SEPARATE OPINION OF JUDGE NOLTE

1. I wish to explain why I voted against the Court's rejection of Nicaragua's third submission (I) and to make a remark regarding the reasoning which underlies the Court's decisions on Nicaragua's first and second submissions (II).

I. Nicaragua's Third Submission

2. The Court interprets Nicaragua's third submission "as seeking a specific finding regarding the effect, if any, that the maritime entitlements of Serranilla [and] Bajo Nuevo . . . would have on any maritime delimitation between the Parties" (Judgment, para. 97). Reiterating that a State's extended continental shelf cannot overlap with the area of continental shelf within 200 nautical miles from the baselines of another State, the Court points out that there is "no area of overlapping entitlement . . . to be delimited", regardless of whether Serranilla and Bajo Nuevo are entitled to a maritime zone of 200 nautical miles (*ibid.*, para. 99). On that basis, the Court "considers that it does not need to determine the scope of the entitlements of Serranilla and Bajo Nuevo in order to settle the dispute submitted by Nicaragua in its Application" (*ibid.*, para. 100).

3. It is true that, regardless of whether Serranilla and Bajo Nuevo generate a maritime zone of 200 nautical miles, their entitlements cannot, pursuant to the Court's decisions on the first and the second submissions, overlap with any possible entitlement to an extended continental shelf generated by Nicaragua's mainland coast. However, "the dispute submitted by Nicaragua in its Application" is not limited to requesting a delimitation of overlapping entitlements.

4. In its Application, Nicaragua requested the Court "to adjudge and declare . . . [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"[1]. In its Memorial and its Reply, Nicaragua specified this request, asking the Court to declare that "Serranilla and Bajo Nuevo are enclaved and granted a territorial sea of twelve nautical miles"[2]. Thus, by requesting the

[1] Application of Nicaragua (AN), para. 12.

[2] Reply of Nicaragua (RN), submissions, para. 3; see also Memorial of Nicaragua (MN), submissions, para. 3.

Court to determine the "precise course of the maritime boundary", Nicaragua asks about the effect, if any, that the maritime entitlements of Serranilla and Bajo Nuevo would have on the course of the relevant part of the maritime boundary. However, the Court does not respond to this request and leaves the Parties in the dark about the "precise course" of the maritime boundary. Contrary to its statement in paragraph 100 of the Judgment, the Court does not "settle the dispute submitted by Nicaragua in its Application".

5. The pleadings of the Parties confirm that the delimitation of overlapping entitlements does not exhaust the subject-matter of the present dispute. Nicaragua specified that the dispute before the Court encompassed the question of the scope of the entitlements of Serranilla and Bajo Nuevo as far as this was necessary for determining "the precise course of the boundary"[3]. Colombia did not contest the Court's jurisdiction to decide on this matter, nor did it argue that Nicaragua's third submission was inadmissible. Rather, Colombia engaged with Nicaragua's arguments in substance and thereby confirmed that the question of the entitlements of Serranilla and Bajo Nuevo formed part of the dispute before the Court[4]. As the Court held in *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, "[t]he subject-matter of a dispute brought before the Court is delimited by the claims submitted to it by the parties"[5]. At no point did the Parties take the position that their dispute was restricted to the delimitation of overlapping entitlements. I do not doubt that the determination whether there are overlapping entitlements is "[a]n essential step" and "the first step in any maritime delimitation" (Judgment, para. 42). But I can see no reason — either procedural or substantive — why this should preclude the Court from adjudicating a dispute concerning the existence of an entitlement when it is necessary to do so to determine "the precise course" of a maritime boundary.

6. Nicaragua claims that it is entitled to an extended continental shelf in the area east of the maritime zones generated by Colombia's islands of San Andrés and Providencia and west of the maritime zones generated by Colombia's mainland coast[6]. This claim would be well founded if, first, Serranilla and Bajo Nuevo were merely entitled to a territorial sea of 12 nautical miles; second, Nicaragua proved that a natural prolongation of its landmass exists in the area east of the 200-nautical-mile zones of San Andrés and Providencia; and, third, a State's entitlement to an extended continental shelf could pass through ("leapfrog over" or "tunnel under") another State's

[3] MN, paras. 3.80, 4.39-4.43; RN, Chap. 4, pp. 101-157. See also CR 2022/27, p. 23, para. 3 (Pellet).

[4] Counter-Memorial of Colombia (CMC), Chap. 4, pp. 174-288; Rejoinder of Colombia (RC), Chap. 4, pp. 104-146.

[5] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 117, para. 39.

[6] See RN, p. 157, fig. 4.4.

200-nautical-mile entitlement. Had the Court upheld Nicaragua's claim, the part of the maritime boundary between the two States which is relevant for the third submission would start in the north where the limit of the 200-nautical-mile zone generated by the Colombian islands of San Andrés and Providencia meets the point where the rights of third States might be affected. From there, the boundary would follow the limit of the 200-nautical-mile zones of San Andrés and Providencia to the south, until it intersected the limit of the 200-nautical-mile zone generated by Colombia's mainland coast. It would then continue north-east along the 200-nautical-mile limit of Colombia's mainland coast until it again reached the point where the rights of third States might be affected.

7. Colombia, in turn, maintains that Serranilla and Bajo Nuevo are each entitled to an EEZ with its attendant continental shelf[7] and that any claim of Nicaragua to an extended continental shelf within that area is excluded[8]. Had the Court upheld Colombia's claim, the maritime boundary between the two Parties would start, in the north, where the limit of the 200-nautical-mile zone generated by Nicaragua's mainland coast meets the point where rights of third States might be affected, and would run south until it intersected the starting-point of the boundary established by the Court in its 2012 Judgment (see Judgment, p. 430, point A on sketch-map No. 2). It would then follow that boundary until the endpoint (*ibid*., Point B on sketch-map No. 2), from where it would continue south along the limit of the 200-nautical-mile zone generated by Nicaragua's mainland coast, to the point where the rights of third States might be affected.

8. Ascertaining whether the three conditions mentioned in paragraph 6 above have been fulfilled is thus a precondition for determining the precise course of the maritime boundary between Nicaragua and Colombia. This is true even if Nicaragua were only able to prove that the natural prolongation of its land territory covers just a part of the relevant area which it claims — assuming that Serranilla and Bajo Nuevo are enclaved and that a State's entitlement to an extended continental shelf may pass through another State's 200-nautical-mile entitlement. In that case, the maritime boundary would still follow the 200-nautical-mile limit of the zones generated by the coasts of San Andrés and Providencia.

9. For these reasons, I do not think that the Court should have rejected Nicaragua's third submission at this stage of the proceedings. The Court should rather have given the Parties the opportunity to present their case and to argue whether Serranilla and Bajo Nuevo generate a maritime zone of 200 nautical miles, whether Nicaragua can prove that the natural prolong-

[7] RC, para. 4.18.
[8] CR 2022/28, pp. 41-42, para. 23 (Valencia-Ospina).

ation of its coast actually extends to the area around the territorial sea of Serranilla and Bajo Nuevo (a question which might have required the Court to seek the help of experts or assessors), and whether a State's entitlement to an extended continental shelf can pass through the 200-nautical-mile zone of another State.

10. In particular, the Court should have given the Parties the opportunity to present oral arguments on the latter question. In their written pleadings, the Parties took opposing views on the possibility of "tunnel[ling]" under or "leapfrog[ging]" over a 200-nautical-mile zone, here the 200-nautical-mile zones generated by San Andrés and Providencia[9]. The Court could then have clarified whether such "tunnelling" or "leapfrogging" is possible under customary international law. This question was touched upon briefly by an ITLOS Special Chamber in a judgment rendered after the hearings in the present case in December 2022[10]. However, the judgment of the ITLOS Special Chamber does not relieve this Court of its obligation to hear the Parties on the disputed questions.

11. Had the Court addressed Nicaragua's third submission in a further phase of the proceedings, it might have found itself again faced with the question whether it should declare one or more of the legal questions raised by this submission to be preliminary, to be dealt with in yet another separate phase of the proceedings[11].

12. In conclusion, I think that "[o]nce the Court has been regularly seised, the Court must exercise its powers"[12]. Indeed, the Court "must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent"[13]. Otherwise, the Court is adjudicating *infra petita*.

II. Nicaragua's First and Second Submissions

13. I doubt that UNCLOS can be interpreted as originally implying a rule according to which the extended continental shelf of one State may not extend within the 200-nautical-mile zone of another. I also doubt that such a

[9] See RN, para. 4.11; RC, para. 4.6; see also CR 2022/25, p. 26, paras. 42-44 (Argüello Gómez); CR 2022/28, pp. 41-42, para. 23 (Valencia-Ospina).

[10] *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), ITLOS, Judgment of 28 April 2023*, paras. 444 and 449.

[11] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Order of 4 October 2022, I.C.J. Reports 2022 (II)*, p. 563 and joint declaration of Judges Tomka, Xue, Robinson, Nolte and Judge *ad hoc* Skotnikov.

[12] *Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122.

[13] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 23, para. 19.

rule was part of the original crystallization of the customary international law régimes governing the exclusive economic zone and the continental shelf. However, I have come to the conclusion that such a rule has subsequently emerged as a rule of customary international law. This is why I find paragraph 77 of the present Judgment to be particularly important. The fact that the Court, in its reasoning, has not described and evaluated the relevant practice and the accompanying attitudes of States in more detail does not mean that its Judgment rests on a mere assertion.

(Signed) Georg NOLTE.