contracting Parties undertake not to hinder in any way the effective exercise of this right.").

[9] Mark E. Villiger, *Customary International Law and Treaties,* Kluwer Law International, 2nd ed., 1997, p. 179.

[10] *I.C.J. Reports 2012 (II)*, declaration of Judge *ad hoc* Mensah, p. 765, para. 8.

able aim set out in the Preamble cannot be accomplished by disregarding or compromising the principle of State sovereignty. The principle of sovereignty is like a thread woven throughout the fabric of the legal order established by UNCLOS. The failure of the Court to take into account in its analysis the intended balance between the legal order and sovereignty results in the Court exaggerating the importance of the Preamble.

14. Delimitation of the continental shelf of a State party to UNCLOS and a non-State party to UNCLOS should be carried out on the basis of: (i) customary international law, which principally means, by virtue of Article 83 of UNCLOS, an obligation to effect the delimitation "in order to achieve an equitable solution", and also, that the definition contained in Article 76 (1) of UNCLOS is observed; and (ii) such other rules as the parties may agree to apply, for example, significantly, they could agree to apply the provisions of Articles 76 (2)-(7) (in relation to which there is no general agreement that they form part of customary international law). Delimitation of the continental shelf between States that are not parties to UNCLOS should be carried out on the basis of: (i) customary international law; and (ii) such other rules as the Parties may agree to apply.

15. The majority's decision today has interpreted the 2012 Judgment as deciding that the Court could not "uphold" Nicaragua's claim in 2012 because Article 76 (8) of UNCLOS created a "condition" that Nicaragua had to satisfy before the Court could proceed to delimit the continental shelf beyond 200 nautical miles. In paragraphs 86 and 87 of today's Judgment, the majority finds that as "Nicaragua states that on 24 June 2013 it provided the CLCS with 'final' information", the majority "accordingly considers that the condition imposed by it in its 2012 Judgment in order for it to be able to examine the claim of Nicaragua contained in the final submission I (3) has been fulfilled in the present case".

16. The disjointed logic of this interpretation is fully discussed in the joint dissent (see Section V of the joint dissent). Further, as discussed therein, why would the Court, in the 2012 Judgment, have explicitly determined that the law applicable between the parties was customary international law, and then, within the same section of reasoning, override this principle by applying as between the parties obligations under a treaty which do not form part of customary international law? This is inherently contradictory. The majority, by its invention of a procedural condition, applies treaty obligations in such a way as to create an asymmetrical relationship between Nicaragua and Colombia; a relationship to which neither State has consented. In so doing, the majority fails to accord due respect to the principles of sovereignty and equality between States.

17. It may be argued that the task before the Court today is simply to determine what the Court said in the 2012 Judgment in order to decide whether the question before it is *res judicata*, and not to consider the correctness of findings made in the 2012 Judgment. If a mistake was made in the 2012 Judgment, it is not for the Court to correct it at this juncture. Yet, in the circumstances of this case, the majority chooses the wrong interpretation, and it is not in a position to shrug off its responsibility for a conclusion that contravenes a fundamental principle of the law of treaties by saying that it is merely reciting what the 2012 Judgment actually said.

18. The result of this strange application of Article 76 (8) of UNCLOS is that Colombia, a non-State party, is accorded something that, in my view, is akin to a benefit under UNCLOS, since the provision, which does not mirror a rule of customary international law, has been enforced against Nicaragua in its relations with Colombia. This raises questions about the compatibility of the Court's approach with the régime envisaged by Articles 34-36 of the Vienna Convention on the Law of Treaties (Treaties and Third States)[11].

19. The joint dissent discusses concerning precedents that could be drawn from the majority's position. I submit this declaration to highlight one more: that the majority's interpretation today adopts a conclusion that runs roughshod over a fundamental principle of the Law of Treaties.

(Signed) Patrick ROBINSON.

[11] See footnote 2 above.