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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2022

Public sitting

held on Monday 5 December 2022, at 10 a.m., at the Peace Palace,

President Donoghue, presiding,

***in the case concerning* Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua *v.* Colombia)**

VERBATIM RECORD

ANNÉE 2022

Audience publique

tenue le lundi 5 décembre 2022, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

***en l'affaire relative à la* Question de la délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne (Nicaragua c. Colombie)**

COMPTE RENDU

Present:	President	Donoghue
	Vice-President	Gevorgian
	Judges	Tomka
		Abraham
		Bennouna
		Yusuf
		Xue
		Sebutinde
		Bhandari
		Robinson
		Salam
		Iwasawa
		Nolte
		Charlesworth
`		Brant
	Judges *ad hoc*	McRae
		Skotnikov
	Registrar	Gautier

Présents : Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Abraham
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte
Mme Charlesworth,
M. Brant, juges
MM. McRae
Skotnikov, juges *ad hoc*

M. Gautier, greffier

The Government of the Republic of Nicaragua is represented by:

H.E. Mr. Carlos José Argüello Gómez, Permanent Representative of the Republic of Nicaragua to the international organizations based in the Kingdom of the Netherlands, Member of the International Law Commission,

as Agent and Counsel;

Mr. Alex Oude Elferink, Director, Netherlands Institute for the Law of the Sea, Professor of International Law of the Sea, Utrecht University,

Mr. Vaughan Lowe, K.C., Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de droit international, member of the Bar of England and Wales,

Mr. Alain Pellet, Emeritus Professor of the University Paris Nanterre, former Chairman of the International Law Commission, President of the Institut de droit international,

as Counsel and Advocates;

Ms Claudia Loza Obregon, Legal Adviser, Ministry of Foreign Affairs of the Republic of Nicaragua,

Mr. Benjamin Samson, PhD, Centre de droit international de Nanterre (CEDIN), University Paris Nanterre,

as Assistant Counsel;

Mr. Robin Cleverly, MA, DPhil, CGeol, FGS, Law of the Sea Consultant, Marbdy Consulting Ltd,

as Scientific and Technical Adviser;

Ms Sherly Noguera de Argüello, Consul General of the Republic of Nicaragua,

as Administrator.

Le Gouvernement de la République du Nicaragua est représenté par :

S. Exc. M. Carlos José Argüello Gómez, représentant permanent du Nicaragua auprès des organisations internationales basées au Royaume des Pays-Bas, membre de la Commission du droit international,

comme agent et conseil ;

M. Alex Oude Elferink, directeur de l'Institut néerlandais du droit de la mer, professeur de droit international maritime à l'Université d'Utrecht,

M. Vaughan Lowe, K.C., professeur émérite de droit international public (chaire Chichele) à l'Université d'Oxford, membre de l'Institut de droit international, membre du barreau d'Angleterre et du Pays de Galles,

M. Alain Pellet, professeur émérite de l'Université Paris Nanterre, ancien président de la Commission du droit international, ***président*** de l'Institut de droit international,

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Mme Claudia Loza Obregon, conseillère juridique au ministère des affaires étrangères de la République du Nicaragua,

M. Benjamin Samson, docteur en droit, Centre de droit international de Nanterre (CEDIN), Université Paris Nanterre,

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Mme Sherly Noguera de Argüello, consule générale de la République du Nicaragua,

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The Government of the Republic of Colombia is represented by:

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H.E. Ms Elizabeth Taylor Jay, former Ambassador of Colombia to Kenya, former Permanent Representative of Colombia to the United Nations Environment Programme and the United Nations Human Settlements Programme,

as Co-Agents;

H.E. Mr. Álvaro Leyva Durán, Minister for Foreign Affairs of the Republic of Colombia,

H.E. Mr. Everth Hawkins Sjogreen, Governor of San Andrés, Providencia and Santa Catalina, Colombia,

as National Authorities;

Mr. W. Michael Reisman, Myres S. McDougal Professor Emeritus of International Law, Yale University, member of the Institut de droit international,

Sir Michael Wood, KCMG, member of the International Law Commission, member of the Bar of England and Wales,

Mr. Rodman R. Bundy, former *avocat à la Cour d'appel de Paris*, member of the Bar of the State of New York, partner at Squire Patton Boggs LLP, Singapore,

Mr. Jean-Marc Thouvenin, Professor at the University Paris Nanterre, Secretary-General of the Hague Academy of International Law, associate member of the Institut de droit international, member of the Paris Bar, Sygna Partners,

Ms Laurence Boisson de Chazournes, Professor of International Law and International Organization, University of Geneva, Professor, Collège de France (2022-2023), member of the Institut de droit international,

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S. Exc. Mme Carolina Olarte-Bácares, ***doyenne de la faculté de droit de la Pontificia Universidad Javeriana, membre de la Cour permanente d'arbitrage,*** ambassadrice - ***désignée*** de la République de Colombie auprès du Royaume des Pays-Bas,

S. Exc. Mme Elizabeth Taylor Jay, ancienne ambassadrice de la Colombie auprès du Kenya et ancienne représentante permanente de la Colombie auprès du Programme des Nations Unies pour l'environnement et du Programme des Nations Unies pour les établissements humains,

comme coagentes ;

S. Exc. M. Álvaro Leyva Durán, ministre des affaires étrangères de la République de Colombie,

S. Exc. M. Everth Hawkins Sjogreen, gouverneur de San Andrés, Providencia et Santa Catalina, Colombie,

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M. W. Michael Reisman, professeur émérite de droit international à l'Université de Yale, titulaire de la chaire Myres S. McDougal, membre de l'Institut de droit international,

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Mr. Gershon Hasin, JSD, Visiting Lecturer in Law at Yale University,

Mr. Gabriel Cifuentes, PhD, adviser to the Minister for Foreign Affairs of the Republic of Colombia,

as Counsel;

Ms Jenny Bowie Wilches, First Secretary, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

Ms Viviana Andrea Medina Cruz, Second Secretary, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

Mr. Raúl Alfonso Simancas Gómez, Third Secretary, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

Mr. Oscar Casallas Méndez, Third Secretary, Group of Affairs before the International Court of Justice,

Mr. Carlos Colmenares Castro, Third Secretary, Group of Affairs before the International Court of Justice,

Ministry of Foreign Affairs of the Republic of Colombia;

Rear Admiral Ernesto Segovia Forero, Chief of Naval Operations,

CN Hermann León, Delegate of Colombia to the International Maritime Organization,

CN William Pedroza, National Navy of Colombia, Director of Maritime and Fluvial Interests Office,

Navy of the Republic of Colombia;

Mr. Lindsay Parson, Geologist, Director of Maritime Zone Solutions Ltd, United Kingdom, former member and Chair of the United Nations International Seabed Authority's Legal and Technical Commission,

Mr. Peter Croker, Geophysicist, Consultant at The M Horizon (UK) Ltd, former Chair of the United Nations Commission on the Limits of the Continental Shelf,

Mr. Walter R. Roest, Geophysicist, Director of Roest Consultant EIRL, France, member of the United Nations Commission on the Limits of the Continental Shelf,

Mr. Scott Edmonds, Cartographer, Director of International Mapping,

Mr. Thomas Frogh, Cartographer, International Mapping,

as Technical Advisers.

M. Eran Sthoeger, Esq., professeur adjoint de droit international à la Brooklyn Law School et à la Seton Hall Law School, membre du barreau de l'Etat de New York,M. Alvin Yap, avocat et *solicitor* à la Cour suprême de Singapour, cabinet Squire Patton Boggs, LLP (Singapour),

M. Gershon Hasin, JSD, chargé d'enseignement en droit invité à l'Université de Yale,

M. Gabriel Cifuentes, PhD, conseiller auprès du ministre des affaires étrangères de la République de Colombie,

comme conseils ;

Mme Jenny Bowie Wilches, première secrétaire, ambassade de la République de Colombie au Royaume des Pays-Bas,

Mme Viviana Andrea Medina Cruz, deuxième secrétaire, ambassade de la République de Colombie au Royaume des Pays-Bas,

M. Raúl Alfonso Simancas Gómez, troisième secrétaire, ambassade de la République de Colombie au Royaume des Pays-Bas,

M. Oscar Casallas Méndez, troisième secrétaire, groupe chargé des affaires portées devant la Cour internationale de Justice,

M. Carlos Colmenares Castro, troisième secrétaire, groupe chargé des affaires portées devant la Cour internationale de Justice,

ministère des affaires étrangères de la République de Colombie ;

Le contre-amiral Ernesto Segovia Forero, chef des opérations navales,

Le capitaine de vaisseau Hermann León, représentant de la Colombie auprès de l'Organisation maritime internationale,

Le capitaine de vaisseau William Pedroza, marine nationale de Colombie, chef de la direction chargée des intérêts maritimes et fluviaux,

marine de la République de Colombie ;

M. Lindsay Parson, géologue, directeur de Maritime Zone Solutions Ltd (Royaume-Uni), ancien membre et président de la commission technique et juridique de l'Autorité internationale des fonds marins des Nations Unies,

M. Peter Croker, géophysicien, consultant auprès de The M Horizon (UK) Ltd, ancien président de la Commission des limites du plateau continental des Nations Unies,

M. Walter R. Roest, géophysicien, directeur de Roest Consultant EIRL, France, membre de la Commission des limites du plateau continental des Nations Unies,

M. Scott Edmonds, cartographe, directeur de International Mapping,

M. Thomas Frogh, cartographe, International Mapping,

comme conseillers techniques.

The PRESIDENT: Please be seated. The sitting is open.

Before turning to the judicial business for this morning, it is necessary for me to say a few words about the composition of the Court.

Following the untimely death of Judge Antônio Augusto Cançado Trindade, who passed away on 29 May 2022, the United Nations General Assembly and Security Council, on 4 November 2022, elected Judge Leonardo Nemer Caldeira Brant to serve for the remainder of the late Judge Cançado Trindade's term, which would have expired on 5 February 2027.

We offer our sincere congratulations to our new colleague and take this opportunity to welcome him to the Court.

Article 20 of the Statute of the Court provides that "[e]very member of the Court shall, before taking up his [or her] duties, make a solemn declaration in open court that he [or she] will exercise his [or her] powers impartially and conscientiously". Article 4, paragraph 2, of the Rules of Court, states that the declaration in question "shall be made at the first public sitting at which the Member of the Court is present", and that such sitting shall be held as soon as practicable after the term of office begins. I shall now say a few words about Judge Brant. I shall then invite him to make his declaration.

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Judge Brant, who is of Brazilian nationality, studied law at the Federal University of Minas Gerais in Brazil, before obtaining his PhD in international law at the University of Paris Nanterre. Judge Brant also enjoyed a distinguished academic career in the field of international law spanning the best part of thirty years, both in Brazil and internationally. Prior to his election, he was Professor of Public International Law at the Federal University of Minas Gerais, a position he has held since 1994. From 2000 to 2021, he was Professor of Public International Law at the Pontifical Catholic University of Minas Gerais. He has also taught at various prestigious universities and academic institutions in Europe, as a visiting professor and lecturer. In 2005, Judge Brant founded the Brazilian International Law Centre, a research institute specialized in international law. In addition, he spent time in 2009 as a Senior Researcher at the Lauterpacht Centre for International Law at Cambridge

University. Judge Brant has published extensively in the fields of public international law, human rights and international criminal law. He has authored many books and articles in Portuguese, French and English. He is the President of the *Brazilian Yearbook of International Law*, which he founded in 2006, as well as the Director of the Brazilian Branch of the International Law Association.

In tandem with his illustrious academic career, Mr. Brant has extensive experience as a practitioner, having worked as a lawyer and partner at the Brazilian law firm Nemer and Guimarães Chambers for over twenty years. During his professional life as a practitioner, he also served as Advis***o***r of International Affairs of the Municipality of Belo Horizonte and as Legal Officer at the Department of Legal Matters in the Registry of this Court.

I shall now invite Judge Brant to make the solemn declaration prescribed by the Statute and I request all those present to rise. Judge Brant, you have the floor.

Judge BRANT:

> «Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

The PRESIDENT: Thank you, Judge Brant. Please be seated. The Court takes note of the solemn declaration made by Judge Brant and I declare him duly installed as a Member of the Court.

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The Court meets today and will meet in the coming days to hear the oral arguments of the Parties in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*. This morning, the Court will hear the first round of oral argument of the Republic of Nicaragua.

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In line with the approach adopted by the Court with respect to its public ***~~hearings~~ sittings***, the present hearing will take place in person. However, taking into account the current public health

situation in relation to the COVID-19 pandemic, a limited number of seats have been made available for the members of the diplomatic corps and guests, as well as for members of the public. In addition, all those present in the Great Hall of Justice will be required to wear face masks at all times, except when taking the floor.

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Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Nicaragua chose Mr. Leonid Skotnikov; Colombia first chose Mr. Charles Brower, who resigned on 5 June 2022, and subsequently Mr. Donald M. McRae.

I recall that Article 20 of the Statute provides that "[e]very Member of the Court shall, before taking up his [or her] duties, make a solemn declaration in open court that he [or she] will exercise his [or her] powers impartially and conscientiously". Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*. Mr. Skotnikov made his solemn declaration and was duly installed as a judge *ad hoc* in the present case on 5 October 2015, during the phase that was devoted to the preliminary objections raised by Colombia. Notwithstanding that Mr. McRae has served as a judge *ad hoc* in other cases before the Court, Article 8, paragraph 3, of the Rules of Court requires him to make a further solemn declaration in relation to the present case.

Before inviting Mr. McRae to make his solemn declaration, I shall first, in accordance with custom, say a few words about his career and qualifications.

Mr. McRae, of Canadian and New Zealand nationalities, is Professor Emeritus and former Dean of Common Law at the Faculty of Law, at the University of Ottawa. He has extensive experience as counsel in the context of international fisheries and boundary arbitrations, and has also appeared as counsel before this Court in proceedings involving the interpretation of a Judgment rendered in a case between Cambodia and Thailand. In the framework of the World Trade Organization, he has appeared as counsel before that organization's dispute settlement panels and Appellate Body and has also served as a member of several WTO panels. In addition, he has been a member and chair of various arbitral tribunals, including cases brought under the Convention on the

Settlement of Investment Disputes between States and Nationals of Other States, and Chapter 11 of the North American Free Trade Agreement. He currently chairs an arbitral tribunal convened pursuant to Annex VII of the United Nations Convention on the Law of the Sea. Mr. McRae is the former Editor-in-Chief of the *Canadian Yearbook of International Law* and has published widely on international law, including on law of the sea and international trade law. He is a member of the Institut de droit international, a member of the Royal Society of Canada, a Companion of the Order of Canada and an Officer of the New Zealand Order of Merit. He was a member of the International Law Commission from 2007 to 2016. Mr. McRae also served as judge *ad hoc* in the case concerning *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)* and in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*. He is currently sitting in the case concerning *Guatemala's Territorial, Insular and Maritime Claim (Guatemala/Belize)*.

I shall now invite Mr. McRae to make the solemn declaration prescribed by the Statute, and I request all those present to rise. Mr. McRae, please proceed.

Mr. McRAE:

> "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The PRESIDENT: Thank you, Mr. McRae. Please be seated. I take note of the solemn declaration made by Judge *ad hoc* McRae and I declare him duly installed as judge *ad hoc* in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*.

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I shall now recall the principal steps of the procedure in this case.

On 16 September 2013, the Government of Nicaragua filed in the Registry of the Court an Application instituting proceedings against Colombia with regard to a dispute concerning "the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond

the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia".

In its Application, Nicaragua sought to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948 and officially designated, according to Article LX thereof, as the "Pact of Bogotá".

By an Order dated 9 December 2013, the Court fixed 9 December 2014 and 9 December 2015 as the respective time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Colombia.

On 14 August 2014, Colombia raised preliminary objections to the jurisdiction of the Court and to the admissibility of the Application, with reference to Article 79 of the Rules of Court of 14 April 1978 as amended on 1 February 2001. By an Order of 19 September 2014, the Court, noting that the proceedings on the merits were suspended by virtue of Article 79, paragraph 5, of the Rules of Court as applicable at the time, fixed 19 January 2015 as the time-limit for the presentation by Nicaragua of a written statement of its observations and submissions on the preliminary objections raised by Colombia. Nicaragua filed its written statement within the prescribed time-limit.

In its Judgment of 17 March 2016, the Court found that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the First Request put forward by Nicaragua in its Application, asking the Court to determine "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012", in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, and that this request was admissible.

By an Order of 28 April 2016, the Court fixed 28 September 2016 and 28 September 2017, respectively, as the new time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Colombia. The pleadings were filed within the time-limits thus fixed. Along with its Memorial, Nicaragua also provided to the Court copies of its full submission in respect of the delineation of the continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf, to which I shall refer as the CLCS.

By an Order of 8 December 2017, the Court authorized the submission of a Reply by Nicaragua and a Rejoinder by Colombia, and fixed 9 July 2018 and 11 February 2019 as the respective time-limits for the filing of those pleadings. The Reply of Nicaragua and the Rejoinder of Colombia were filed within the time-limits thus fixed.

In an Order of 4 October 2022, the Court indicated that, in the circumstances of this case, before proceeding to any consideration of technical and scientific questions in relation to the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the baselines from which the breadth of the territorial sea of Nicaragua is measured, it was necessary to decide on certain questions of law, after hearing the Parties thereon. Accordingly, the Court decided that, at the forthcoming oral proceedings in the case, Nicaragua and Colombia shall present their arguments exclusively with regard to the following two questions:

— *First*: under customary international law, may a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea is measured extend within 200 nautical miles from the baselines of another State?

— *Second*: what are the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and, in this regard, do paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea reflect customary international law?

Thus, the current oral proceedings will be limited to arguments by the Parties on these two questions.

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Having ascertained the views of the Parties and in light of the scope of the oral proceedings that open today, the Court decided, pursuant to Article 53, paragraph 2, of its Rules, that copies of the pleadings and the documents annexed would not be made accessible to the public at this time.

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I would now like to welcome the delegations of the Parties. In particular, I recognize the presence here in the Great Hall of Justice of H.E. ***Mr.*** Álvaro Leyva Durán, Minister for Foreign

Affairs of Colombia, as well as the Agent of Nicaragua and the Agent of Colombia, each accompanied by members of their respective State's delegation.

In accordance with the arrangements for the organization of the proceedings which have been decided by the Court, the hearings will comprise a first and a second round of oral argument. The first round of oral argument will begin with the statement of Nicaragua today from 10 a.m. to 1 p.m. Tomorrow, Tuesday 6 December, Colombia will present its first round of oral argument, from 10 a.m. to 1 p.m. The second round of oral argument will begin on the afternoon of Wednesday 7 December and conclude on Friday 9 December. Each Party will have a maximum of one and a half hours to present its arguments.

In this first sitting, Nicaragua may, if required, avail itself of a short extension beyond 1 p.m., in view of the time taken up by the installation of a new Member of the Court and by my introductory remarks.

I shall now give the floor to the Agent of Nicaragua, H.E. Mr. Carlos José Argüello Gómez. You have the floor, Your Excellency.

Mr. ARGÜELLO GÓMEZ:

1. Madam President, Members of the Court, good morning. Our greetings also to the Colombian delegation and its distinguished Foreign Minister H.E. Mr. Alvaro Leyva Durán. We also extend a warm welcome to H.E. Judge Leonardo Brant and wish him all the best in his new role as he has been sworn in as a Member of the Court.

2. Madam President, Members of the Court, it is, as always, an honour to be before you, representing my country.

3. These hearings are being held pursuant to the Order of the Court of 4 October last which decided that in these oral proceedings the Parties should present their arguments exclusively with regard to two specific questions of law. This is the first time after the closure of the final written pleadings in a case, that oral proceedings are being held, not on the merits of the case as presented by the Parties, but limited to certain aspects of the case as decided by the Court.

4. Nicaragua presented its views to the Court on this issue after it first became aware of it, when it was informed by the Registrar of the Order, and thus no further comments are necessary.

BACKGROUND OF THE PROCEEDINGS

5. Madam President, in its final submissions made at the hearing of 1 May 2012 in the case concerning the *Territorial and Maritime Dispute*, Nicaragua requested the Court to draw a "boundary dividing by equal parts the overlapping entitlements to the continental shelf of both parties"[1]. Although it had declared the claim admissible, the Court considered that Nicaragua had "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"[2]. Consequently, it declared, in its Judgment of 19 November 2012, that it was not in a position to proceed as requested by Nicaragua[3], particularly as it had only submitted preliminary information to the CLCS, and that there was no need to examine other points of law[4]. These points of law are in fact the subject of these oral proceedings.

6. In its Judgment of 17 March 2016, the Court "clarified the content and scope of subparagraph 3 of the operative clause of the 2012 Judgment"[5], and confirmed that the rejection of the final submission made by Nicaragua was because it had failed to comply with 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"[6].

7. Nicaragua fulfilled this obligation by submitting to the CLCS, on 24 June 2013, the necessary "final" information. The Court took note of this in its 2016 Judgment and considered that the condition to which a final decision on the delimitation of the continental shelf between the two Parties was subject was satisfied[7].

8. Madam President, the two questions that the Court has ordered that the Parties address in this oral pleading are exclusively questions of law that could be answered without any reference to

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[1] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)* (hereinafter the "2012 Judgment"), p. 636, para. 17.

[2] 2012 Judgment, p. 669, para. 129.

[3] 2012 Judgment, p. 670, para. 131; see also p. 719, para. 251 (3).

[4] 2012 Judgment, p. 669, para. 130; see also p. 719, para. 251 (3).

[5] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)* (hereinafter the "2016 Judgment"), p. 132, para. 85.

[6] 2016 Judgment, p. 132, para. 84.

[7] 2016 Judgment, p. 132, paras. 84-88.

the actual case before the Court. But since this is a pleading that is part of a case pending before the Court, it is inevitable that some references be made to what the case is about in order to put the responses in context.

9. Some context is inevitable particularly because this case deals with a maritime delimitation, that is, it deals with an issue in which the Court has to reach an equitable result for which, as the Court has repeatedly emphasized, each case is different and the special circumstances are paramount[8].

10. This being said, Nicaragua would begin by recalling that these two questions have already been argued by the Parties in the course of the written pleadings and during the oral hearings on the preliminary objections posed by Colombia, including the answers given to a question posed by Judge Bennouna during the hearings devoted to the examination on the merits of the *Territorial and Maritime Dispute*[9]. The pertinence of these previous arguments will be dealt with in the course of these pleadings by Professors Lowe and Oude Elferink when addressing in detail the two questions posed by the Court.

POSITION OF COLOMBIA IN THE NICARAGUA-COLOMBIA CASES

11. As an introduction to these pleadings, I will make some preliminary points on the position that Colombia has traditionally maintained and has adapted several times to address the issues under discussion throughout the cases brought by Nicaragua against it in this Court (the *Nicaragua-Colombia* cases). The issue refers to the customary rules that apply to a continental shelf and its delimitation; that is, whether Articles 76 and 83 of UNCLOS reflect customary rules of international law.

12. Both Colombia and Nicaragua have unequivocally accepted that Articles 76 (1) and 83 of UNCLOS reflect rules of customary international law. The apparent divergence of the positions is with respect to paragraphs 2 to 6 of Article 76. But a careful reading of the position of Colombia in

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[8] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 290, para. 81. See also *Delimitation of the maritime boundary between Guinea and Guinea-Bissau, Decision of 14 February 1985*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XIX, p. 182, para. 89, and *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 77, para. 86.

[9] CR 2012/17, 4 May 2012, p. 37.

the three disputes brought against it by Nicaragua indicates that the position of Colombia has not been consistent.

13. Up to the year 2008, in its Counter-Memorial during the first *Territorial and Maritime Dispute*, Colombia recognized

> "that while the provisions of the 1982 Convention are not applicable as a source of conventional law per se, the relevant provisions of the Convention dealing with a coastal State's baselines and its entitlement to maritime areas, as well as the provisions of Articles 74 and 83 dealing with the delimitation of the exclusive economic zone and continental shelf respectively, reflect well established principles of customary international law"[10].

14. What are the provisions of the 1982 Convention that deal with entitlement to the maritime area of the continental shelf? Well, Article 76, paragraphs 1 to 6, are precisely these provisions.

15. This statement by Colombia cited above was made in 2008 at a time when Nicaragua's claim to an extended continental shelf had not been squarely made and Colombia without reservations, as cited above, accepted that the entitlement to maritime areas contained in UNCLOS III were rules of customary international law.

16. But Colombia has changed its position on the customary nature of the rules in Article 76 and at present has accepted that only paragraph 1 of Article 76 reflects customary international law[11]. This, in any case, corresponds with what the Court itself has already stated: that paragraph 1 is also a rule of customary international law[12].

17. But even this position has been clouded over because Colombia now seems to argue that only that part of paragraph 1 that refers to a 200-nautical-mile limit corresponds with customary law, and that the reference to natural prolongation in that paragraph is a treaty obligation applicable to parties to the Convention[13].

18. This is a singular position. The extension of a continental shelf has never been related to a distance criterion until the 1982 UNCLOS. There was a centuries-old discussion on the extent in distance of the territorial sea but when the claim to a continental shelf started to arise, there was never

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[10] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* Counter-Memorial of Colombia, 11 Nov. 2008 (hereinafter "CMC 2008"), p. 306, para. 4.

[11] CR 2012/16, p. 43, para. 39 (Bundy).

[12] 2012 Judgment, p. 666, para. 118.

[13] See for example Counter-Memorial of the Republic of Colombia (CMC), p. 13, para. 1.18.

any discussion of a distance limitation. Although the concept of States' rights to a continental shelf is older, the usual starting date is the so-called Truman Proclamation on which Professor Lowe will speak further. For the moment I would point out that the description of the shelf given in that Proclamation has no reference to distance and simply states that "the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it". Yes, "an extension of the land-mass", that is, the natural prolongation of the landmass as it later came to be called.

19. The position of Colombia accepting rights to an extended continental shelf beyond 200 nautical miles as part of customary international law ordained in paragraph 1 of Article 76 and then asserting that it does not accept that paragraphs 2 to 6 are also part of customary international law, is disruptive of the international system of the maritime zones. These paragraphs not accepted by Colombia are basically addressed to the question of the extended continental shelf and in particular the limits placed on rights over the continental shelf that are susceptible to claims by coastal States. Colombia does not indicate what would be the limits, if any, to coastal States' rights to a continental shelf if those limits mandated in paragraphs 2 to 6 of Article 76 are ignored.

20. If we do not apply the criteria of Article 76, paragraphs 1 to 6, for establishing an extended continental shelf, a criterion that is accepted by the 168 parties to the Convention and by other non-parties with extended shelves with the sole exception of Colombia, then what criteria are to be applied?

TRADITIONAL POSITION OF COLOMBIA

21. In the past, Colombia had its own idea on the extent of the continental shelf. It had nothing to do with distance but only with an extensive view of natural prolongation.

22. During a meeting of Caribbean States in the Dominican Republic on 7 June 1972, a document was signed by Colombia, Costa Rica, Mexico, Venezuela and Nicaragua among others on the territorial sea, patrimonial sea and continental shelf. This document, which was called the Santo Domingo Declaration, urged "the Latin American Delegations in the Committee on the Seabed and Ocean Floor of the United Nations [to] promote a study concerning the advisability and timing

for the establishment of precise outer limits of the continental shelf taking into account the outer limits of the continental rise"[14].

23. If there was any doubt that Colombia included the rise in its description of the continental shelf, this was dissipated at the meetings of the Sea-Bed Committee in 1973[15], when Colombia, Mexico and Venezuela submitted draft treaty articles that went further than the Santo Domingo Declaration[16] and in Article 13 defined the continental shelf as the "sea-bed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, to the outer limits of the continental rise bordering on the ocean basin or abyssal floor"[17].

24. Eventually the United Nations conference decided to limit the extent of the continental shelf with the Irish formula, which "proposed that the rise should be regarded as ending either where the thickness of sedimentary rocks became less than 1% of the shortest distance between such rocks and the foot of the continental slope, or at a distance between such rocks and the foot of the continental slope"[18].

25. This Irish proposal became part of paragraph 4 of Article 76 and limited the aspirations of States like Colombia that wanted the shelf to include the totality of the rise.

26. If States not bound by the 1982 Convention accept as a customary rule only paragraph 1 (as Colombia does in the present case), then they could ignore the limits imposed particularly in paragraphs 4 and 5, and potentially claim a more extensive continental shelf. Mr. Oxman refers to this as the "audacious contention" by Colombia "that its status as a non-party . . . confers upon it the exceptional benefit of a continental shelf that is not limited by the detailed substantive criteria and constraints set forth in art. 76"[19]. Judge Tuerk, the former Vice-President of ITLOS, highlights that "[i]t would hardly seem acceptable to States Parties if a State not a party to UNCLOS were to base

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[14] S. N. Nandan, S. Rosenne, N. R. Grandy, *United Nations Convention on the Law of the Sea 1982. A Commentary*, 1993, Vol. II (hereinafter the "Virginia Commentary"), p. 842, para. 76.3.

[15] Originally issued as document A/AC.138/SC.II/L.21 and now contained in the Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Vol. III, 1973, pp. 19-21.

[16] Virginia Commentary, Vol. II, p. 842, para. 76.4.

[17] Originally issued as document A/AC.138/SC.II/L.21 and now contained in the Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Vol. III, 1973, pp. 19-21.

[18] D. P. O'Connell, *The International Law of the Sea*, Vol. I, Oxford, 1982, p. 496.

[19] B. H. Oxman, "Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals" in: *The Oxford Handbook of The Law of the Sea*, Oxford, 2015, edited by Rothwell et al., p. 411, fn. 52.

its position exclusively on paragraph 1 of Article 76 and ignore the conditions and constraints imposed by the following paragraphs"[20].

27. Clearly, the traditional position of Colombia has not been to protect international law against what might be perceived as excessive claims to extended continental shelves, but rather to espouse these claims so long as they might result in its favour. In the present circumstances, Colombia attempts to move away from this position that it perceives not to favour its interests but more so those of Nicaragua.

28. What this present position of Colombia means is that if the Court were to find that paragraphs 2 to 6 are not customary law, then coastal States would have rights to the natural prolongation of their territory up to the outer edge of the continental margin without there being any customary rule limiting this right. This result would at the very least be disruptive of the legal order of the oceans and would be so perceived not only by the 168 presently parties to UNCLOS but also by the States not parties, with the exception of Colombia. This is clear from resolutions of the United Nations General Assembly that on several occasions has urged all States parties and non-parties to UNCLOS to harmonize their national legislation with the provisions of the Convention[21].

29. Furthermore, if Article 76, paragraph 1, reflects customary international law as accepted by both Parties and as decided by the Court, it must follow that paragraphs 3 to 4 have to be considered as customary rules because there would be no other way of applying paragraph 1 that points to the outer edge of the continental margin as the seaward limit of the continental shelf. Paragraphs 3 to 4 indicate how this margin is determined and without this, paragraph 1 "would be deprived of substance" as has been pointed out before[22].

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[20] H. Tuerk, "Questions Relating to the Continental Shelf Beyond 200 Nautical Miles: Delimitation, Delineation, and Revenue Sharing", *International Law Studies*, 2021, Vol. 97, p. 239.

[21] K. Baumert, "The Outer Limits of the Continental Shelf Under Customary International Law", *The American Journal of International Law (AJIL)*, Vol. 111, No. 4, Oct. 2017, p. 855, fn. 212; also available at https://www.jstor.org/stable/26568898?searchText=baumert+continental+shelf&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dbaumert%2Bcontinental%2Bshelf&ab_segments=0%2FSYC-6704_basic_search%2Fcontrol&refreqid=fastly-default%3A8a01e6ff94ddae8a08d42ddd97fd0b32#metadata_info_tab_contents (last accessed 4 Dec. 2022).

[22] X. Liao, *The Continental Shelf Delimitation Beyond 200 Nautical Miles: Towards a Common Approach to Maritime Boundary-Making*, Cambridge, 2022, p. 94.

30. Colombia is aware of this and had expressed agreement that you cannot have an effective paragraph 1 without paragraphs 2 to 6. In its preliminary objections filed in this case, that is before it was certain that the Court would find this case admissible, Colombia stated:

> "Outside 200 nautical miles, the potentiality of entitlement is recognized by UNCLOS Article 76 (1) up to the outer edge of the continental margin, provided the conditions set out in paragraphs 4, 5 and 6 of that article for determining such outer edge are satisfied."[23]

31. Consequently, Colombia also agrees that paragraph 1 cannot stand alone, that it needs at least paragraphs 4, 5 and 6 in order to be implemented. If Colombia agrees that this is correct, then how can it square that paragraph 1 reflects customary rules if at the same time it denies the customary nature of the other paragraphs that are indispensable for implementing paragraph 1? In any case, what seems clear is that both Parties agree that Article 76, paragraph 1, cannot have meaning or subsist without paragraphs 2 to 6.

PERSISTENT OBJECTOR

32. Madam President, Colombia has also claimed that paragraphs 2 to 6 of Article 76 do not apply to it because it has persistently objected against them. In its Counter-Memorial to this case, it asserts that it "is not a Party to UNCLOS and has persistently objected to the OCS [outer continental shelf] regime provided therein"[24]. This assertion was reiterated in its Rejoinder[25].

33. To begin with, outside of the pleadings in the Nicaragua-Colombia cases, and particularly in the present case, Colombia has never made any objection to paragraph 76 that was clearly expressed, made known to other States and maintained persistently as indicated in conclusion 15 of the International Law Commission (ILC) on the identification of customary international law[26].

34. Colombia has not even been a persistent objector in the cases brought against it by Nicaragua before this Court. If it ever made objections, they were so ambiguously affirmed during the cases with Nicaragua that a commentator writing in a respected journal has pointed to the

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[23] Preliminary Objections of the Republic of Colombia, p. 161, para. 7.7.

[24] CMC, p. 23, para. 1.37.

[25] Rejoinder of the Republic of Colombia (RC), p. 49, para. 2.45, fn. 69.

[26] International Law Commission, Draft Conclusions on the Identification of Customary International Law, 2018, available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf (last accessed 1 Dec. 2022).

inconsistencies of Colombia's position[27]. This could hardly be considered an objection to the rules of paragraphs 2 to 6 that have been clearly expressed and maintained persistently, when even expert commentators publicly point out these inconsistencies.

35. Although Colombia has not become a party to the 1982 Convention, it was an active participant during the almost ten years this Convention was being negotiated. It was a State signatory, and during that period it made no pertinent objections to the rules that were to become Article 76. After the Convention came into force in 1994, Colombia made no objection to Article 76. Furthermore, Colombia did not object to the first 65 requests made to the CLCS on the application of Article 76, that started with the first request made by the Russian Federation in December 2001 and had reached number 65 with that made by the Republic of Korea on 26 December 2012[28]. These submissions are communicated to all States and the countries claiming an extended shelf are making claims *erga omnes*, that is, with effect against all nations, and thus should be objected particularly by a pretended persistent objector. It was not until after Nicaragua presented its submissions to the CLCS on 24 June 2013 and filed its Application to this Court on 16 September 2013 that Colombia finally voiced these objections. To be exact, it was on 24 September 2013, a week after Nicaragua filed its case that Colombia filed objections to the CLCS.

EQUITABLE SOLUTION

36. Madam President, one final consideration with respect to the need imposed by customary and conventional law of finding an equitable solution to a delimitation in the special circumstances of this case.

37. Although the first question posed by the Court will be addressed directly by Professor Lowe, it would be useful to briefly go over what originated it; what is behind this question. The issue arose from the contention of Colombia that the exclusive economic zone (EEZ) and continental shelf generated by its islands and mainland coast, trump any possible claim by Nicaragua to an extended continental shelf.

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[27] K. A. Baumert, "Limits of the Continental Shelf Under Customary International Law", *AJIL*, Oct. 2017, Vol. 111, No. 4, p. 854.

[28] See CLCS official website available at https://www.un.org/depts/los/clcs_new/commission_submissions.htm (last accessed 1 Dec. 2022).

38. The position of Nicaragua is that continental shelves, as all maritime areas that overlap between States, have to be delimited in accordance with international law now enshrined in Article 83 of UNCLOS, a rule that is accepted by both Parties as a rule of customary international law.

39. During the first case, the *Territorial and Maritime Dispute*, the Court delimited the maritime areas of Nicaragua and Colombia up to the 200-nautical-mile limit of Nicaragua's EEZ. In this area, basically located within the 200-nautical-mile reach of Nicaragua's mainland, which was the object of the first maritime delimitation in the 2012 Judgment, the islands attributed to Colombia — those of San Andrés, Providencia and Santa Catalina, with a land area of approximately 40 sq km — were awarded over 80,000 sq km of maritime area, as can be seen on the screen. Even the insignificant feature of Quitasueño that, according to unverified information presented by Colombia, had an area of 1 square metre that emerged permanently above water — about the same width and a bit shorter than this lectern. This feature was awarded over three thousand square kilometres of one of the prime areas in dispute, prime area both in fishing and the possibility of hydrocarbon exploitation.

40. There was never any question that the maritime areas of Nicaragua within the 200-nautical-mile reach of its mainland including its continental shelf area could be immune to any delimitation with these relatively minuscule areas, or that they superseded all rights to maritime areas generated by these incidents appertaining to Colombia. Nicaragua's continental shelf and EEZ were delimited with those of Colombia and the equitable result found by the Court was the delimitation decided in its Judgment of 19 November 2012 and which we have on the screen. In its Judgment of 21 April 2022, in the second case concerning the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, the Court found that Nicaragua's rights even within the 200-nautical-mile area were not immune to a declaration by Colombia of a contiguous zone around its small, uninhabitable islands.

41. In the present case, Nicaragua is requesting the continuation of the delimitation of Nicaragua's and Colombia's continental shelves. Colombia, for its part, claims that there are no areas subject to delimitations since the EEZ and continental shelf of its islands and mainland coast predominate over any claim by Nicaragua to a continental shelf beyond 200 nautical miles.

42. On the screen we have Figure 4.4 of the Counter-Memorial of Colombia. In it is portrayed the EEZ and continental shelf generated by its uninhabited rocks of Bajo Nuevo, Serranilla, Serrana and Roncador. In passing, it should be noted that the entitlement to maritime areas generated by some of these features has already been limited by the Court or by Colombia itself in its agreement with Jamaica. In spite of this, Colombia claims to block Nicaragua's rights to its continental shelf with the maritime areas supposedly generated by these incidents. If this claim were successful, Colombia would more than double the already substantial amount of maritime areas attributed by the Court to the small, inhabited islands of San Andrés, Providencia and Santa Catalina. This can be clearly appreciated in the figure from Colombia's Counter-Memorial on the screen.

43. What the Court has now to decide is if it would be an equitable result to a delimitation of the continental shelf of the Parties if the 40 sq km of the small, scattered maritime incidents of Colombia seen in Figure 4.4 obliterate and supersede any claim by Nicaragua to its continental shelf generated by its mainland territory, which on the relevant Caribbean side is over one thousand times larger than all these Colombian features.

44. We can appreciate in Figure 4.4 of the Counter-Memorial of Colombia what the end result of the *Nicaragua* v. *Colombia* cases would be if these small islands and uninhabitable cays were to block Nicaragua's claim to its continental shelf. The result is evident on the screen without recourse to technical measurements: these very minor features would have practically an equal maritime area than that generated by the whole coastline of Nicaragua.

45. Madam President, Members of the Court, this ends my presentation. Thank you for your kind attention. May I ask you, Madam President, to call Professor Lowe to the podium.

The PRESIDENT: I thank the Agent of Nicaragua for his statement. I now invite Professor Vaughan Lowe to take the floor. You have the floor, Professor.

Mr. LOWE:

A STATE'S ENTITLEMENT TO A CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES MAY EXTEND WITHIN 200 NAUTICAL MILES FROM THE BASELINES OF ANOTHER STATE

1. Madam President, Members of the Court: it is a privilege to appear before the Court and an honour to have been entrusted with the presentation of this part of the submissions of the Republic of Nicaragua.

2. As you recall, Madam President, the Court ordered that in this oral hearing, the Parties shall present their arguments exclusively with regard to two closely related questions. The first asks whether one State's entitlement to a continental shelf beyond 200 nautical miles can extend within 200 nautical miles of the baselines of another State; and the second asks how the limit of the continental shelf beyond 200 nautical miles is determined. The texts of these questions are in your judges' folders at tab VL-1.

3. Both of the questions are expressly framed in terms of customary international law. As our Agent has noted, Nicaragua has already made detailed submissions in writing on these matters in its Memorial and its Reply in this case[29], and in Nicaragua's written reply[30] to the question put by Judge Bennouna on 4 May 2012 in the case concerning the *Territorial and Maritime Dispute*, and also in Nicaragua's comments dated 18 May 2012 on Colombia's reply to that question. I will not repeat those submissions here, and we are not entirely sure what we can add to them; but Nicaragua stands by those submissions and respectfully refers the Court to them.

4. The Court indicated that it did not wish to have further written pleadings on these two questions and our understanding is that the Court does not wish to have further detailed analyses of State practice and doctrine, but wishes the Parties to bring out the key elements of their respective cases limited to these purely legal questions. And in that spirit, we will refrain in this hearing from the presentation of detailed catalogues of State practice and doctrine, and will focus on issues of principle.

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[29] Memorial of the Republic of Nicaragua (MN), Chap. 2; Reply of the Republic of Nicaragua (RN), Chaps. 3 and 5.

[30] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Written reply of the Republic of Nicaragua to the question put by Judge Bennouna at the public sitting held on the afternoon of 4 May 2012.

5. I shall address the first of the questions. Professor Oude Elferink will address the second question on the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles.

6. UNCLOS Article 76 is a bridge between the two questions. It defines what the continental shelf *is*, and how its extent — subject to delimitation — is to be determined. Professor Oude Elferink and I will both refer to Article 76 in general, and particularly to Article 76, paragraph 1; and he will also address the customary law status of paragraphs 2 to 6 of Article 76.

7. And that specificity is significant. It reflects the fact that both Parties accept that Article 76, paragraph 1, forms part of customary law[31], as the Court itself has indicated[32], while the status of the other paragraphs of Article 76 remains in dispute between the Parties[33].

8. So, let me turn to the question whether under customary international law a State's entitlement to a continental shelf beyond 200 nautical miles from its baselines may extend within 200 nautical miles of another State.

9. Allow me to make one preliminary point. Colombia's written submissions seem designed to argue in every way possible against a position that Nicaragua does not in fact adopt. Colombia seems to believe that Nicaragua's position is that wherever the natural prolongation of one State's territory under the sea — its continental shelf — extends as matter of physical fact within 200 nautical miles of another State, the Court should necessarily set the boundary dividing the continental shelf between them along the median line between the furthest reach of that natural, physical shelf and the 200-nautical-mile limit of the other State[34].

10. Colombia says that, in Nicaragua's view, where there are two States 401 nautical miles apart, State A having a 350-nautical-mile "shelf" — it means a 350-nautical-mile natural prolongation or continental margin — and State B having a 25-nautical-mile natural "shelf", the delimitation *would be* the median line between the edge of State A's 350-nautical-mile shelf and State B's 200-nautical-mile limit[35].

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[31] 2012 Judgment, p. 666, paras. 114-117. See also RC, paras. 2.27-2.28

[32] *Ibid.*, p. 666, para. 118.

[33] See CMC, paras. 2.9-2.28; RC, paras. 2.24-2.29.

[34] RC, para. 3.19 and Fig. CR 3.2.

[35] RC, para. 3.19 and Fig. CR 3.2.

11. But that is not correct. All that Nicaragua is saying is that where there is such an overlap, the Court, or the two States, must proceed to a delimitation in accordance with the principles of international law applicable to the delimitation of overlapping maritime claims, i.e. the delimitation must produce an equitable solution. As is firmly established in the jurisprudence of the Court, the drawing of the median line is only the first step in the process. Only if the Court considered the median line to be an "equitable solution" would that median line stand.

12. Nicaragua has tried to make this clear. It has said that

> "the delimitation of overlapping continental shelf claims, whether based on distance or geological or gradient criteria under Article 76, are to be settled on a case-by-case basis in order to achieve an equitable solution in accordance with UNCLOS Article 83. The point is that stopping at or short of the 200 NM limit of another State does not necessarily secure an equitable solution in every case, so that it can be applied mechanically without regard to the specific circumstances in each case"[36].

13. Nicaragua considers that this is a case about the equitable delimitation of the continental shelf, and that the Court's established methodology for such delimitation implies that the starting-point must be a median line between Colombia's mainland 200-nautical-mile continental shelf and the outer limits of Nicaragua's continental shelf. Then, at the second stage of the delimitation, all special circumstances must be taken into consideration. This includes the existence of the tiny cays and islets before ascertaining the equitable result of the process.

14. Colombia's position is that this matter is not a question for the Court's judgment as to what is an equitable solution and that the Court must automatically rule that rights over any area of overlapping continental margin within 200 nautical miles of Colombia's baselines automatically belong exclusively to Colombia.

15. The dispute, within the context of the two questions posed by the Court for this hearing, is essentially over the question whether or not the delimitation question in this case should be approached by the steps laid down by the Court in other maritime delimitation cases, as Nicaragua says, or whether that approach is inapplicable because of one special characteristic of the overlapping continental shelf claims in this case, as Colombia says.

16. That special characteristic — that special circumstance — is the overlap between one entitlement to a continental shelf based on the "natural prolongation" principle, referring to the

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[36] RN, para. 5.57, emphasis omitted.

physical, geomorphological fact of the extension of a coastal State's land territory under the sea, and an entitlement based on the rights of a State over the sea-bed within 200 nautical miles of its coasts, in accordance with the definition of the continental shelf articulated in Article 76 (1) of the 1982 Law of the Sea Convention.

17. Nicaragua says that the basis of the continental shelf claim makes no difference; Colombia says that claims based on the 200-nautical-mile rule always extinguish claims based on natural prolongation so that there is, *pro tanto*, no need to delimit the claims.

18. With this in mind, let me address more directly your question whether, under customary international law, a State's entitlement to a continental shelf beyond 200 nautical miles from its baselines may extend within 200 nautical miles of another State.

19. Nicaragua submits that the answer to this question is unequivocally, yes. There are only two ways in which it could be otherwise. Either *(a)* the legal concept of the continental shelf is itself inherently limited, so that *a priori* the continental shelf of one State could not extend within 200 nautical miles of another State, or *(b)* the legal rights of other States over the seas out to 200 nautical miles from their baselines are such as to automatically extinguish what would otherwise be, prima facie, a neighbouring State's overlapping entitlement to the continental shelf.

20. Nicaragua submits that neither is correct.

A. No inherent limit on the extent of the continental shelf

21. As to the first, the continental shelf as a legal concept has from its first inception *not* been limited by *any* criterion relating to distance from what I shall call "the coastal State" — the State whose continental shelf entitlement is in question — or from any other State. (The other States are themselves, of course, also coastal States; but I hope that the terminology is clear.) A distance criterion is, to use this Court's terminology, not "an inescapable *a priori* accompaniment of basic continental shelf doctrine"[37].

22. The absence of any inherent distance limitation on the continental shelf is something that we will surely all remember from the days of revising for our undergraduate examinations in

[37] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 32, para. 46.

international law. The continental shelf has its origin in the 1945 Truman Proclamation, which is in your judges' folder at tab VL-4. The Proclamation said that

> "the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles."[38]

23. The Proclamation used the term "continental shelf" in its ordinary sense, without offering a definition of it. The term had been used by international lawyers at least as far back as the 1920s, as was noted by Professor O'Connell in chapter 13 of his 1982 monograph *The International Law of the Sea*[39].

24. The general understanding was that, in the words of a member of the League of Nations Codification Committee working on the Law of the Sea, at

> "a certain distance from the coast — a distance which varied to some extent — the bottom of the sea is marked by a sort of great step, almost always abrupt, which divides it into two quite distinct regions. The region extending from this step to the coast-line has been called the 'continental shelf.' The other, much vaster which extends beyond this step, is the abysmal region..."[40]

25. The Truman Proclamation itself explicitly recognized that "the continental shelf" may extend "to the shores of another State". Indeed, this happens all over the world, as the geomorphology of the sea-bed contiguous to the United States shows. This Court has, of course, been familiar with this since it heard the *North Sea Continental Shelf* cases, in the 1960s, concerning the continental shelf that extends to the coasts of Denmark, Germany, the Netherlands, Belgium, France, the United Kingdom and Ireland.

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[38] Proclamation 2667 – Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, and Executive Order 9633, 28 September 1945, 10 Fed. Reg. 12,305 (1945), available at https://www.gc.noaa.gov/documents/gcil_proc_2667.pdf.

[39] D. P. O'Connell, *The International Law of the Sea*, Vol. I (1982), pp. 467-475. Cf., Ø. Jensen, *The Commission on the Limits of the Continental shelf* (2014), pp. 8-13.

[40] Comment by M. Barbosa de Magalhaes, "Questionnaire No. 2: Territorial Waters", *The American Journal of International Law*, Vol. 20, No. 3 Supplement, July 1926, p. 126, available at https://doi.org/10.2307/2213207.

26. The next steps in the development of the continental shelf as a legal concept are also well-known. Other States followed the lead of the United States in asserting rights over the continental shelf. Those early claims established no limit based on distance from the coast[41].

27. The International Law Commission, studying the question during the 1950s, worked on the basis that coastal States should be recognized as having exclusive rights over the resources of the sea-bed adjacent to their coasts in so far as those resources can be exploited. The whole of that sea-bed was to appertain to the adjacent coastal State.

28. Despite some suggestions that it should do so[42], the ILC at no stage proposed the adoption of any limit based upon distance from the coast. The continental shelf was not a fixed zone like the territorial sea or the contiguous zone.

29. In line with the views of many States[43], the ILC did, however, propose a criterion based upon *depth*, which was adopted in the definition in Article 1 of the 1958 Convention on the Continental shelf:

> "*Article 1*
>
> For the purpose of these articles, the term 'continental shelf' is used as referring *(a)* to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; *(b)* to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."[44]

30. The ILC's Commentary on the draft Articles on the continental shelf made it very clear that the whole of the exploitable area was included, notwithstanding the existence of some areas within it deeper than 200 metres[45].

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[41] D. N. Hutchinson, "The Seaward Limit to Continental Shelf Jurisdiction in Customary International Law", *British Yearbook of International Law*, Vol. 56, 1985, pp. 115-117, available at https://doi.org/10.1093/bybil/56.1.111.

[42] See the "Comments by Governments on the draft articles on the continental shelf and related subjects prepared by the International Law Commission at its third session in 1951", *Yearbook of the International Law Commission (YILC)* 1953, Vol. II, pp. 241-269: Brazil, p. 242; Norway, p. 261; Yugoslavia, p. 269, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1953_v2.pdf.

[43] See the "Comments by Governments on the draft articles on the continental shelf and related subjects prepared by the International Law Commission at its third session in 1951", *YILC*, 1953, Vol. II, pp. 241-269, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1953_v2.pdf. See also *United Nations Legislative Series*, "Laws and Regulations on the Regime of the Territorial Sea", UN doc ST/LEG/SER.B/6, p. 4 (Chile), p. 6 (Costa Rica), p. 11 (Dominican Republic), p. 13 (Ecuador), p. 22 (Honduras), p. 39 (Peru), p. 49 (UK-Falkland Islands) and p. 515 (Iceland).

[44] Available at https://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf.

[45] ILC, Report of the International Law Commission on the Work of its Eighth Session, 23 April-4 July 1956, Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159), *YILC*, 1956, Vol. II, pp. 295-297, available at https://legal.un.org/ilc/documentation/english/reports/a_cn4_104.pdf.

31. It also expressly recognized that there are cases where "*the same continental shelf* is adjacent to the territories of two or more States whose coasts are opposite each other"[46]. That provision eventually appeared as Article 6, paragraph 1, of the 1958 Convention: "[w]here *the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other*, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them" (emphasis added). And, of course, the Court itself accepted this in the *Tunisia/Libya* case, where it said that: "[t]he submarine area of the Pelagian Block which constitutes the natural prolongation of Libya substantially coincides with an area which constitutes the natural submarine extension of Tunisia"[47].

32. This Court engaged in an extensive consideration of these fundamental issues in its 1969 Judgment in the *North Sea Continental shelf* cases[48]. In one of its most widely-known passages, the Court referred to "the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it"[49]. The Court said that this rule is

> "that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is 'exclusive' in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent."[50]

33. That rule, which had already been enshrined in the 1958 Geneva Convention on the Continental Shelf, has not been questioned since.

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[46] ILC, Report of the International Law Commission on the Work of its Eighth Session, 23 April-4 July 1956, Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159), *YILC*, 1956, Vol. II,, p. 300, Article 72, available at https://legal.un.org/ilc/documentation/english/reports/a_cn4_104.pdf; emphasis added.

[47] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 58, para. 67, and cf. paras. 68, 133 (2).

[48] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969.*

[49] *Ibid.*, p. 22, para. 19.

[50] *Ibid.*

34. Thus, by 1969 it was firmly established, and recognized by this Court, that each coastal State has sovereign rights over the exploitable natural resources on the sea-bed that constitutes a natural prolongation of its land territory into and under the sea — its continental shelf, with no "distance" criterion to be applied — and that these rights exist *ipso facto* and *ab initio*.

35. I emphasize that latter point. It is those very same continental shelf rights which the Court in 1969 recognized *already* appertained to the coastal State as a matter of law, that are now to be delimited on the sea-bed that lies between Nicaragua and Colombia. Nicaragua emphatically does *not* base its claim on some new legal entitlement deriving from UNCLOS. Natural prolongation is not in any way a new concept introduced by UNCLOS in 1982: it was from the very outset the very essence of the legal concept of the continental shelf.

36. It was also clear in 1958, and recognized by the Court, that the "same continental shelf" may extend far from the coastal State and close to the coastline of another State. You have seen that recognized in Article 6 of the 1958 Continental Shelf Convention; and it was addressed by the Court in 1969. The Court said:

> "whenever a given submarine area does not constitute a natural — or the most natural — extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State; — or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it"[51].

37. Natural prolongation is not erased by considerations of proximity.

38. That remains the position at present. No "distance" criterion has been introduced to limit the scope of continental shelf claims, except in the very detailed provisions of UNCLOS concerning the technical determination of where the outer edge of the continental margin actually lies. Those provisions, in UNCLOS Article 76, paragraphs 4 to 7, are not material here; but you will note that the criteria in those paragraphs are expressed in terms of practical approximations for the location of the outer edge of the continental margin — it is pure "natural prolongation". Only in the case of Article 76, paragraph 5, is a fixed limit introduced: in cases where the continental margin extends beyond 200 nautical miles *and* extends more than 100 nautical miles from the 2,500-metre isobath,

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[51] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 31, para. 43.

the continental margin may nonetheless not extend more than 350 nautical miles from the territorial sea baseline. But this is not a basis of *entitlement* to the continental shelf, based on distance: it is a *limitation* accepted by UNCLOS States parties on the extent of the continental margin appertaining to a State. That limitation ensures that coastal States cannot extend continental shelf claims endlessly into the international sea-bed area, which is the "common heritage of mankind".

39. The natural prolongation criterion has now been supplemented by the two-legged definition in UNCLOS Article 76, paragraph 1, which both Parties, and the Court, have accepted as customary law. It supplements natural prolongation with an additional criterion based on distance.

> "The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout *the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines* from which the breadth of the territorial sea is measured *where the outer edge of the continental margin does not extend up to that distance*." (Emphasis added.)

40. At the beginning, Article 76 (1) explicitly preserves the "natural prolongation" criterion. That remains an inescapable *a priori* element of basic continental shelf doctrine. But Article 76 (1) then proceeds also to ascribe to coastal States an entitlement to continental shelf rights beyond that which flows automatically from natural prolongation, in those circumstances, and only in those circumstances, where the natural prolongation ends before the 200-nautical-mile limit. The continental shelf is now defined as "the natural prolongation of [the] land territory to the outer edge of the continental margin" (which, for convenience, I will refer to as the "natural shelf"), *plus*, in those circumstances where "the outer edge of the continental margin does not extend up to" 200 nautical miles from the baselines, the sea-bed up to 200 nautical miles (that I shall refer to, for convenience, as the "200-nautical-mile rule"). The definition is plain and unambiguous.

41. Colombia says "there are two distinct sources of title for the continental shelf: one within 200 nautical miles and one beyond"[52]. It says that within 200 nautical miles the source of title to continental shelf rights is "the customary and conventional EEZ regime", but beyond 200 nautical miles it is "geological and geomorphological features".

42. But that is not correct. The reference in Article 76, paragraph 1, to natural prolongation plainly includes both that part of the natural prolongation that lies within 200 nautical miles and also

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[52] RC, paras. 3.3, 3.18, 3.37.

that part that lies beyond 200 nautical miles. Natural prolongation is the source of title for both parts. When asserting its rights over the natural shelf within 200 nautical miles, a State whose continental margin extends beyond 200 nautical miles has no need to refer to the "distance" criterion in the latter part of the definition. The 200-nautical-mile "distance" criterion is applicable only in circumstances "where the outer edge of the continental margin does *not* extend up to that distance".

43. If there are two distinct sources of title, the distinction is between the natural prolongation of the coastal State on the one hand and, on the other hand, those areas of the sea-bed that are not part of the natural prolongation but are within 200 nautical miles of the baselines.

44. The result is that at any given location, one or more States may have — not *claim*, but *have*, as a matter of law, *ipso facto* — a continental shelf claim based on distance, and in addition one or more States may have an entitlement based on natural prolongation. That is how overlapping claims arise.

45. In the present case the contested area does not include any locations within 200 nautical miles of Nicaragua. The simple question is, therefore, whether the sea-bed in the contested area is or is not a part of the "natural prolongation of [Nicaragua's] land territory into and under the sea" — part of its natural shelf — and whether it is or is not either part of Colombia's natural prolongation or within 200 nautical miles of Colombia. If either of those things is true, the area will need to be delimited.

46. Determination of the extent of a continental margin is a technical exercise. As the Commission on the Limits of the Continental Shelf put it, "[t]he 'natural prolongation of [the] land territory' is based on the physical extent of the continental margin to its 'outer edge' (article 76, paragraph 1) i.e. 'the submerged prolongation of the land mass . . .' (article 76, paragraph 3)"[53].

47. The Commission went on to explain that the determination of the extent of the continental margin is a matter of basic scientific fact. It will require the scientific and technical analysis of maps of the sea-bed depicting its bathymetry, geomorphology, geology and associated data.

[53] Summary of Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission Made by the United Kingdom of Great Britain and Northern Ireland in respect of Ascension Island on 9 May 2008, http://www.un.org/depts/los/clcs_new/submissions_files/submission_gbr.htm, para. 22.

48. The Court has, however, indicated that it will proceed to any consideration of those questions only after it has determined the two legal questions on which the Parties are now addressing it.

49. Colombia now advances a new argument to circumvent these points. It attempts to draw a distinction between the "continental shelf" and the "outer continental shelf" — the OCS — which it presents as an entirely new legal régime that is not accepted as part of customary international law[54].

50. There are two problems with that claim. First, it is inconsistent with the fact that Colombia itself asserts that all of the sea-bed between Colombia and Nicaragua belongs either to Colombia or Nicaragua. The second problem is that there is no evidence to support that interpretation of UNCLOS or of legal history, and that it would require Colombia to resile from its acceptance of the definition of the continental shelf in Article 76, paragraph 1.

51. Certainly, for UNCLOS parties the continental shelf beyond 200 nautical miles is coupled with an ancillary obligation to make payments or contributions to an UNCLOS fund in respect of the exploitation of non-living resources of the continental shelf beyond 200 nautical miles from their baselines. Some may characterize that payment provision as a price paid by coastal States with extensive continental shelves for the recognition of their rights over the "natural prolongation". Others may characterize it differently. It was certainly a part of the great UNCLOS "package-deal", which will be discussed by Professor Oude Elferink. But however individual members of the scores of delegations to UNCLOS may have viewed it, there is certainly no evidence at all on the face of UNCLOS that the OCS is a new legal régime — a new legal zone distinct from the continental shelf as the "natural prolongation" of a coastal State beneath the sea. Nor does Colombia point to any evidence that the "natural prolongation" principle was at any time understood to stop at 200 nautical miles from the coast.

52. As we have pointed out in Chapters 2 and 5 of our Reply, and as courts and arbitral tribunals have consistently held, there is only *one* continental shelf extending throughout the continental margin within and beyond 200 nautical miles from the baselines; and the same legal

[54] RC, Chap. 2, especially para. 2.45.

régime applies to all of it. That point was made in the *Barbados* v. *Trinidad* award in 2006[55]; it was upheld by ITLOS in *Bangladesh/Myanmar* in 2012[56], upheld again in the *Bay of Bengal* award in 2014[57] and by the ITLOS Chamber in *Ghana/Côte d'Ivoire* in 2017[58].

53. If this Court had been asked, when it decided on maritime boundaries in 1969, or 1985, or 1993, or 2009, or at any other time, what is the extent of the continental shelf rights of Nicaragua or Colombia, would it really have said anything other than that those rights extend throughout the natural prolongation of the land territory of Nicaragua or Colombia or at least out to 200 nautical miles from the baselines? We submit not.

54. To sum up this first point, there is no sign whatever of the continental shelf ever having had any inherent limitation as a legal concept which precludes a single continental shelf extending to the coasts of more than one State and requiring delimitation. As a matter of law, the continental shelf that extends up to the limits of Nicaragua's territorial sea is the same continental shelf that extends up towards the coasts of Colombia's mainland and its islands, within 200 nautical miles of Colombia's baselines. It is the overlap between that continental shelf and Colombia's continental shelf that the Court is asked to delimit.

Madam President, I have about 15 minutes to go with a second point. I can continue or I can break now if you would prefer to do that.

The PRESIDENT: Please continue to the end of your speech, Professor Lowe.

Mr. LOWE: Thank you, Madam President.

B. The EEZ does not automatically extinguish continental shelf rights

55. So I turn to the second point. On the basis that the continental margin does as a matter of fact extend from the coast of Nicaragua to within 200 nautical miles of Colombia's island and/or

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[55] *Barbados* v. *Trinidad and Tobago*, PCA Case No. 2004-02, Award, 11 Apr. 2006, para. 213; *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, PCA Case No. 2010-16, Award, 7 July 2014, para. 77.

[56] *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Case No. 16, Judgment, 14 Mar. 2012, paras. 361-362.

[57] *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, PCA Case No. 2010-16, Award, 7 July 2014, para. 77.

[58] *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, ITLOS Case No. 23, Judgment, 23 Sept. 2017, paras. 490, 526.

mainland coasts, the only other possibility for sustaining Colombia's position is that the legal entitlements that flow *ipso facto* and *ab initio* from that fact are in some way automatically extinguished at any point that lies more than 200 nautical miles from Nicaragua but within 200 nautical miles of Colombia's baselines.

56. Colombia argues that there is a legal principle that a continental shelf of up to 200 nautical miles always prevails over an entitlement based on natural prolongation, or that an EEZ claim, which entails sovereign rights over sea-bed resources, has that effect[59].

57. I note in passing that Colombia repeatedly refers to its entitlement to "an *ipso jure* EEZ"[60], as if that establishes some kind of juridical parity with the *ipso facto* and *ab initio* entitlement to a continental shelf. It is not clear how an "*ipso jure* EEZ" differs from any other kind of EEZ; but Colombia's point is in any event misconceived. As this Court declared, a continental shelf *automatically* appertains to a coastal State and exclusive rights over it do not depend upon any declaration or exercise of those rights. That is not the case with an EEZ. There is no rule in customary international law, or in UNCLOS, that makes an EEZ an *ipso facto* and *ab initio* appurtenance of every coastal State. If a coastal State does not declare an EEZ, it does not have one. Period.

58. As I have observed, Nicaragua's position is that wherever there are overlapping continental shelf entitlements, delimitation is necessary. That is true whether the entitlements arise by virtue of the natural prolongation of the land territory or because the area in question is deemed to be part of the continental shelf by the 200-nautical-mile rule. Both are straightforward applications of the undisputed definition of the continental shelf reflected in UNCLOS Article 76 (1).

59. In cases such as the present, where there is an overlap between a natural shelf and a 200-nautical-mile zone, States have in general preferred to have a single maritime boundary rather than have any part of the continental shelf of one State lie under the 200-nautical-mile zone of the other. There are exceptions, such as the maritime boundaries between Australia and Indonesia, and in the Bay of Bengal: but the single maritime boundary is normal. It is neater that way. But the question is not whether it is neater, but whether it is *mandated* by international law in every case or

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[59] See e.g. RC, para. 3.6.

[60] See e.g. CMC, paras 1.12, 1.14, 1.18, 1.20, 1.27, 1.30, 1.37, 1.40, 1.41, 2.5, 2.7, 2.12, 2.49, Chaps. 3 and 4 *passim*, 5.26, 5.29, 5.30, 5.33, 5.34; RC, para. 1.2.

whether, as Nicaragua says, the boundary is in each case to be decided on the basis of the general obligation to ensure that delimitation achieves an "equitable solution".

60. That is the answer to Colombia's argument based on its assertion that "in general State practice, States have refrained from according natural prolongation any consideration in respect of title in respect of seabed areas less than 200 NM from the coast are concerned"[61]. Even assuming for the sake of argument that the assertion is correct, it misses the point. The question is not whether States have generally refrained from doing it: it is whether they did so in the belief that international law gave them no option but to do so. Only that belief could supply the *opinio juris* necessary as the basis of a rule that excludes the Court's right to apply the normal "equitable solution" approach in this case. There is no evidence that any such rule exists; and the judgment of the ITLOS in the *Bangladesh/Myanmar* case very clearly indicates that there is no such rule[62].

61. Colombia's elaborate arguments that the EEZ provisions, in a treaty to which Colombia is not a party, were intended to extinguish continental shelf rights beyond 200 nautical miles do not get off the ground. Whatever may have been said by individual delegates, and however the UNCLOS package deal was stitched up in the tea-rooms of the United Nations, if you want to find out what UNCLOS did, you have to read its text. That is what the parties signed up to and ratified. That is the deal by which they are bound.

62. As my colleague will demonstrate, despite the fact that UNCLOS *does* provide that the "continental margin" principle exhausts its effect after the margin reaches the limits set in Article 76 (5) and (6) — tied to the 2,500-metre-isobath and a 350-nautical-mile limit — regardless of any other State's interests, and despite the fact that the United Nations Conference even added an Annex to the Final Act to deal specifically with the geomorphology and geology of the southern part of the Bay of Bengal, it contains no provision whatever that could possibly be interpreted as automatically extinguishing any continental shelf entitlements arising in respect of areas of the natural shelf within 200 nautical miles of another State.

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[61] RC, para. 3.36.

[62] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, pp. 72-78, paras 463-476.

63. It is not credible to suggest that UNCLOS somehow contains an implicit provision to this effect; and it is not credible to suggest that there is such an "extinguishing" principle established under customary international law that was omitted, whether by design or neglect, from the closely negotiated, almost excruciatingly detailed text of UNCLOS that defines the continental shelf.

64. If such a principle existed, one would expect it to have left some footprints on the 1982 Convention. But there is nothing.

65. The drafting of the UNCLOS provisions on the continental shelf are summarized in texts such as the Virginia Commentary on the Convention[63], and the Proelss Commentary[64]. In short, a compromise formula was adopted that gives every coastal State continental shelf rights over the seabed out to 200 nautical miles regardless of geology and geomorphology, but allowed States with continental margins exceeding 200 nautical miles to retain rights over the margin beyond 200 nautical miles, subject to certain maximum permissible limits set by criteria combining the 350-nautical-mile limit and the 2,500 metre isobath.

66. Those outer limits are not relevant here. What is relevant is the complete and total absence of any suggestion in the Convention that a State's continental shelf rights over its margin cease at points within 200 nautical miles of another State. There is no sign of any such principle in UNCLOS.

67. Even less, of course, is there any evidence of any such supposed rule crystallizing or morphing into a rule of customary international law. Yes: of course, most maritime boundaries are single boundaries for the EEZ and the continental shelf. There are exceptions, as Colombia admits, but a single maritime boundary is generally a convenient way to settle disputes. But for all Colombia's insistence on methodological rigour in handling State practice and *opinio juris*, it is surprisingly ready to conflate what is generally a convenient practice with what is a mandatory rule of law. Nicaragua submits that there is no such rule of law.

C. The position in this case

68. Where does this leave Nicaragua's claim? On the basis that the natural prolongation of Nicaragua's land territory does extend within 200 nautical miles of the coast of Colombia's mainland

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[63] Virginia Commentary, pp. 825-890.

[64] A. Proelss (ed.), *United Nations Convention on the Law of the Sea. A Commentar*y, 2017, pp. 587-604.

or of its islands that qualify for a continental shelf under the rule reflected in UNCLOS Article 121 — and the uninhabitable cays, of course, have no such entitlement — there are two possibilities.

69. First, as a matter of geomorphology, part of Nicaragua's natural prolongation is also part of the natural, geomorphological prolongation of Colombia's land territory (like it was in the *North Sea Continental Shelf* cases). It does not matter whether the area of overlap is within 200 nautical miles of Colombia or its qualifying islands, or beyond 200 nautical miles. In either case there are overlapping entitlements and the Court will proceed to delimitation. That follows from what the ICJ found to be customary international law as early as the *North Sea Continental Shelf* cases, and is what the Court and other tribunals have consistently maintained since then.

70. Alternatively, second, part of the natural prolongation of Nicaragua's land territory extends to an area within 200 nautical miles of Colombia's coast, which area is therefore within Colombia's continental shelf according to UNCLOS Article 76 (1) regardless of the questions of the geomorphology of the sea-bed adjacent to Colombia. Article 76 (1) is agreed by the Parties to represent customary international law. Again, there are overlapping entitlements and the Court will proceed to delimitation.

71. Whichever way one looks at it, the delimitation of the overlapping entitlements is a matter to be determined by the Court.

72. If Colombia's 200-nautical-mile zone overlaps Nicaragua's continental shelf, there is a "grey area", just as there was after the delimitations of the boundaries in *Bangladesh/Myanmar*[65]. It is then for the Parties to determine what measures are appropriate to address the situation. As ITLOS observed, the legal régime of the continental shelf has always co-existed with another legal régime in the same area, whether it be the high seas or an EEZ; and there are many ways in which the Parties can make appropriate agreements or co-operative arrangements to deal with that situation.

73. Madam President, Members of the Court, thank you for your attention. That brings my part of these submissions to an end. I would ask that, perhaps after the coffee break, you call on Professor Oude Elferink to close Nicaragua's first-round submissions.

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[65] *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, paras 475-476. Cf., *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, PCA Case No. 2010-16, Award, 7 July 2014, para. 498.

The PRESIDENT: I thank Professor Lowe for his presentation. The Court will indeed take a coffee break now but before we break, I wish to mention that a nationwide testing of the public warning system has been scheduled by the Government of the Netherlands at noon today, and that testing will make a loud noise and may include a loud signal being sent to Dutch mobile phones. Given where we are at the moment in our programme, what I would like to do is to take a coffee break now and to ask the Parties to be ready to resume at approximately one minute after noon, by which time the testing should be behind us. The sitting is adjourned.

The Court adjourned from 11.40 a.m. to 12.05 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now invite Professor Alex Oude Elferink to address the Court. You have the floor.

Mr. OUDE ELFERINK: Thank you, Madam President.

CUSTOMARY LAW IN RELATION TO THE OUTER LIMITS OF THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES

A. Introduction

1. Madam President, Members of the Court, it is an honour to appear before you today, and a privilege to speak on behalf of the Republic of Nicaragua.

2. Madam President, today I will be addressing the second question the Court has asked the Parties to address. This question reads:

> "What are the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and, in this regard, do paragraphs 2 to 6 of Article 76 of the United Nations Convention on the Law of the Sea reflect customary international law?"

3. As may be observed, the question of the Court consists of two elements. First, the Court requests the Parties to identify the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles. Second, the Parties are asked whether paragraphs 2 to 6 of Article 76 of the Convention reflect customary law.

4. Nicaragua during these proceedings has argued that paragraphs 2 to 6 of Article 76 reflect customary law. Customary law does not contain any different or additional criteria for determining

the outer limits of the continental shelf beyond 200 nautical miles. On the other hand, Colombia rejects that these provisions of Article 76 of the Convention reflect customary law.

5. Madam President, before further discussing the positions of Nicaragua and Colombia, allow me to make two preliminary observations. First, the Parties are in agreement that Article 76, paragraph 1, of the Convention reflects customary law[66]. As already noted by my colleague Professor Lowe, the fact that this paragraph reflects customary law has been confirmed by the Court[67], and the Court has not requested the Parties to address the customary law in relation to the basis of entitlement of the continental shelf. Still, Article 76, paragraph 1, is relevant to the Court's second question. Article 76, paragraph 1, defines the continental shelf by reference to distance from the coast — the continental shelf extends to 200 nautical miles on the basis of the distance component of paragraph 1 — and natural prolongation of the coastal State's land territory. The extent of that natural prolongation is defined by reference to the outer edge of the continental margin. As I will argue subsequently, the reference to the outer edge of the continental margin implies an intrinsic link between paragraph 1 of Article 76 of the Convention and its paragraph 4, which contains specific criteria for determining the outer edge of the continental margin.

6. Madam President, my second preliminary point concerns the fact that Colombia has not been consistent in its approach to Article 76 in its appearances before the Court, as was observed by the Agent. Initially, Colombia argued that Nicaragua had failed to demonstrate that Article 76, paragraphs 4 to 7, reflect customary law[68]. Only subsequently, Colombia included a reference to paragraphs 2 and 3 in this connection[69].

7. Colombia's initial exclusion of, in particular, paragraph 3 of Article 76 is telling. Paragraph 3 provides a more precise definition of the continental margin, which term is also included in paragraph 1 of Article 76, which, as is agreed by the Parties, reflects the customary law defining the extent of the continental shelf. Paragraph 3 specifically provides that the continental margin "consists of the seabed and subsoil of the shelf, the slope and the rise". Apparently, Colombia initially

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[66] See e.g. RN, para. 2.18; RC, para. 2.27.

[67] Judgment 2012, p. 666, paras. 116-117.

[68] See *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, CR 2012/16, p. 43, para. 39 (Bundy).

[69] See e.g. RC, para. 2.33.

had no difficulty in recognizing that the legal continental shelf under customary law includes the geophysical shelf, slope and rise, and that paragraph 1 of Article 76 of the Convention has to be read in conjunction with its paragraph 3. And as far as the definition of the continental margin is concerned, we are not aware of any State practice that points to a different definition of that concept.

8. Madam President, in the remainder of my presentation I would like to address the following points. First, I will explain the intrinsic link between paragraph 1 of Article 76 and its paragraphs 3 and 4. In this connection, I will also explain that Colombia surreptitiously is suggesting that natural prolongation has a different meaning under Article 76 and customary law. That is not the case; it has the same meaning under both sources. Second, I will address the point that paragraphs 2 to 6 of Article 76 have become customary law. A final point I would like to bring to your attention is that Colombia's rejection of Article 76, paragraphs 2 to 6, as customary international law is detrimental to the public order of the ocean.

B. Article 76, paragraph 1, is intrinsically linked to Article 76, paragraphs 3 and 4

9. Madam President, as I just explained, Article 76, paragraph 1, which defines natural prolongation by reference to the outer edge of the continental margin, is intrinsically linked to Article 76, paragraph 3, which defines the continental margin. The same applies to paragraph 4 of Article 76, which provides criteria for determining the outer edge of the continental margin.

10. In *Bangladesh/Myanmar*, a case decided by the International Tribunal for the Law of the Sea (ITLOS), the parties disputed the meaning of the term "natural prolongation". Bangladesh argued that natural prolongation referred to the need for geological as well as geomorphological continuity between the land mass of the coastal State and the sea-bed beyond 200 nautical miles[70]. Myanmar disputed Bangladesh's interpretation of natural prolongation. According to Myanmar, natural prolongation could not be made to be a new and independent criterion or test of entitlement to the continental shelf beyond 200 nautical miles. As Myanmar argued, under Article 76, paragraph 1, of the Convention, the controlling concept is not natural prolongation, but the outer edge of the

[70] *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, para. 426.

continental margin. Myanmar submitted that "article 76 (4) of UNCLOS controls to a large extent the application of article 76 as a whole and is the key to the provision"[71].

11. To resolve the disagreement between the parties over the meaning of the term "natural prolongation", the Tribunal considered how the term, as used in Article 76, paragraph 1, had to be interpreted[72]. After a detailed analysis, the Tribunal concluded as follows:

> "the Tribunal is of the view that the reference to natural prolongation in article 76, paragraph 1, of the Convention, should be understood in light of the subsequent provisions of the article defining the continental shelf and the continental margin. Entitlement to a continental shelf beyond 200 [nautical miles] should thus be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with article 76, paragraph 4. To interpret otherwise is warranted neither by the text of article 76 nor by its object and purpose."[73]

The Tribunal also commented on the relationship between natural prolongation and the continental margin under Article 76, paragraphs 1 and 4, observing that they "are closely interrelated. They refer to the same area"[74]. Nicaragua is not claiming that these findings of themselves turn Article 76, paragraph 4, into customary law. As I will explain subsequently, this has happened through the acceptance of paragraph 4 as customary law by the community of States. What the Tribunal's findings do indicate is the close conceptual relationship between paragraphs 1 and 4 of Article 76.

12. Madam President, we think it is telling that Colombia in the present proceedings seeks to resurrect the Bangladeshi argument that natural prolongation requires "both geomorphological continuity — *and* continuity of geology"[75]. Interestingly, this assertion is not backed up by reference to the judgment of the ITLOS in *Bangladesh/Myanmar* or, for that matter, any other pertinent legal analysis of the term "natural prolongation". Instead, the Colombian Counter-Memorial refers to a report of its technical experts[76]. The relevant paragraph of that report simply states the proposition that is also contained in the Counter-Memorial but fails to provide any reference to materials supporting this assertion. Perhaps it does not do so for obvious reasons. The Colombian argument

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[71] *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, para. 427.

[72] *Ibid.*, para. 428.

[73] *Ibid.*, para. 437.

[74] *Ibid.*, para. 434.

[75] CMC, para. 7.52, emphasis added.

[76] CMC, p. 353, fn. 548.

was made by Bangladesh in *Bangladesh/Myanmar* and was squarely rejected by the Tribunal. After presenting its conclusions on the reference to term "natural prolongation" in Article 76, paragraph 1, the Tribunal added: "The Tribunal *therefore* cannot accept Bangladesh's contention that, by reason of the significant geological discontinuity dividing the Burma plate from the Indian plate, Myanmar is not entitled to a continental shelf beyond 200 [nautical miles]"[77]. No party to subsequent proceedings involving the delimitation of the continental shelf beyond 200 nautical miles, excepting Colombia, has sought to rely on Bangladesh's contention concerning geological discontinuity[78].

13. Madam President, Colombia's attempt to revive Bangladesh's argument on the need for geological continuity goes to the heart of the second question the Court has posed to the Parties. The Colombian position implies that the outer limits of the continental shelf beyond 200 nautical miles under customary law may be different from those under Article 76 of the Convention. This is illustrated by the case of Myanmar. Under Article 76 of the Convention, Myanmar's continental shelf extends beyond 200 nautical miles, as was recognized by the International Tribunal for the Law of the Sea. On the other hand, if the Court were to accept Colombia's argument on the need for geological continuity, Myanmar's continental shelf under customary law would stop at the 200-nautical-mile limit. At a later stage of my presentation, I will dwell on the public order implications of this Colombian position.

14. Madam President, allow me to make one additional point in relation to Colombia's unfounded argument about the alleged need for geological continuity. If Colombia were to insist on its position, it would be upon Colombia to prove that the meaning of the terms "natural prolongation" and "continental margin" have undergone a radical transformation in the process of becoming customary international law.

15. Thus far, I have not referred to Article 76, paragraphs 5 and 6, which are also referenced in the second question of the Court. The reason for not mentioning these paragraphs, yet, is that they are not intrinsically linked to the definition of the continental margin and its outer edge. Rather, they

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[77] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 114, para. 438, emphasis added.

[78] This concerns *Bay of Bengal Maritime Boundary Arbitration, (Bangladesh/India)*; *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*; and *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)*.

are restraints that have to be applied after a coastal State has determined the extent of the continental margin to arrive at the establishment of the outer limit of the continental shelf beyond 200 nautical miles. Notwithstanding the absence of this intrinsic link, Nicaragua considers, as I will further explain subsequently, that State practice and the accompanying *opinio juris* demonstrate that these provisions are also part and parcel of the customary law on the definition of the outer limits of the continental shelf beyond 200 nautical miles.

C. Paragraphs 2 to 6 of Article 76 have become customary international law

16. Madam President, I now turn to the question whether paragraphs 2 to 6 of Article 76 of the Convention have become customary law. However, before addressing that question, I will deal with two arguments Colombia has advanced to argue that paragraphs 2 to 6 of Article 76 are not capable of being transformed into customary international law. First, Colombia considers that these paragraphs are not of a fundamentally norm-creating character. To be precise, Colombia only makes this claim in relation to paragraphs 4 to 7 of Article 76, apparently conceding that paragraphs 2 and 3 are not caught by this Colombian objection[79]. Second, Colombia submits that paragraphs 2 to 6 of Article 76 were negotiated as part of a package deal that also includes the procedure involving the Commission on the Limits of the Continental Shelf (CLCS), to which Colombia refers as the "OCS regime"[80]. According to Colombia, this package-deal nature prevents Article 76, paragraphs 2 to 6, from becoming customary international law. As I will explain, this argument mischaracterizes the idea of the package deal and ignores that the package-deal nature of the Convention has not prevented specific provisions of the Convention from becoming customary international law.

(a) Paragraphs 2 to 6 of Article 76 are similar to other conventional provisions that have become customary international law

17. Madam President, as the Court observed in *North Sea Continental Shelf* in relation to the concept of "fundamentally-norm creating character", it would be necessary that the provision concerned should be "such as could be regarded as forming the basis of a general rule of law"[81]. The

[79] RC, para. 2.36.

[80] See e.g. RC, para. 2.29.

[81] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 41-42, para. 72.

provisions contained in Article 76, paragraphs 2 to 6, meet that requirement, as is illustrated by the abundant State practice that has relied on these provisions by incorporating them in national legislation or bilateral treaties. The fact that paragraphs 2 to 6 of Article 76 meet this requirement may be further illustrated by considering them in a comparative context.

18. Before doing so, let me point out that Colombia seeks to muddy the waters in discussing the nature of the provisions contained in paragraphs 2 to 6 of Article 76. In the Rejoinder, Colombia submits that: "They are highly technical and scientific, containing strict and complex measurements such that they could not enter into the corpus of customary international law."[82] The reference to the need for strict and complex measurements is completely beside the point. The measurements are needed to implement these provisions in the specific case. No measurement whatsoever is needed to recognize that the content of Article 76, paragraphs 2 to 6, reflect customary law. That is simply a matter of, for instance, incorporating these paragraphs into national legislation. States have done so routinely, and there is no indication that they have done so after gathering any or all of the scientific and technical data that is required to make a submission to the CLCS.

19. Having clarified this preliminary point, I turn to the question how Article 76, paragraphs 2 to 6, compare to some other conventional provisions that have become customary international law. Colombia's argument indicates that the crux of the matter are paragraphs 4 to 6 of Article 76. These provisions refer to a number of parameters that are mostly defined by reference to specific numerical requirements.

20. Madam President, Article 76 of the Convention is not the first provision that defines the continental shelf by reference to numerical and other requirements. Article 1 of the 1958 Convention on the Continental Shelf defines the continental shelf with reference to the 200 metre isobath and the criterion of exploitability. Notwithstanding the reference in Article 1 to the 200 metre isobath and the vague exploitability criterion, the Court in its Judgment in *North Sea Continental Shelf* found that Article 1 possessed a fundamentally norm-creating character[83].

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[82] RC, para. 2.36.

[83] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 41-42, para. 72.

21. Another example that belies Colombia's argument that a conventional provision that raises complex issues of implementation is not capable of being transformed to customary law is Article 121 of the Convention. The application and implementation of its paragraph 3, just like Article 76, raises a host of complex questions, as will for instance be immediately apparent from perusing the pleadings of the Parties during the present proceedings. That notwithstanding, the Court has found that Article 121 as a whole has the status of customary international law[84].

(b) The package-deal nature of the Convention does not prevent its individual provisions from becoming customary international law

22. Madam President, I now turn to Colombia's argument that the package-deal nature of what Colombia terms the "OCS regime" prevents Article 76, paragraphs 2 to 6, from becoming customary law. Colombia submits that these paragraphs are part of a package that also includes Article 76, paragraph 8, which requires States to make a submission on the outer limits of their continental shelf beyond 200 nautical miles to the CLCS, and Article 82, which provides for revenue sharing in relation to the continental shelf beyond 200 nautical miles[85].

23. As I will explain, Colombia's argument on this point fails for two reasons. First, Colombia misconstrues the package-deal nature of the Convention. Second, the package-deal nature of the Convention does not prevent its individual provisions from becoming customary law.

24. Both of these points are illustrated by the oft-quoted statement of Ambassador Tommy Koh of Singapore, the President of the Third United Nations Conference on the Law of the Sea, at the closing session of the Conference[86]. During his statement, which is at tab AOE1-1 of the judges' folder, Ambassador Koh discussed a number of themes. One of those was the package-deal nature of the Convention. He had this to say on this point:

> "[T]he provisions of the Convention are closely related and form an integral package. Thus it is not possible for a State to pick what it likes and to disregard what it does not like. It was also said that rights and obligations go hand in hand and it is not permissible to claim rights under the Convention without being willing to shoulder the corresponding obligations."

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[84] Judgment 2012, p. 674, para. 139.

[85] See e.g. RC, paras. 2.21 and following.

[86] "A Constitution for the Oceans", remarks by Tommy T. B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea.

As is apparent from Ambassador Koh's statement, he was referring to the Convention as a whole and was not singling out specific elements of the Convention. The Convention as a whole is a package. If we were to accept Colombia's argument about separate packages within the Convention, States would be able to do exactly what Ambassador Koh said they should not be doing. They could lift such an alleged "mini-package" out of the overall package and not assume the obligations contained in other parts of the Convention.

25. Now, Colombia might respond that Ambassador Koh in his statement also specifically referred to Article 76 of the Convention. I am not going to deny that. He did. But what he said aptly illustrates that the package-deal nature of the Convention does not prevent its individual provisions from becoming customary international law. So what did Ambassador Koh observe about Article 76?

26. Interestingly, he referred to Article 76 in the context of the codification of customary international law. He submitted that "[t]he argument that the Convention . . . codifies customary law or reflects existing international practice is factually incorrect and legally insupportable". One of the examples he invoked in this connection was Article 76. He submitted that the Convention had "created new law in that it had expanded the concept of the continental shelf to include the continental slope and the continental rise". As he also observed, this concession was in return for the revenue sharing provision contained in Article 82 of the Convention. Leaving aside the question whether the reference to the continental margin in defining natural prolongation created new law, what is of interest here is the conclusion Ambassador Koh drew from these propositions. Ambassador Koh was of the view that "a State which is not a party to the Convention cannot invoke the benefits of the article". However, this is what happened subsequently. As I mentioned earlier, the Court has found, and Colombia recognizes, that Article 76, paragraph 1, represents customary law. And paragraph 1 is included in Ambassador Koh's reference to Article 76. Customary law thus provides that States are entitled to a continental shelf up to the outer edge of the continental margin, which includes the shelf, slope and rise. And we have witnessed a similar development in relation to other provisions of the Convention. I already referred to the fact that the Court has recognized that Article 121, on the régime of islands, represents customary law. The régime of the exclusive economic zone, which also

created new law, already became part of customary international law in the 1980s[87]. And it may be noted that Colombia itself already claimed an exclusive economic zone in 1978[88]. The Colombian Act concerned in that connection does not refer to the obligations the Convention imposes on a coastal State in relation to its exclusive economic zone[89]. In other words, Colombia lifted the benefit of having an exclusive economic zone out of the package without assuming the concomitant obligations.

27. To conclude on this point, the package-deal concept refers to the Convention as a whole. It was not intended to identify alleged "mini-packages" within the Convention. Second, the package-deal nature of the Convention does not exclude its individual provisions from becoming customary international law. As a matter of fact the Convention does not contain any provision that addresses this point, implying that the general rules on the formation of customary law are fully applicable.

(c) Colombia's arguments that paragraphs 2 to 6 of Article 76 have not become customary international law are flawed

28. Madam President, having dealt with these preliminary points, I now turn to answering the Court's question as to whether paragraphs 2 to 6 of Article 76 of the Convention reflect customary law.

29. This point has already been argued extensively by the Parties and I respectfully refer the Court to Nicaragua's earlier pleadings on this point[90]. Nicaragua's position may be summarized as follows. First, there is a widespread practice of both States parties and States not parties to the Convention accepting the criteria contained in Article 76, paragraphs 1 to 6. Second, State practice does provide evidence that States consider that other States have applied the criteria contained in Article 76 incorrectly, without, however, rejecting that these criteria may not be used as such. Third, we are not aware of any State that has sought to develop other criteria than those contained in Article 76, paragraphs 2 to 6, to determine the outer limits of its continental shelf. None!

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[87] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, para. 34.

[88] Act No. 10 of 4 August 1978 establishing rules concerning the Territorial Sea, the Exclusive Economic Zone and the Continental Shelf and regulating other matters, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/COL_1978_Act.pdf.

[89] See *ibid*., Arts. 7 and 8.

[90] MN, paras. 2.5-2.11; RN, paras. 2.8-2.36.

30. What I would like to do now is to focus on the arguments that Colombia has advanced to argue that Article 76, paragraphs 2 to 6, do not reflect customary law. In the final analysis, Colombia's arguments come down to a couple of specific points. First, Colombia submits that "there is no practice or acceptance as law *(opinio juris)* to suggest" that Article 76, paragraphs 2 to 6, reflect customary law[91]. Second — and this suggests that Colombia may have serious doubts about the strength of its argument in this respect — Colombia's pleadings hint at the fact that Colombia has consistently rejected that Article 76, paragraphs 2 to 6, reflect customary law and in case they were to reflect customary law, the Court would have to determine whether Colombia is a persistent objector to that rule[92].

31. As regards Colombia's first point it may first of all be noted that Colombia takes a somewhat simplistic approach to the element of *opinio juris*. Colombia limits itself to submitting that Nicaragua has failed to produce evidence of *opinio juris*[93]. That is not the case. I respectfully refer the Court to Nicaragua's extensive argument on the presence of *opinio juris* in the case at hand made in the Reply[94].

32. Apart from these general arguments that refute Colombia's position, let me also point to a specific argument Colombia makes in relation to Article 76. As Colombia's Rejoinder observes in discussing the State practice that Nicaragua adduces: "In particular, Nicaragua overlooks the fact that States would have been acting in anticipation of becoming States Parties to UNCLOS."[95] This is an obvious attempt at reverse engineering of history. The fact that a State subsequently becomes a party to a treaty, does not necessarily indicate that the State in adopting legislation was anticipating that later action. This is particularly relevant in the case of the Convention.

33. After its adoption in 1982, the fate of the Convention long hung in the balance, and the Convention only became universally accepted after the hard-fought compromise on sea-bed mining as contained in the 1994 Agreement relating to the implementation of Part XI of the Convention. That state of affairs makes it highly improbable that all States in the late 1970s, 1980s or even early

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[91] RC, para. 2.29.

[92] See CMC, para. 2.26; RC, p. 49, fn. 69.

[93] RC, para. 2.40.

[94] RN, paras. 2.26-2.34.

[95] RC, para. 2.40.

1990s were adopting the formulae contained in Article 76, paragraphs 4 to 6, in anticipation of their becoming a party to the Convention. For an overview that includes such States, I refer the Court to pages 839 and 840 of the article by Kevin Baumert, which is at tab AOE1-2 of the judges' folder.

34. Colombia has also complained that Nicaragua has referred to the practice of only one State that as of yet is not a party to the Convention, namely the United States, that regards that Article 76, paragraphs 2 to 6, are customary law[96]. Apart from the fact that, as I just argued, practice of States that are a party to the Convention is also relevant in determining the content of customary international law, Colombia's statement is factually incorrect. In its Reply, in discussing State practice, Nicaragua also referred to other non-parties that have relied on the formulae that are contained in Article 76, paragraphs 4 to 6. This concerns Venezuela and Peru[97]. In addition, it may be noted that the practice of non-parties to the Convention to which Nicaragua referred also concerns bilateral treaties with parties to the Convention. This concerns Cuba in relation to the United States, and Trinidad and Tobago in relation to Venezuela[98]. By concluding these bilateral agreements, these States recognize that their neighbours under customary law enjoy the same rights as States parties do under Article 76, paragraphs 4 to 6, of the Convention.

35. The second point that Colombia has advanced in relation to the customary law on the outer limits of the continental shelf is that Colombia has consistently rejected that Article 76, paragraphs 2 to 6, reflect customary law. According to Colombia's Counter-Memorial, its objection to these rules "as customary, and thus as applicable to itself, has been public and persistent"[99]. However, this quotation is accompanied by a footnote that refers to hearings in *Territorial and Maritime Dispute*, in which counsel for Colombia answered a question posed by Judge Bennouna that does not talk to this point. The footnote also refers to "statements of the President of the Republic and the Ministry of Foreign Affairs". That is the extent of the information that Colombia has provided on these alleged statements. Nothing as regards their content or date of issuance.

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[96] RC, para. 2.40.

[97] RN, paras. 2.24, 2.25 and 2.31.

[98] See RN, para. 2.24.

[99] See CMC, para. 2.26.

36. Colombia also maintains that if Article 76, paragraphs 2 to 6, reflects customary law, the Court would have to determine whether Colombia is a persistent objector to that rule[100]. However, Colombia has done next to nothing to assist the Court in this respect. The only information it has provided is the uncorroborated reference to "statements of the President of the Republic and the Ministry of Foreign Affairs", to which I just referred. Nicaragua in its Reply already pointed out that Colombia's opposition to the customary law status of Article 76 has been wavering. As the Reply observed "Colombia never objected to its neighbour Ecuador's continental shelf limits established in 1985 and based on paragraph 5 of Article 76, or to Chile's extended continental shelf claim made public that same year"[101]. In its Rejoinder, Colombia had nothing to say in reply. This confirms the conclusion of the Agent's speech that Colombia does not meet the requirements that have to be met by a persistent objector.

D. Colombia's rejection of Article 76, paragraphs 2 to 6, as customary international law is detrimental to the public order of the ocean

37. Madam President, Colombia's rejection of the customary law status of paragraphs 2 to 6 of Article 76 poses a fundamental challenge to the public order of the ocean. Although Colombia thus far has not provided the Court with any cogent argument as to what are the criteria for determining the outer limits of the continental shelf beyond 200 nautical miles, its rejection of the customary law status of Article 76, paragraphs 2 to 6, seemingly implies that it considers that outer limits of the continental shelf determined under customary law are located differently from outer limits determined in accordance with Article 76 of the Convention.

38. Madam President, I think it is appropriate to consider for a moment what the practical implications of the Colombian position would be. That position implies that the outer limit of the continental shelf beyond 200 nautical miles under customary international law may either be landward or seaward of the outer limits established in accordance with Article 76 of the Convention. Let me first consider the implications of the first scenario for a State that is a party to the Convention in relation to other States. This situation is illustrated in the figure that is now on screen and at tab AOE1-3 of the judges' folder. The green line that now appears is the outer limit of the continental

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[100] RC, p. 49, fn. 69.

[101] RN, para. 2.34, footnotes omitted.

shelf beyond 200 nautical miles established in accordance with Article 76 of the Convention. The green area is the continental shelf beyond 200 nautical miles of the coastal State under Article 76 of the Convention. The red line that now appears represents the outer limit of the continental shelf beyond 200 nautical miles under customary law. The difference in the extent of the continental shelf beyond 200 nautical miles under the Convention and customary international law is now also illustrated on screen. The grey area is part of the continental shelf of the coastal State concerned under the Convention, but part of the ocean floor beyond national jurisdiction under customary law. Other States parties to the Convention in this area, for instance, have to comply with the régime for marine scientific research that is applicable to the continental shelf[102]. On the other hand, States that are not a party to the Convention have the right to conduct marine scientific research in that area without the involvement of the coastal State as that area under customary law is beyond national jurisdiction. This situation would be particularly poignant where the scientific research eventually would lead to the commercial use of marine genetic resources. Under the régime of the continental shelf, the coastal State has sovereign rights in relation to such use. Beyond the continental shelf, that is not the case. Which outcome would be the case would depend on whether the flag State of the vessel conducting the marine scientific research would be a party to the Convention or not.

39. The second scenario — outer limits that under customary law are seaward from the outer limits established in accordance with Article 76 of the Convention — could have serious implications for a State that currently is not a party to the Convention, but subsequently would become a party to the Convention. While a coastal State has sovereign rights over mineral resources of such an area under customary law, under the Convention the same resources would be part of the area and the common heritage of humankind. This case is illustrated by the figure on screen that I will now run you through. The figure is also at tab AOE1-4 of the judges' folder. It includes a licence area of a company that is exploiting the mineral resources of the area concerned under a licence from the coastal State as part of its continental shelf under customary law. If that State were to become a party to the Convention, the outer limits of its continental shelf fall short of the outer limits under customary international law, and the licence area would become located beyond the continental shelf

[102] See Convention, Art. 246.

and the company would be mining mineral resources in the ***A***rea. Consequently, the company, if it would not be able to secure a contract with the International Seabed Authority, would be illegally mining the common heritage of humankind[103].

E. Conclusions

40. Madam President, that brings me to my conclusions. First, paragraph 1 of Article 76, which Colombia recognizes reflects customary law, is intrinsically linked to the Article's paragraphs 3 and 4.

41. Second, Colombia's argument that Article 76 requires geological continuity has been squarely rejected by the International Tribunal for the Law of the Sea. Colombia has offered no evidence whatsoever that this requirement is a part of customary international law.

42. Third, contrary to what Colombia argues, Article 76, paragraphs 2 to 6, are of a fundamentally norm-creating character and, as I observed, they are similar to other conventional provisions the Court has recognized to have become customary international law.

43. Fourth, the package-deal nature of the Convention does not prevent individual provisions of the Convention from becoming customary international law.

44. Fifth, there is a virtually uniform State practice and accompanying *opinio juris* recognizing paragraphs 2 to 6 of Article 76 as customary international law. The only State that has taken a different position, and at that inconsistently, is Colombia. However, Colombia does not meet the criteria for being qualified as a persistent objector to the rule.

45. Finally, Colombia's position that different criteria apply for determining the outer limits of the continental shelf under the Convention as compared to customary law is detrimental to the public order of the ocean.

46. Unless I can be of further assistance, Madam President, Members of the Court, that brings me to the end of my submissions, and of Nicaragua's submissions during this first round of pleadings. I thank you for your attention.

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[103] See Convention, Arts. 136 and 137.

The PRESIDENT: I thank Professor Oude Elferink, whose statement brings this sitting to a close. The oral proceedings in the case will resume at 10 a.m. tomorrow, Tuesday 6 December, when Colombia will present its first round of oral argument.

The sitting is adjourned.

The Court rose at 12.45 p.m.

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