# DISSENTING OPINION OF JUDGE TOMKA

*Serious misgivings about Judgment's conclusion that under customary international law 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 may not extend within 200 nautical miles from the baselines of another State — Court arrives at a conclusion it could have arrived at in 2012 had it believed that such a rule existed — Bifurcated procedure — No opportunity for the Applicant to present its case in full.*

*Conclusion of the Court based on hypothetical "assumption" and inconclusive* travaux préparatoires *of the Convention — No trace in Convention or in* travaux préparatoires *that States participating in negotiations "assumed" that a State's continental shelf entitlement beyond 200 nautical miles "would only extend into maritime areas that would otherwise be located in the Area".*

*Identification of customary international law — No widespread and uniform State practice in support of alleged customary rule — Court ignores State practice that contradicts its finding.*

*No* opinio juris *in support of alleged customary rule — Flawed methodology — Court infers* opinio juris *from negative State practice — Negative State practice not motivated by a sense of legal obligation — Court ignores the view of those States that maintain that a State's continental shelf beyond 200 nautical miles may extend within 200 nautical miles from the baselines of another State.*

*Finding of the Court based on relationship between continental shelf and exclusive economic zone — Court's 1985 Judgment* Continental Shelf (Libyan Arab Jamahiriya/Malta) *misrepresented — 1985 Judgment does not support finding of the Court.*

*Finding of the Court departs from the jurisprudence of international courts and tribunals — Court provides no rationale for this departure — Fragmentation.*

1. This Judgment is disquieting. It has been arrived at by an irregular procedure which prevented the Applicant from presenting its case in full as required by the Rules of Court. The Court rejects the Applicant's submissions just on the basis of its written pleadings. The Court is expected to rule on the final submissions of the applicant as presented at the end of the oral proceedings which have to be submitted by the agent in written, duly signed

form[1]. The Court in its Order of 4 October 2022 directed the Parties to address "*exclusively*" the two questions it put to them[2].

2. The Court adopted this procedure without ascertaining the Parties' views on the procedure as required by the Rules of Court[3].

3. The Judgment is not based on the application of international law but on a rule that the Court simply "invented". The Judgment does not provide any serious analysis of State practice nor the required *opinio juris*. It limits itself to a simple assertion of "customary rule".

4. It is perplexing that, in its 2012 Judgment, the Court did not dismiss Nicaragua's claim to a continental shelf beyond 200 nautical miles on the basis of what the Court now asserts to be a "customary rule of international law". It is to be recalled that, already in 2012, Colombia presented legal arguments in support of its position that a State's entitlement to a continental shelf beyond 200 nautical miles may not extend within 200 nautical miles from the baselines of another State[4], the same arguments it has repeated in the current proceedings. The Court did not consider these legal arguments in 2012. Instead, the Court decided that it could not uphold Nicaragua's continental shelf delimitation claim contained in its final submission I (3)[5] because Nicaragua, being a party to the 1982 United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or the "Convention"), had not presented its full submission to the Commission on the Limits of the Continental Shelf (hereinafter the "CLCS" or the "Commission") in accordance with Article 76, paragraph 8, of the Convention[6].

5. The Court subsequently confirmed, in its Judgment on preliminary objections rendered in 2016 in the present case, that it did not proceed to the delimitation of Nicaragua's continental shelf beyond 200 nautical miles for that particular reason, and not because Nicaragua's entitlement cannot

[1] Article 60, paragraph 2, of the Rules of Court.

[2] *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. 565 (emphasis added).

[3] Article 31 of the Rules of Court.

[4] Rejoinder of Colombia, pp. 119-121, paras. 4.11-4.12, pp. 149-156, paras. 4.60-4.69, p. 157, para. 4.71 and pp. 331-332, para. 13; CR 2012/11, pp. 27-28, para. 34 (Crawford); CR 2012/12, pp. 60-61, paras. 77-78 (Bundy); CR 2012/16, p. 52, para. 85 (Bundy). For Nicaragua's arguments, as presented to the Court in 2012, see notably Reply of Nicaragua, paras. 3.47-3.56, 3.67; CR 2012/8, pp. 27-28, paras. 6-7 (Oude Elferink); CR 2012/9, pp. 25, 27, 28-31, 34-35, paras. 21, 30, 38-48, 53, 66-73 (Lowe); CR 2012/15, pp. 23-26, paras. 31-51 (Lowe).

[5] In its final submission I (3), Nicaragua requested the Court to decide that "[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties".

[6] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 719, para. 251 (3). It will be noted that the Court saw this issue as one of "delimitation".

extend within 200 nautical miles from Colombia's mainland coast. Having heard the Parties' arguments on the scope of its 2012 Judgment, the Court stated that

> "[i]t has found that delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast was conditional on the submission by Nicaragua of information on the limits of its continental shelf beyond 200 nautical miles, provided for in paragraph 8 of Article 76 of UNCLOS, to the CLCS. The Court thus did not settle the question of delimitation in 2012 because it was not, at that time, in a position to do so."[7]

6. Still in 2016, the Court was of the view that it would be able to proceed to the delimitation of the continental shelf beyond 200 nautical miles claimed by Nicaragua subsequent to the filing of Nicaragua's submission to the Commission in 2013. The Court has thus allowed a further decade of litigation between the Parties, only to arrive in 2023 at the conclusion it could have arrived at in 2012, had it been convinced that this rule of customary international law existed.

7. In its Order of 4 October 2022, the Court formulated two questions of law to the Parties:

> "(1) 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?
>
> (2) 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?"[8]

8. In today's Judgment the Court rejects Nicaragua's request for delimitation because, according to it, under customary international law, 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 "may not extend within 200 nautical miles from the baselines of another State" (Judgment, para. 79). Today's conclusion by the Court is surprising since the Court is supposed to know the law (*iura novit curia*). As the Court has stated in the past,

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[7] *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)*, p. 132, para. 85.

[8] *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. 565.

> "as an international judicial organ, [it] is deemed to take judicial notice of international law . . . It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court."[9]

The question remains why the Court did not adopt this view in 2012. No answer is given in the present Judgment.

9. As I disagree with the Court's conclusion, I should explain why.

## I. Scope and Meaning of the First Question

10. The Court's first question concerns only one step in the delimitation process. As the Judgment correctly points out, "[a]n essential step in any delimitation is to determine whether there are entitlements, and whether they overlap" (Judgment, para. 42). This step is essential for at least two reasons. For one, what States claim to be entitled to, and what they are in point of fact entitled to, do not always coincide; the Court must therefore determine for itself what the parties' entitlements are. It does so by identifying the parties' coasts that generate entitlements to maritime areas. Entitlements are said to "overlap" when the projections from the coast of one party overlap with projections from the coast of the other party[10]. This step is also essential because overlapping entitlements are a condition precedent for the Court to proceed to delimitation; in the absence of overlapping entitlements, there is simply nothing for the Court to delimit.

11. The Court's question is directed at this preliminary step of the delimitation process (which I will for convenience refer to simply as "the identification step"). The question has been framed in terms of law, as a legal question in general, not in terms of the circumstances of the present case.

12. At risk of stating the obvious, just because a State is entitled to a certain maritime area, this does not mean that it must obtain the full extent of that entitlement at the end of the delimitation process. Unlike a valid title over a certain territory, which implies the exclusion of any other title over the same territory, maritime entitlements have the particular feature that they can overlap with other maritime entitlements[11]. As the Court

[9] *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 9, para. 17, and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 181, para. 18.

[10] See *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 89, para. 77.

[11] Prosper Weil, "Délimitation maritime et délimitation terrestre" in Yoram Dinstein and Mala Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Martinus Nijhoff Publishers, 1989, pp. 1021-1023.

explained in the *Maritime Delimitation in the Black Sea* case, the task of delimitation consists of "resolving the overlapping claims by drawing a line of separation of the maritime areas concerned"[12]. This requires that, so far as possible, the line of delimitation should "allow the coasts of the [p]arties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way"[13]. Entitlements can be amputated to achieve an equitable solution. The delimitation process often results in one or both parties not obtaining areas that they would otherwise be entitled to had it not been for the presence of the other[14].

13. It follows that an affirmative answer to the Court's question in no way implies that Nicaragua must be allocated all, most — or indeed any — of the area where the Parties' entitlements might overlap within 200 nautical miles from Colombia's coast.

14. It is also useful to say a word about the problem which is at the heart of the Court's question and to put this problem into context. Usually, the identification step is a straightforward exercise, even when the parties disagree, for example, about the identification of their relevant coasts. Not so in the present case. The existence and breadth of Nicaragua's entitlement to a continental shelf beyond 200 nautical miles[15] must be determined by the application of the geomorphological and geological criteria set out in Article 76 of the Convention, rather than just the configuration of its coasts[16]. To establish its entitlement, Nicaragua relies on its 2013 submission to the Commission. According to Nicaragua, this submission provides sufficient data to show that it has an entitlement to a continental shelf beyond 200 nautical miles in accordance with the geological and geomorphological criteria, the limits of which are subject to the constraints set out in

[12] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 89, para. 77.

[13] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 703, para. 215.

[14] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 64, para. 59.

[15] I shall avoid the use of the expression "extended continental shelf". Though perhaps convenient as a shorthand expression, it finds no basis in the Convention and can be misleading. Obviously, when a State claims a continental shelf beyond 200 nautical miles, it is not "extending" its continental shelf or claiming something additional to the continental shelf. It is merely asserting the outer limits of an entitlement that international law recognizes exist *ipso facto* and *ab initio*. See paragraph 29 of this opinion.

[16] Though it must be stated that, because Nicaragua invokes the distance constraint line in the delineation of the outer limits of the continental shelf in accordance with Article 76, paragraph 5, of the Convention, Nicaragua's coast remains relevant. The distance constraint line submitted by Nicaragua is constructed by arcs at 350 nautical miles' distance from the baselines from which the territorial sea is measured.

Article 76, paragraph 5, of the Convention. Colombia opposes this claim. It argues that Nicaragua has not established that the natural prolongation from Nicaragua's land territory extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast[17].

If Colombia is correct *on the facts*, there would be no need for the Court to proceed to the delimitation as there would be no overlapping entitlements within 200 nautical miles from Colombia's mainland coast.

15. But this is not the problem at the heart of the Court's question. The problem at the heart of the Court's question — and of today's Judgment — is one of law. It concerns a situation where, in a given area, broad-margin State A claims an entitlement to a continental shelf beyond 200 nautical miles from its coast and within 200 nautical miles from the coast of State B, where the latter State has a continental shelf entitlement based on the 200 nautical miles distance criterion and an entitlement to an exclusive economic zone up to 200 nautical miles. This situation is not a new phenomenon, nor is it uncommon; international courts and tribunals have been faced with it on several occasions.

16. In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, the parties debated a similar issue, where Canada, for convenience, referred to an area of overlapping entitlements beyond 200 nautical miles from the United States' coast but within 200 nautical miles from its coast as the "grey area"[18]. While the Chamber of the Court was not called upon to delimit the parties' entitlements in that area, the parties in that case advocated for different delimitation lines that created grey areas of varying sizes when extended seaward[19]. This issue was also before the arbitral tribunal in the *Arbitration between Barbados and the Republic of Trinidad and Tobago*[20]. However, the tribunal took no position on "the substance of the problem"[21]. Three other cases, namely the two cases concerning the delimitation in the Bay of Bengal, *Delimitation of the Maritime Boundary*

[17] Rejoinder of Colombia, paras. 6.43-6.81.

[18] See *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Vol. III, pp. 214-217, paras. 570-576. See also *ibid*., Vol. V, pp. 477-478, paras. 243-245. This appears to be the first time the expression "grey area" was used in this sense in international practice. On this expression and its different uses, see David A. Colson, "The Legal Regime of Maritime Boundary Agreements" in Jonathan I. Charney and Lewis M. Alexander, *International Maritime Boundaries,* Martinus Nijhoff, 1993, Vol. I, pp. 67-69.

[19] *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Vol. VI, pp. 162-164, argument of Mr Weil; *ibid*., Vol. VII, pp. 217-220, Rejoinder of Mr Colson.

[20] *Arbitration between Barbados and the Republic of Trinidad and Tobago, Award of 11 April 2006*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVII, p. 242, para. 367.

[21] *Ibid*., p. 242, para. 368.

*in the Bay of Bengal (Bangladesh/Myanmar)*[22] and *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India)*[23] (hereinafter the "*Bay of Bengal* cases"), as well as the Court's Judgment in the *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)* case[24], have also addressed this issue. I shall return to these cases and their implications below.

17. In the present case, the area of overlapping entitlements arises because Nicaragua claims a continental shelf entitlement beyond 200 nautical miles that extends far out into the Western Caribbean and within 200 nautical miles of Colombia's mainland coast, where it encounters Colombia's entitlement to a continental shelf based on the 200 nautical miles distance criterion.

18. At the identification step, such an area of overlap raises various questions of law which for some time had mostly been the concern of scholarly writings[25]. One question is whether as a matter of law such an overlap of entitlements may occur in the first place. That is: is a State "prevented" from claiming its continental shelf entitlement beyond 200 nautical miles into an area that is claimed by another coastal State as its own continental shelf on the basis of the 200 nautical miles distance criterion? Colombia has strenuously argued that this is so.

19. It should be clear that today's Judgment is concerned with the area of overlapping entitlements at the identification step. The question is whether the Parties' entitlements overlap thus calling for a delimitation. How the Court should then approach delimiting the area of overlapping entitlements, and what the Parties' rights would be in such a maritime area, is a question of equitable delimitation that is *not* within the scope of the Court's first question. In this sense, it is important to distinguish between (1) an area of overlapping entitlements and (2) the maritime area that may be established by a court or tribunal. This distinction is important. The Respondent seems to assume that the existence of an area of overlapping entitlements in the

[22] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, pp. 119-121, paras. 463-476.

[23] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India), Award of 7 July 2014, RIAA*, Vol. XXXII, pp. 155-157, paras. 498-508.

[24] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 277, para. 197.

[25] See e.g. Malcom D. Evans, "Delimitation and the Common Maritime Boundary", *British Yearbook of International Law*, 1994, Vol. 64 (1), pp. 283-332; Alex G. Oude Elferink, "Does Undisputed Title to a Maritime Zone Always Exclude Its Delimitation: The Grey Area Issue", *The International Journal of Marine and Coastal Law*, 1998, Vol. 13 (2), p. 143; Malcolm D. Evans, "Maritime Boundary Delimitation: Whatever Next?" in Jill Barrett and Richard Barnes (eds.), *Law of the Sea: UNCLOS as a Living Treaty*, British Institute of International and Comparative Law, 2016, pp. 70-79; Xuexia Liao, "Is There a Hierarchical Relationship between Natural Prolongation and Distance in the Continental Shelf Delimitation?", *The International Journal of Marine and Coastal Law*, 2018, Vol. 33 (1), p. 79.

Caribbean Sea within 200 nautical miles of its mainland coast necessarily means that the Court will have to establish the same kind of maritime area established, for instance, in the *Bay of Bengal* cases, with the same division of rights. This is not so. Should the Parties' entitlements overlap, it would be for the Court to adopt its own equitable solution.

20. I have set out these preliminary considerations in some length because they are necessary to understand the Court's first question.

## II. Entitlement to the Continental Shelf beyond 200 Nautical Miles

21. The starting-point of the enquiry is Article 76, paragraph 1, of the Convention. While the Convention is not applicable as between the Parties, the Court has stated that the definition of the continental shelf set out therein forms part of customary international law[26]. There is no doubt in my mind that the other key provisions defining the outer limits of the continental shelf beyond 200 nautical miles are also reflective of customary international law[27]. The continental shelf concept cannot have a different meaning in customary international law than in the Convention. The Convention provides that the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that either *(a)* extend "beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin", or *(b)* "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"[28]. In this respect, Article 76 of the Convention contains a series of complementary provisions that define the continental margin and specify how its outer edge is to be determined beyond 200 nautical miles.

22. The first key provision is paragraph 3, which defines the "continental margin". The second key provision, contained in paragraph 4 *(a)* (i) and (ii), determines the position of the outer limit of the continental margin by means of the application of two rules (sometimes referred to as "formulae"). Both the "1 per cent sediment thickness formula" and the "60-nautical-mile distance formula" specified in paragraph (4) *(a)* are applied by reference to the foot of the continental slope, a geological feature. The result that one

[26] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 666, para. 118; *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)*, p. 130, para. 78.

[27] See Kevin A. Baumert, "The Outer Limits of the Continental Shelf under Customary International Law", *American Journal of International Law*, 2017, Vol. 111, p. 827.

[28] Article 76, paragraph 1, of the Convention (emphasis added).

derives from the application of the formulae must then be subjected to the constraints specified in paragraph 5. The first constraint in paragraph 5 (the "distance constraint") provides that the outer limits of the continental shelf may not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. Alternatively, States may apply the second constraint in paragraph 5 (the "depth constraint"), which provides that the outer limits of the continental shelf may not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

23. The distance constraint of 350 nautical miles can be set aside when submarine elevations are still natural parts of the continental margin, such as its plateaux, rises, caps, banks and spurs[29].

24. A State can use the most favourable combination of the formulae in order to establish the outer edge of its continental margin and it can also use the most favourable combination of the depth and distance constraints to establish the outer limits of the continental shelf[30].

25. If I have outlined the rules defining the outer limits of the continental shelf beyond 200 nautical miles in some detail, it is not to show that the determination of the outer limits of the continental shelf beyond 200 nautical miles is a complicated matter. It is to show what the rules bring and do not bring to the table; they bring in concepts of geodesy, geology, geophysics and hydrography, as well as very precise formulae and constraints. What they do not bring, however, is this: the notion that a State's entitlement to a continental shelf beyond 200 nautical miles "stops" at, or "cannot extend" within, 200 nautical miles from the baselines of another State.

26. The Convention is silent on the issue whether a State's entitlement to a continental shelf beyond 200 nautical miles may extend within 200 nautical miles from the baselines of another State. In the absence of a limitation to this effect, it must be accepted that the existence and breadth of a continental shelf entitlement beyond 200 nautical miles depend solely on the geological and geomorphological criteria set out above, subject to the applicable constraints under paragraph 5 of Article 76. This conclusion is in harmony with the cardinal principle, often repeated in delimitation cases, that "the land dominates the sea". A State's maritime entitlements derive from *its* sovereignty over the land, notably *its* coast that generates maritime entitlements. As the Court observed in the *North Sea Continental*

[29] Article 76, paragraph 6, of the Convention.

[30] However, there is one restriction on when a State is permitted to use the more favourable constraint (or combination of constraints). According to Article 76, paragraph 6, "submarine ridges" constitute a special case to which only the distance constraint (and not the depth constraint) may be applied.

*Shelf* cases[31], and later in the *Maritime Delimitation in the Black Sea* case[32], this principle is the basis for a continental shelf entitlement. The existence of a coastal State's continental shelf entitlement does not depend on the proximity to the coast of another State.

27. There is also no reservation in the Convention that specifies that a State's continental shelf entitlement beyond 200 nautical miles cannot overlap with the continental shelf within 200 nautical miles of another State. In the absence of such a reservation, it must be accepted that these entitlements may overlap. As mentioned above, a feature of maritime entitlements is that they can overlap with one another.

28. The Parties have referred extensively to the *travaux préparatoires* of the Convention in support of their arguments. But, as the Court's Judgment correctly notes, the issue of one State's continental shelf beyond 200 nautical miles extending within 200 nautical miles from the baselines of another State was "not debated during the Third United Nations Conference on the Law of the Sea" (Judgment, para. 76). This is not entirely surprising. It may be recalled that during the negotiation of the continental shelf régime, only 30 or so States were seen as possibly having continental margins beyond 200 nautical miles from their coasts that would call for the application of the delineation procedure set out in Article 76[33]. States may not have envisioned all aspects of this issue during the negotiations.

29. Despite the foregoing and the absence of any express limitation, in paragraph 76 of the Judgment, the Court seems inclined to find a tacit limitation to the entitlement to a continental shelf beyond 200 nautical miles on the basis of paragraphs 4 to 9 of Article 76, as well as Article 82, paragraph 1, of the Convention, which concerns payments and contributions with respect to the exploitation of the non-living resources of the continental shelf which would otherwise have been part of the Area.

The Judgment ventures that these provisions suggest that "the States participating in the negotiations *assumed* that the [continental shelf beyond 200 nautical miles] would only extend into maritime areas that would otherwise be located in the Area" — the implication being that a continental shelf beyond 200 nautical miles can *only* extend in the Area and not within 200 nautical miles from the baselines of another State (Judgment, para. 76, emphasis added). There is no trace of such an assumption in the

[31] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 51, para. 96.

[32] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 89, para. 77.

[33] See United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Definition of the Continental Shelf: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, New York, 1993, p. 6.

*travaux préparatoires* of the Convention. In my view, this is a mere supposition which, even if accepted, could not jettison the clear text of the Convention.

The concept of the continental shelf had developed several decades before the adoption of the 1982 Convention. As the Court stated authoritatively in 1969, 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"[34]. States had long recognized this concept and accepted that it could extend beyond 200 nautical miles from a State's coast up to the continental slope, even if the precise outer limits of the continental shelf remained debated[35]. For a time, the breadth of the continental shelf was conventionally defined with an exploitability test[36]. But this was rather imprecise. The formulae and constraints of Article 76 described above were the results of extensive negotiation, and they constituted an attempt at defining, but also limiting, the breadth of the continental shelves of broad-margin States[37]. They provide a methodology to establish the limits of the continental shelf. Given that the provisions of the Convention were subjected to scrutiny and extensive negotiation, the idea that the Convention imposes a tacit limitation on States' continental shelf entitlements beyond 200 nautical miles is untenable.

30. Thus, in my view, the answer to the question "may a State's entitlement to a continental shelf beyond 200 nautical miles . . . extend within 200 nautical miles from the baselines of another State?" is "yes". There is nothing in the Convention to suggest otherwise.

## III. Jurisprudence

31. The jurisprudence of the Court and international tribunals in maritime delimitation cases supports the conclusion just reached. The Court and other tribunals have accepted that a State's entitlement to a continental shelf beyond 200 nautical miles may extend within 200 nautical miles from

[34] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 22, para. 19.

[35] R. Y. Jennings, "The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment", *International and Comparative Law Quarterly*, 1969, Vol. 18, p. 830.

[36] Article 1 of the 1958 Convention on the Continental Shelf.

[37] Ted L. McDorman, "An ISA Side Issue: UNCLOS, Article 82 and Revenue Sharing" in Alfonso Ascencio-Herrera and Myron H. Nordquist (eds.), *The United Nations Convention on the Law of the Sea, Part XI Regime and the International Seabed Authority: A Twenty-Five Year Journey*, Brill/Nijhoff, 2022, p. 367.

the baselines of another State. The *Bay of Bengal* cases, as well as the Court's Judgment in the *Maritime Delimitation in the Indian Ocean* case, are particularly relevant here.

32. In the *Bay of Bengal* cases, both the International Tribunal for the Law of the Sea (hereinafter "ITLOS") and an Annex VII tribunal accepted that the parties' entitlements overlapped in the grey area. In the first *Bay of Bengal* case, ITLOS delimited the maritime entitlements of Bangladesh and Myanmar, including their entitlements beyond 200 nautical miles from their coasts. As the ITLOS shifted the provisional equidistance line in favour of Bangladesh, the delimitation of the continental shelf beyond 200 nautical miles involved an area located beyond 200 nautical miles from the coast of Bangladesh but within 200 nautical miles from the coast of Myanmar, yet on the Bangladeshi side of the delimitation line[38]. Similarly, the arbitral tribunal's delimitation within and beyond 200 nautical miles in *Bangladesh* v. *India* involved an area lying beyond 200 nautical miles from the coast of Bangladesh and within 200 nautical miles from the coast of India, yet on the Bangladeshi side of the delimitation line[39]. As a matter of delimitation, the tribunals allocated to Bangladesh an area corresponding to its continental shelf beyond 200 nautical miles that would have otherwise been areas of the continental shelf within 200 nautical miles of Myanmar and India. Thus, these decisions are premised on the finding that the parties' continental shelf entitlements could and did overlap[40]. As discussed above, this concerns the identification step (see paragraph 11).

33. The Court's Judgment in *Somalia* v. *Kenya* is also relevant. There, the Court accepted that Kenya's entitlement to a continental shelf beyond 200 nautical miles *could extend* within 200 nautical miles from Somalia's coast. In that case, the Court stated that, depending on the extent of Kenya's entitlement (as it may be established on the basis of the Commission's recommendations), the delimitation line constructed by the Court might give rise to an area "located beyond 200 nautical miles from the coast of Kenya and within 200 nautical miles from the coast of Somalia, but on the Kenyan side of the delimitation line"[41]. The Court described this area as a "possible grey area" (which is depicted on sketch-map No. 12 of the Judgment as a small grey wedge)[42]. The reason the Court used the term "possible" is plain.

[38] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 119, para. 463.

[39] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India), Award of 7 July 2014, RIAA*, Vol. XXXII, p. 147, para. 498.

[40] Malcolm D. Evans, "Maritime Boundary Delimitation: Whatever Next?" in Jill Barrett and Richard Barnes (eds.), *Law of the Sea: UNCLOS as a Living Treaty*, British Institute of International and Comparative Law, 2016, p. 74.

[41] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 277, para. 197.

[42] *Ibid*., p. 278.

When the Judgment was rendered in 2021, the Commission had not issued its recommendations in respect of Kenya's submission on the continental shelf beyond 200 nautical miles[43]. There thus remained — at the time, but no more[44] — some doubt about the extent of Kenya's continental shelf entitlement beyond 200 nautical miles. That said, the Court considered that the parties' continental shelf entitlements could overlap as a matter of law.

34. That the Court so considered is also evident from the way the Court delimited the maritime boundary beyond 200 nautical miles between the parties. It did so by extending, beyond 200 nautical miles, the same geodetic line that constitutes the single maritime boundary delimiting the exclusive economic zone and the continental shelf up to 200 nautical miles[45]. The issue is this: had there been no overlapping continental shelf entitlements, the Court would have been precluded from doing so —at least initially. Somalia alone would have had a continental shelf entitlement within the wedge. The Court would have had to draw a delimitation line taking a "zig-zag" course. The Court did not do so, however. Presumably, it saw no bar in international law to delimit the maritime boundary in such a way as resulting in Kenya's continental shelf beyond 200 nautical miles extending within 200 nautical miles from the baselines of Somalia.

35. The question may be asked how these decisions differ from the present one?

36. In paragraph 72 — which is not a model of clarity — the Court's Judgment is quick to reply that these three decisions are "of no assistance". The Judgment attempts to find safety in the suggestion that the present case differs from these decisions because Nicaragua "claims an extended continental shelf that lies within 200 nautical miles from the baselines of one or more other States". By contrast, says the Judgment, in the two *Bay of Bengal* cases, it was the "use of an adjusted equidistance line in a delimitation between adjacent States [that], as an incidental result of that adjustment, gave rise to a grey area". Likewise, in *Somalia* v. *Kenya*, it was the use of an adjusted equidistance line that gave rise, "as an incidental result", to a possible grey area between two adjacent States.

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[43] *Ibid*., p. 220, para. 34.

[44] What was referred to as a "possible grey area" in *Somalia* v. *Kenya* has become a reality, for the recommendations issued by the Subcommission of the Commission on the Limits of the Continental Shelf were approved by the Commission itself and seem to confirm that Kenya has an entitlement to a continental shelf beyond 200 nautical miles from its coast. See Summary of Recommendations of the CLSC in regard to the Submission Made by the Republic of Kenya on 6 May 2009, adopted by the Subcommission on 8 November 2022, approved by the Commission, with amendments, on 7 March 2023, https://www.un.org/depts/los/clcs_new/submissions_files/ken35_09/20230307ComSumRecKen.pdf.

[45] *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Judgment, I.C.J. Reports 2021*, p. 277, para. 196.

It is hard to know what to make of this cryptic statement. What it seems to boil down to is a distinction between States with adjacent coasts (the *Bay of Bengal* cases and *Somalia* v. *Kenya*) and States with opposite coasts (as in this case). It is true that an area of overlap may arise and be dealt with differently depending on the coastal configuration. When a tribunal delimits the entitlements of adjacent States both within and beyond 200 nautical miles, a grey area will arise whenever the single maritime boundary of the 200-nautical-mile entitlements departs from an equidistance line. Between States with opposite coasts, where the distance between the two coasts is greater than 400 nautical miles, and only one State has an entitlement to a continental shelf beyond 200 nautical miles — as is the case here — the grey area may have a different shape than the wedge-shaped areas seen with adjacent States. The shape and size of the grey area, if any, will vary depending on the extent of a State's entitlement to a continental shelf beyond 200 nautical miles as determined by a court or tribunal applying the rules on maritime delimitation calling for the achievement of an equitable result.

37. The Respondent insists that the grey areas of the *Bay of Bengal* cases and *Somalia* v. *Kenya* were merely "incidental results" of the delimitation process. This looks to me self-defeating: to suggest that they were incidental results of the delimitation is to accept that the parties' entitlements overlapped to begin with, and hence, that they can overlap as a matter of law[46]. Again, courts and tribunals may only delimit the parties' entitlements that overlap.

The Respondent further suggests that the "small" grey areas at stake in these decisions are different from "the huge grey area that Nicaragua seeks to create in the present [case]"[47].

This confuses the preliminary identification step with the final delimitation. I agree that, depending on the circumstances of a particular case, there may be something inequitable in allocating to broad-margin State A an area which it may claim as a continental shelf beyond 200 nautical miles but that falls within 200 nautical miles of State B. In such a hypothesis, State B could be left with a continental shelf not reaching 200 nautical miles from its coast, whereas State A would enjoy its continental shelf both up to and beyond 200 nautical miles from its coast. However, this is a matter of delimitation. The size of a grey area may have some role to play at later stages of the delimitation — for instance, as a possible circumstance relevant to an equitable solution — but it plays no role in determining whether there is an overlap of entitlements.

[46] Jin-Hyun Paik, "The Grey Area in the Bay of Bengal Case" in Myron H. Nordquist et al. (eds.), *International Marine Economy: Law and Policy*, Brill/Nijhoff, 2017, p. 275.

[47] CR 2022/26, p. 46, para. 3 (Palestini).

The coastal configuration of States — whether they are States with opposite or adjacent coasts — can have no bearing on the issue of principle whether, at the identification step, a State's continental shelf entitlement beyond 200 nautical miles may overlap with another State's entitlement to a continental shelf based on the 200-nautical miles distance criterion. The entitlement of the coastal State over the continental shelf is the same, no matter its coastal situation[48].

Rather, if grey areas are "impossible" because legally there can be no overlapping entitlements — as today's Judgment seems to conclude in paragraph 82 — then grey areas are impossible no matter the circumstances.

38. It seems, therefore, that there is no escape from the conclusion that today's Judgment departs from the Court's jurisprudence and that of international tribunals. This jurisprudence contains a consistent finding of law which the Court simply ignores. I regret that the Court provides no convincing rationale for this departure[49]. As my distinguished colleagues observed in the past, the Court

> "must ensure consistency with its own past case law in order to provide predictability . . . This is especially true in different phases of the same case or with regard to closely related cases"[50].

## IV. Practice of States

39. I pass now to an examination of the existence of an alleged rule of customary international law that would prevent a State's entitlement to a continental shelf beyond 200 nautical miles from extending within 200 nautical miles from the baselines of another State. According to the Court's settled jurisprudence, the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris*[51]. Despite the importance of this question and the extensive pleadings of the Parties on this issue, it is hard to say that the Court has taken its task of identifying custom very seriously. The Court's Judgment devotes only a single

[48] Articles 77 and 83 of UNCLOS.

[49] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 428, para. 53.

[50] *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, p. 330, para. 3.

[51] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/ Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77.

paragraph to its "analysis" of this practice (Judgment, para. 77). In fact, the Judgment does not even summarize the Parties' arguments properly. I thus feel the need to give a very summary account of the Parties' legal contentions. Without being exhaustive, I shall also examine the two elements of custom below.

40. Basically, the Respondent argues that States follow a customary rule according to which natural prolongation "is not a source of title within maritime areas that lie 200 nautical miles from another State's baselines"[52]. It refers to the practice of some 30 broad-margin States (35 States in its Counter-Memorial[53], 31 States in its Rejoinder[54]) which, it says,

> "could have potentially claimed [a continental shelf beyond 200 nautical miles from their coasts] that would have encroached upon the 200-nautical-mile entitlement of another State, but . . . stopped at the other State's 200-nautical-mile zone"[55].

This alleged body of practice mostly takes the form of 51 CLCS submissions, which Colombia compiled in an annex to its Counter-Memorial[56].

41. This argument is not new. The Respondent made the same argument in 2012[57].

### *A. State Practice*

42. Is there a general practice of States in support of the putative customary rule? The answer appears to be affirmative — but only at first sight. A number of States in their submissions or "preliminary information" to the Commission have limited their claims to a continental shelf entitlement beyond 200 nautical miles in a way that does not extend within 200 nautical miles from a neighbouring State's baselines. This practice of self-restraint varies in shape but is generally consistent. Some States have placed the fixed points of their proposed continental shelf outer limits on the 200 nautical miles limit of a neighbouring State. Others have used endpoints that deliberately stop short of the 200 nautical miles limit of a neighbouring State. This is true both of individual CLCS submissions and of joint

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[52] Rejoinder of Colombia, para. 3.1.

[53] Counter-Memorial of Colombia, para. 3.70.

[54] Rejoinder of Colombia, para. 3.38.

[55] Counter-Memorial of Colombia, para. 3.70.

[56] *Ibid.*, Ann. 50.

[57] See e.g. *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, CR 2012/12, p. 60, para. 78 (Bundy). During the oral proceedings, counsel for Colombia referred to some 32 "filings" to the CLCS (18 full submissions, 14 submissions of "Preliminary Information"), suggesting that most States "approach other States 200-mile limits . . . and [avoid] encroaching on the 200-mile limits of other States".

submissions. This practice may be described as a form of "negative practice", in the sense that it consists of abstentions. I agree that this body of practice is not insignificant. It originates from various parts of the world, and it appears widespread.

43. Nicaragua argues that this body of practice is insufficient to give rise to a customary rule because the States that have engaged in it "do not represent even 25 [per cent] of the State Parties" to the Convention[58]. This threshold argument misses the mark. In assessing the generality of State practice, regard must be had to those States that are particularly involved in the relevant activity or are most likely to be concerned with the alleged customary rule. In the present case, this includes those broad-margin States that can claim a continental shelf beyond 200 nautical miles that can extend within 200 nautical miles from the baselines of another State. Within this more limited "pool" of States, the question is whether most States have adopted a representative and consistent practice not to claim a continental shelf entitlement so close to another State's coast. The Court's Judgment proceeds on the basis of this postulate to assess this body of practice. Rightly so.

44. This being said, I feel bound to say that the Court's analysis is incomplete.

45. For one, the Judgment does not acknowledge, much less analyse, the existence of contrary State practice whereby States have claimed a continental shelf entitlement that extends within 200 nautical miles from the baselines of another State. Examples — some of them uncontroversial as between the Parties — include: (i) Bangladesh's 2011 submission in respect of the Bay of Bengal[59]; (ii) Cameroon's 2009 preliminary information in respect of the Gulf of Guinea[60]; (iii) China's 2012 partial submission in part of the East China

[58] Written comments by Nicaragua on the reply of Colombia to the question put to it by Judge Robinson, para. 10.

[59] See Submission by the People's Republic of Bangladesh to the Commission on the Limits of the Continental Shelf, Executive Summary, February 2011, p. 11 (in which Bangladesh claimed an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coasts of India and Myanmar. In paragraph 5.1 of its Executive Summary, Bangladesh explained that its maritime entitlements overlap with those of India and Myanmar).

[60] See Demande préliminaire du Cameroun aux fins de l'extension des limites de son Plateau Continental, 11 May 2009, p. 4 (in which Cameroon claimed an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coast of Equatorial Guinea).

Sea[61]; (iv) France's 2014 partial submission in respect of Saint-Pierre-et-Miquelon[62]; (v) Korea's 2012 partial submission in respect of the East China Sea[63]; (vi) the Applicant's 2013 submission in respect of the Caribbean Sea[64]; (vii) Russia's 2001 submission in respect of the Arctic Ocean[65]; (viii) Somalia's 2015 amended executive summary of its submission in respect of the Indian Ocean[66]; (ix) Tanzania's 2009 preliminary information in respect of the Indian Ocean[67]; or (x) Argentina's 2009 submission in respect of the South Atlantic Ocean[68]. This practice cuts against the Judgment's rather exaggerated assertion that the "vast majority" of States parties to UNCLOS that have made submissions to the CLCS have chosen not to assert therein limits that extend within 200 nautical miles of another State's coast (Judgment, para. 77). This is not a "small number" of States (*ibid*.).

[61] See Submission by the People's Republic of China concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea, p. 7, fig. 2 (in which China claimed an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coast of Japan).

[62] See Partial Submission to the Commission on the Limits of the Continental Shelf, pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea in respect of the Area of Saint-Pierre-et-Miquelon, Part 1, Executive Summary, p. 5, fig. 2 (in which France claimed an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coast of Canada). See also Pascale Ricard, "Saint-Pierre-et-Miquelon. Les prolongements (sous-marins) d'un arbitrage?" in Alina Miron and Denys-Sacha Robin (eds.), *Atlas des espaces maritimes de la France*, Pedone, 2022, p. 189.

[63] See Partial Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea, Executive Summary, p. 9, fig. 1 (in which Korea claimed an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coast of Japan).

[64] See Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea, June 2013, Part I: Executive Summary, p. 4, fig. 1.

[65] See Submission by the Russian Federation, to the Commission on the Limits of the Continental Shelf, 20 December 2001, Executive Summary, map 2 "Area of the continental shelf of the Russian Federation in the Arctic Ocean beyond 200-nautical-mile zone" (in which Russia claimed an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coast of Norway).

[66] See Continental Shelf Submission of the Federal Republic of Somalia, Executive Summary Amended, p. 9, fig. 2 (in which Somalia appears to claim an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coast of Yemen).

[67] See Preliminary Information Indicative of the Outer Limits of the Continental Shelf and Description of the Status of Preparation of Making a Submission to the Commission on the Limits of the Continental Shelf for the United Republic of Tanzania, 7 May 2009, p. 10, fig. 4 (in which Tanzania claimed an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the coast of the Seychelles).

[68] See Argentine Submission, Outer Limits of the Continental Shelf, p. 23, fig. 7. The outer limits of the continental shelf beyond 200 nautical miles claimed by Argentina in the Tierra del Fuego margin region would appear to extend within 200 nautical miles from Chile's baselines.

46. The Judgment also ignores the wealth of State practice available. The Court simply refers to the negative practice adduced by the Respondent, as though nothing else existed in the practice of States or even in the record before it. The Court is tasked with ascertaining what the international law is. In the fulfilment of its task, the Court need not confine itself to a consideration of the arguments put forward by the parties, but must research "all precedents, teachings and facts to which it ha[s] access and which might possibly" reveal the existence of the putative customary rule[69]. I regret to say that the Court has not fulfilled its task.

47. The Court ignores the positions taken by States before international courts and tribunals in delimitation cases. These are pleadings in which States either have acknowledged the existence of a grey area, or expressly claimed that, as matter of legal principle, a State's entitlement to a continental shelf beyond 200 nautical miles *may* extend within 200 nautical miles from the baselines of another State[70]. The pleadings of Bangladesh[71], Canada, Côte d'Ivoire[72], Ghana[73], Trinidad and Tobago, the United States or Somalia[74] are illustrative. As mentioned above, the grey area issue has found itself before international courts and tribunals on a number of occasions. The official statements made by Australia in the Timor Sea Conciliation are also relevant[75]. There, Australia claimed an entitlement to a continental shelf beyond 200 nautical miles up to the edge of the Timor Trough that extended within 200 nautical miles from the baselines of Timor-Leste[76].

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[69] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 31.

[70] "Conclusions on identification of customary international law, with commentaries", *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, p. 91 (Conclusion 6, para. 5).

[71] *ITLOS Pleadings, Minutes of Public Sittings and Documents 2012*, Vol. 17/I, *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Memorial of Bangladesh, p. 143, para. 7.39 (stating that "[t]he proposition that even a sliver of EEZ of State B beyond the outer limit of State A's EEZ puts an end by operation of law to the entitlement that State A would otherwise have under Article 76 of UNCLOS to its outer continental shelf should not be entertained").

[72] *ITLOS Pleadings, Minutes of Public Sittings and Documents 2017*, Vol. 26/I, *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Merits, Counter-Memorial of the Côte d'Ivoire, p. 833, paras. 8.32-8.34 (describing the grey area as "un phénomène connu et bien répertorié" and suggesting that the Special Chamber should delimit the grey area) and fig. 8.3.

[73] *Ibid*., Memorial of Ghana, p. 171, para. 5.82 (recognizing that the use of the bisector method in that case would create a grey area).

[74] *I.C.J. Pleadings, Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya)*, Memorial of Somalia, p. 113, para. 7.33, and fig. 7.4 (depicting a grey area of 8,875.5 sq km).

[75] *Timor Sea Conciliation (Timor-Leste* v. *Australia)*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, PCA Case No 2016-10, para. 234.

[76] The fact that Australia has not made a submission to the CLCS in this regard does not reduce the weight of this practice. Australia appears to be of the view that a CLCS submission may not be needed when the area of continental shelf beyond 200 nautical miles claimed falls within 200 nautical miles of the baselines of another State. See Andrew Serdy, "Is There a

Relevant contrary practice can also be found in the form of treaties[77].

48. Thus, it may be asked whether there is in fact a general practice?

49. I accept that some inconsistencies and contradictions are not necessarily fatal to a finding of "a general practice". It is not expected that in the practice of States the application of the putative rule "should have been perfect", in the sense that States should have refrained with "complete consistency" from claiming a continental shelf entitlement within 200 nautical miles of another State's baselines[78]. I also accept that, for some States, practice varies and should arguably be given less weight. Nevertheless, it seems reasonable to infer from the foregoing that up to 20 States have accepted — either in their CLCS submissions, preliminary information, or otherwise — that a continental shelf entitlement beyond 200 nautical miles may extend within 200 nautical miles of another State's baselines. This State practice seems capable of seriously calling into question the element of a "general practice". Yet, the Court treats this practice as of no account. The Judgment does not explain why and is content to adopt a very general analysis. It may be asked whether the Court is "so general because the particulars do not withstand analysis"[79].

50. Be that as it may, establishing that a certain practice is sufficiently general does not in itself suffice to find a rule of customary international law. State practice must be accompanied by *opinio juris*. This is true even when some of the practice takes the form of abstentions, which may make the ascertainment of *opinio juris* more difficult[80]. It is to this requirement that I turn next.

### *B. Acceptance as Law (*Opinio Juris*)*

51. The Parties have expressed markedly different views on *opinio juris*. For Nicaragua, it is not enough to show that 30 States or so have refrained from claiming a continental shelf entitlement within 200 nautical miles of

400-Mile Rule in UNCLOS Article 76 (8)?" (2008), *International and Comparative Law Quarterly*, Vol. 57, p. 948; Victor Prescott, "Resources of the Continental Margin and International Law" in Peter J. Cook and Chris M. Carleton (eds.) *Continental Shelf Limits: The Scientific and Legal Interface*, Oxford University Press, 2000, p. 73.

[77] See e.g. Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, signed 14 March 1997, not yet in force, *International Legal Materials*, 1997, Vol. XXXVI, No. 5, p. 1055.

[78] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 98, para. 186 (*mutatis mutandis*).

[79] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, dissenting opinion of Judge Schwebel, p. 186.

[80] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 28.

another State; it must also be shown that "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"[81]. In Annex 2 of its written comments on Colombia's reply to the question put to it by a Member of the Court, Nicaragua reviews the CLCS submissions referred to by Colombia. It concludes from this review that not even a single CLCS submission "states directly or·even indirectly" that their conduct is compelled by the law[82].

52. The Judgment is grounded on the assumption that this practice is undertaken with a sense of legal obligation. It assumes that these abstentions *must* be motivated by a sense of obligation and not by extra-legal motives, such as political expediency or convenience, even though States have not framed their abstentions as legally compelled by reason of a rule of customary international law.

There are serious difficulties about this way of looking at things. The Judgment recognizes this, for it states that this practice "may have been motivated in part by considerations other than a sense of legal obligation" (Judgment, para. 77). This is a prudent disclaimer, especially considering that only the executive summaries of CLCS submissions are made public and included in the record before the Court. These summaries contain maps, co-ordinates indicating the outer limits of the continental shelf and baselines, and the indication of which provisions of Article 76 are invoked, but they are of little to no assistance in ascertaining *opinio juris*. They do not explain why States act the way they do. Yet this disclaimer is immediately forgotten when the Court infers that this negative State practice, "given its extent over a long period of time, . . . may be seen as an expression of *opinio juris*" (*ibid.*).

53. According to the Respondent, there is only one explanation for the negative practice of States. As it sees it, it would "strain[] credulity to suggest that 31 States, while believing that they had a legitimate source of title to the seabed and subsoil within [200 nautical miles from the baselines of another State], simply relinquished such title in return for nothing"[83]. The complete answer to this argument is simply that motives vary. A State may refrain from claiming an entitlement to a continental shelf beyond 200 nautical miles that extends within 200 nautical miles from the baselines of another State notably *(a)* to put off a diplomatic row[84]; *(b)* to avoid the objection pro-

[81] CR 2022/25, p. 40, para. 60 (Lowe).

[82] Written comments by Nicaragua on the reply of Colombia to the question put to it by Judge Robinson, para. 15.

[83] Rejoinder of Colombia, para. 3.39.

[84] See e.g. Jun, Qiu and Zhang Haiwen, "Partial Submission Made by the Republic of Korea to the Commission on the Limits of the Continental Shelf: A Review", *China Oceans Law Review*, Vol. 2013 (18), p. 91.

cedure of the CLCS, which would result in blocking or seriously delaying the consideration of its submission; or *(c)* because a given area may not be worth claiming[85]. These motives are not "wild speculations"[86], as the Respondent would have it. They are reflected in the practice of States.

54. Circumstance *(b)* deserves consideration. The delineation procedure at the CLCS must be borne in mind. States have adopted various strategies to avoid the possibility of their submissions being blocked by a neighbour[87]. They may seek assurances of "no objection". They may make a partial submission. They may even amend their submissions to exclude areas that are in dispute[88]. It is not far-fetched to suggest that some States have preferred to relinquish an area of continental shelf entitlement beyond 200 nautical miles; after all, "half a loaf is better than none".

55. Indeed, the Applicant's submission to the CLCS has been blocked for a decade[89].

56. To give only one example of circumstance *(b)*, reference may be made to the 2009 submission of Trinidad and Tobago. It will be recalled that, in the *Barbados/Trinidad and Tobago* case, the parties debated how to delimit an area of overlap (which they referred to as the "intermediate zone"), said to be beyond 200 nautical miles from Trinidad and Tobago but within 200 nautical miles of the coast of Barbados. Trinidad and Tobago was of the view that a State's entitlement to a continental shelf beyond 200 nautical miles may extend within 200 nautical miles from the baselines of another State[90]. Yet, in its 2009 CLCS submission, while maintaining its view on the law, it abstained from claiming a continental shelf within 200 nautical miles of Barbados. Being unable to secure an agreement from Barbados not to object to its CLCS submission, Trinidad and Tobago clearly stated that it decided to

[85] See e.g. Øystein Jensen, "Russia's Revised Arctic Seabed Submission", *Ocean Development and International Law*, 2016, Vol. 47 (1), p. 82.

[86] CR 2022/28, p. 15, para. 16 (Wood).

[87] See Coalter Lathrop, "Continental Shelf Delimitation beyond 200 Nautical Miles: Approaches Taken by Coastal States before the Commission on the Limits of the Continental Shelf" in David A. Colson and Robert W. Smith (eds.) *International Maritime Boundaries*, 2011, Vol. VI, p. 4147.

[88] See e.g. Executive Summary, Partial Amended Submission to the Commission on the Limits of the Continental Shelf in respect of the North Sea pursuant to Article 76 of the United Nations Convention on the Law of the Sea by the Republic of Palau, 12 October 2017, available at https://www.un.org/depts/los/clcs_new/submissions_files/plw41_09/plw2017executivesummary.pdf.

[89] The Submission appears to have made no progress since 2013. See Progress of Work in the Commission on the Limits of the Continental Shelf, Statement by the Chair, CLCS/83, 31 March 2014, Item 14, paras. 78-83.

[90] See e.g. *Arbitration between Barbados and the Republic of Trinidad and Tobago*, Counter-Memorial of the Republic of Trinidad and Tobago, Vol. 1 (1), para. 272 (advancing the view that "the continental shelf of State A can overlap and co-exist with the exclusive economic zone of State B").

submit a submission that was "not dependent on the utilization of maritime space within 200 [nautical miles] of the Barbados coastline"[91].

57. Was it reasonable, then, for the Court to infer *opinio juris* in the way it did? I think not.

58. I accept that, in certain circumstances, State practice may have been motivated by *opinio juris*. And I do not suggest that all 30 or so States that have refrained from claiming a continental shelf beyond 200 nautical miles that extends within 200 nautical miles of another State have done so for extra-legal motives. It may well be that some of them have undertaken this practice with a sense of legal obligation on the basis of the putative rule of customary international law. But is it really reasonable to suppose that all of them did? In my considered view, in light of the circumstances and on the basis of the limited information available in the executive summaries, such an inference is a perilous leap to make. The Court holds no crystal ball into the motives of States. The Judgment fails to explain why, in the circumstances, such an inference is appropriate or even reasonable.

59. Quite apart from this methodological problem, it seems to me that the Court's finding flies in the face of clear *opinio juris* to the contrary. Today's Judgment does not acknowledge the existence of clear expressions of *opinio juris* to the effect that a State's entitlement to a continental shelf beyond 200 nautical miles *may* extend within 200 nautical miles from the baselines of another State.

60. Such expressions can be found, for instance, in Cameroon's preliminary information to the Commission of 11 May 2009, as well as France's Note Verbale dated 17 December 2014 concerning its submission on Saint-Pierre-et-Miquelon. France's submission to the Commission in relation to Saint-Pierre-et-Miquelon appears to include areas that are located within 200 nautical miles from Canada, whereas Cameroon's preliminary information includes areas that are located within 200 nautical miles from Equatorial Guinea. In response to a Note Verbale from Canada, France expressed the view that its claims "do not run counter to [UNCLOS] or any rule of international law"[92]. In its preliminary information, Cameroon explicitly acknowledges that

> "its resulting legal title beyond 200 nautical miles is, because of the geopolitical configuration of the region, called upon to overlap with the

[91] Executive Summary, Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea, Republic of Trinidad and Tobago, 12 May 2009, pp. 17-18.

[92] Note Verbale of France dated 17 December 2014, TS/MSM/No. 622, available at https://www.un.org/depts/los/clcs_new/submissions_files/can70_13/1467831E.pdf.

> partially competing titles that neighbouring States may assert . . . within 200 nautical miles"[93].

A similar expression of *opinio juris* can be found in a Note Verbale of the Republic of Korea dated 23 January 2013[94].

61. To this can be added the positions taken by States in their statements before international courts and tribunals[95] in delimitation cases. As mentioned above, examples include the pleadings of such States as Bangladesh, Canada, Côte d'Ivoire, Ghana, the Maldives, Trinidad and Tobago, the United States, or Somalia. In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, for instance, Canada accepted that its proposed delimitation line would create a small "grey area". It suggested that, in such a situation, the continental shelf could be subject to the jurisdiction of one State, and the water column subject to the other[96]. The United States, for its part, asserted that "[t]he international community long has recognized the existence of the grey area"[97] and that "the Third United Nations Conference on the Law of the Sea . . . never once . . . took up the grey area issue in all the debates about the 200-nautical-mile zone"[98]. Referring to various instances of State practice, it suggested that "the practice of States clearly does not regard the creation of a grey area as a problem to be avoided"[99]. The grey area was depicted in maps annexed to the parties' pleadings.

62. In the *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* case before the Special Chamber of the ITLOS, the question was put to the parties whether the Maldives' entitlement to the continental shelf beyond 200 nautical miles from its baseline can be extended into the 200 nautical miles limit of Mauritius, as indicated in figure 29 of the Maldives' Counter-Memorial and figure 6 of the Maldives' Rejoinder[100], which depicted a grey

[93] Demande préliminaire du Cameroun aux fins de l'extension des limites de son plateau continental, 11 May 2009, p. 4, available at https://www.un.org/depts/los/clcs_new/submissions_files/preliminary/cmr2009informationpreliminaire.pdf (my translation).

[94] Note Verbale of the Republic of Korea dated 23 January 2013, MUN/022/13, available at https://www.un.org/depts/los/clcs_new/submissions_files/kor65_12/kor_re_jpn_23_01_2013.pdf (stating that UNCLOS "establishe[d] two distinct bases of entitlement in the continental shelf . . . Neither . . . is afforded priority over the other under the Convention. Japan, therefore, cannot use its entitlement based on the distance criterion to negate Korea's entitlement based on geomorphological considerations").

[95] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 135, para. 77 (relying on the positions taken by States to identify *opinio juris*).

[96] See *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Vol. VI, p. 163, argument of Mr Weil.

[97] *Ibid*., Vol. VII, p. 218, reply of Mr Colson.

[98] *Ibid*., p. 219.

[99] *Ibid*.

[100] *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, *ITLOS Reports 2022-2023*, to be published, para. 57.

area. That area was on the Maldives' side of the delimitation line, located beyond 200 nautical miles from the coast of the Maldives but within 200 nautical miles from the baselines of Mauritius. In response, the Maldives "confirm[ed] its position that [its] entitlement to the continental shelf beyond 200 nautical miles from its baseline can be so extended"[101].

63. The present Judgment does not explain how the *opinio juris* supposedly identified by the Court squares with the above examples.

### *C. Assessment*

64. The Court's finding on a bright-line customary rule is open to serious doubt. This finding rests on a curated selection of State practice, and on little to no analysis of *opinio juris*. The Court's finding also does not comport with the indications furnished by subsidiary means for the determination of rules of law, including the decisions of international courts and tribunals (see above, paragraphs 31-38) and scholarly writings[102]. I regret that the Court's analysis does not demonstrate the existence of the alleged rule.

## V. Entitlement to the Exclusive Economic Zone

65. There is another matter which seems to call for comment. So far, the question of the overlap of entitlements has been approached from the perspective of the continental shelf, that is, by asking whether a State's continental shelf entitlement beyond 200 nautical miles may overlap with another State's continental shelf within 200 nautical miles. I have reasoned that the answer is "yes".

66. Another way to approach the issue is from the perspective of the exclusive economic zone. States are entitled to an exclusive economic zone of up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. It may thus be asked whether one State's continental shelf entitlement beyond 200 nautical miles may overlap with another State's exclusive economic zone entitlement. That is: does the entitlement of a coastal State to an exclusive economic zone, encompassing the waters superjacent to the seabed, *but also the seabed and its subsoil*, "exclude" an entitlement by another State to a continental shelf beyond 200 nautical

[101] ITLOS/PV.22C28/4, p. 7 (Sander).

[102] The scholarly writings that have examined this issue all conclude that the negative practice of States in the form of CLCS submissions is not accompanied by sufficient *opinio juris*. See e.g. Xuexia Liao, *The Continental Shelf Delimitation beyond 200 Nautical Miles: Towards a Common Approach to Maritime Boundary-making*, Cambridge University Press, 2021, p. 81 (stating that "[u]nless more convincing evidence regarding the binding nature of States' behavior is available, it is difficult to establish the *opinio juris* that is necessary for the formation of customary international law").

miles from its baselines that extends into the same area? Colombia has strenuously argued that this is so. Again, this a question of law and it arises at the identification step.

This argument is not new. The Respondent made the same argument in 2012.

67. The Court's Judgment does not squarely engage with this question, and I do not wish to dwell on it. It suffices to note that the *Bay of Bengal* decisions and the Court's Judgment in *Somalia* v. *Kenya*, in so far as they recognized the existence of grey areas, found that an entitlement to a continental shelf beyond 200 nautical miles may extend and overlap with an exclusive economic zone entitlement. That is the correct finding in law. The institutions of the continental shelf and the exclusive economic zone are "different and distinct"[103]. Neither nullifies — or takes "priority" over — the other to prevent an overlap[104]. Again, a feature of maritime entitlements is that they can overlap (see paragraph 12 above). This is true even when the entitlements are of a different nature[105].

68. Paragraphs 68 to 70 of the Judgment are devoted to the relationship between the régime of the exclusive economic zone and that of the continental shelf under customary international law. Presumably, this relationship is seen by the Court as germane to answering the first question. The Court observes that the régime of the exclusive economic zone is the result of a compromise; it notes that this régime confers sovereign rights of exploration, exploitation, conservation and management of natural resources to the coastal State; it recalls that, within the exclusive economic zone, the rights with respect to the seabed and subsoil are to be exercised in accordance with the régime of the continental shelf. These observations are on their face unobjectionable, and I could subscribe to the Court's reasoning were it not for the fact that this reasoning seems to carry with it a veiled proposition the implications of which are not teased out in the Judgment but nonetheless significant.

69. In paragraph 70 of the Judgment the Court quotes a passage of its 1985 Judgment in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case. Said passage reads as follows:

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

[104] See *Arbitration between Barbados and the Republic of Trinidad and Tobago, Award of 11 April 2006, RIAA*, Vol. XXVII, p. 213, para. 234 (stating that "the continental shelf and the EEZ co-exist as separate institutions, as the latter has not absorbed the former (*Libya/Malta, I.C.J. Reports 1985*, p. 13) and as the former does not displace the latter").

[105] For instance, in its 2012 Judgment, the Court found an overlap between the territorial sea entitlement of Colombia derived from islands and the entitlement of Nicaragua to a continental shelf and exclusive economic zone. The Court did not accept Colombia's argument that its territorial sea had "priority". See *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), I.C.J. Reports 2012 (II)*, p. 689, para. 174 and p. 690, para. 177.

> "Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf." (*Judgment, I.C.J. Reports 1985*, p. 33, para. 34.)

The Court does not explain why this passage of the 1985 Judgment is relevant. It draws no conclusion from its reasoning.

70. I find it hard to see the quotation of this passage as a mere happenstance. Throughout the proceedings, the Respondent has relied on this passage of the Court's Judgment in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case to suggest that the Court should avoid "creating" a "huge" grey area in the present case. For Colombia, the existence of a grey area cannot be upheld in this case without calling into question the very notion of the exclusive economic zone, which, it claims, was meant to join all the physical layers of the sea under one national jurisdiction in which the coastal State would exercise sovereign rights over both the living and non-living resources (Judgment, para. 63). Colombia argues that an exclusive economic zone the water column of which is divorced from the seabed and subsoil, is no longer an exclusive economic zone (*ibid*., para. 64). To support this argument, Colombia purports to rely on the Court's "finding" in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, quoted above, that "there cannot be an exclusive economic zone without a corresponding continental shelf"[106].

71. The truncated passage on which Colombia relies does not support its argument. In *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, the Court was merely stating the obvious: a continental shelf exists *ipso facto* and *ab initio*[107], whereas an exclusive economic zone has to be proclaimed by the coastal State. An exclusive economic zone exists only in so far as the coastal State chooses to proclaim such a zone[108]. That is why "[a]lthough there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf". That is all. This passage does not stand for the proposition that "the water column of the exclusive economic zone cannot in principle be divorced from its sea-bed and subsoil"[109]. This is a reading of the 1985 Judgment that its text cannot bear.

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[106] See e.g. Rejoinder of Colombia, paras. 2.20 and 3.21; CR 2022/26, p. 45, para. 1 (Palestini); CR 2022/28, p. 38, para. 13 (Valencia-Ospina).

[107] Article 77, paragraph 3, of the Convention.

[108] David Joseph Attard, *The Exclusive Economic Zone in International Law*, Oxford University Press, 1987, p. 141.

[109] CR 2022/26, pp. 48-49, para. 7 (Palestini).

72. In any event, the Respondent's concerns against differentiating water-column rights and continental-shelf rights in a given area relate to the achievement of an equitable result. They do not concern the identification step. As mentioned above (see paragraph 19), an area of overlapping entitlements must be distinguished from the *maritime area* that may be established by a court or tribunal on the basis of such overlapping entitlements. It is true that in the *Bay of Bengal* cases, for instance, the tribunals' decisions to delimit the parties' entitlements resulted in maritime areas in which jurisdiction over the water column was adjudicated as appertaining to one State and jurisdiction over the seabed and subsoil to another. As the arbitral tribunal explained in *Bangladesh* v. *India*, "[t]he establishment of a maritime area in which the States concerned have shared rights is not unknown under the Convention"[110]. It is also not unknown in practice. Needless to say, the Court could have arrived at this or at a different solution in its task to find an equitable solution in the present case had it proceeded to the delimitation.

## VI. Conclusions

73. This Judgment asserts a legal principle which is not consistent with the jurisprudence of the Court, the International Tribunal of the Law of the Sea, and an Annex VII arbitral tribunal. I understand that judges and lawyers may feel more at home in the legal sphere than in matters of geomorphology and geology. This, however, cannot justify an approach which avoids dealing with the facts as presented by the parties in a particular case.

74. I have found myself unable to agree with the conclusion reached by the Court on the first legal question it put to the Parties in its Order of 4 October 2022, and with its finding in the operative clause of the Judgment which follows from its conclusion (Judgment, para. 104 (1)). My vote however should not be seen as meaning that I would have necessarily upheld Nicaragua's submission as far as the delimitation line it proposed. The determination of the maritime boundary would have been a matter for adjudication, applying the rules calling for the achievement of an equitable result, had the Court allowed the case to proceed to that stage.

75. I only note that the consequences of today's Judgment lead to an inequitable result.

*(Signed)* Peter Tomka.

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[110] *Bay of Bengal Maritime Boundary Arbitration (Bangladesh* v. *India), Award of 7 July 2014, RIAA*, Vol. XXXII, p. 148, para. 507.