SEPARATE OPINION OF JUDGE IWASAWA

There are important differences with regard to the legal basis for the entitlement to a continental shelf within and beyond 200 nautical miles — Only the distance criterion is relevant for the continental shelf within 200 nautical miles — The régime of the exclusive economic zone, in particular as provided for in Article 56 of UNCLOS, affords a strong basis for the conclusion that the outer continental shelf of a State may not extend within 200 nautical miles of another State — Opinio juris *may be inferred in certain circumstances from the general practice of States — In their submissions to the CLCS, States have refrained from extending an outer continental shelf within 200 nautical miles of the baselines of another State out of a sense of legal obligation* — Opinio juris *is to be sought with respect to both the States engaging in the relevant practice and those in a position to react to it — Nicaragua is not entitled to an outer continental shelf in the area to the east of the 200-nautical-mile line of the Colombian islands of San Andrés, Providencia and Santa Catalina.*

1. I voted in favour of the Court's decisions in the operative paragraph (paragraph 104 of the Judgment) and generally agree with the reasoning set out in the Judgment. The purpose of this opinion is to supplement the reasons underlying the Court's conclusions and to elaborate upon some issues which are not addressed at length in the Judgment.

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2. I agree with the Court 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" (paragraph 79 of the Judgment).

3. The International Tribunal for the Law of the Sea (ITLOS) and arbitral tribunals have stated in maritime delimitation cases that there is in law a single continental shelf (see e.g. *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, pp. 208-209, para. 213;

Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, p. 96, para. 361). It is true that the rights and obligations of the coastal and other States in relation to the continental shelf are largely the same whether within or beyond 200 nautical miles.

4. However, as the Court acknowledges, there are important differences with regard to the legal basis for the entitlement to a continental shelf within and beyond 200 nautical miles (paragraph 75 of the Judgment). In 1969, the Court described the continental shelf by reference to a natural prolongation of the coastal State's land territory into and under the sea (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 22, para. 19). Since that time, however, natural prolongation has been replaced by distance as the criterion used to define the continental shelf within 200 nautical miles. While Article 76, paragraph 1, of UNCLOS refers both to natural prolongation and to the distance of 200 nautical miles, only the distance criterion is relevant for the continental shelf within 200 nautical miles; natural prolongation cannot form the legal basis for the entitlement to the continental shelf within 200 nautical miles. The scientific elements associated with the natural prolongation criterion are set out in the subsequent paragraphs of Article 76, which are relevant only for the continental shelf beyond 200 nautical miles.

5. The Court described this evolution as follows in *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (1985). Up to 200 nautical miles from the coast, "title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf". Thus, within 200 nautical miles, there was "no reason to ascribe any role to geological or geophysical factors", which were "completely immaterial" (*Judgment, I.C.J. Reports 1985*, p. 35, para. 39). Moreover, recalling that the Court had previously ascribed a role to geophysical or geological factors in delimitation in the *North Sea Continental Shelf* (1969) and *Tunisia/Libyan Arab Jamahiriya* (1982) cases, it explained that this was because it found warrant for doing so in "a régime of the title itself which used to allot those factors a place which *now belongs to the past*, in so far as sea-bed areas less than 200 miles from the coast are concerned" (*ibid*., p. 36, para. 40; emphasis added).

6. The Court reaffirmed in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (2012) that, in respect of overlapping entitlements within 200 nautical miles of the coasts of States, it had "repeatedly made clear that geological and geomorphological considerations are not relevant" (*Judgment, I.C.J. Reports 2012 (II)*, p. 703, para. 214).

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7. Up to 200 nautical miles, the rights of the coastal State over the continental shelf derive not only from the régime of the continental shelf but also from the régime of the exclusive economic zone. As the Court acknowledges, the two legal régimes "are interrelated" (paragraph 70 of the Judgment). Referring to Article 56 of UNCLOS, the Court stresses that the régime of the *exclusive* economic zone "confers *exclusively* on the coastal State the *sovereign* rights of exploration, exploitation, conservation and management of natural resources [of the seabed and its subsoil] within 200 nautical miles of its coast" (*ibid*., para. 69; emphasis added). Thus, the régime of the exclusive economic zone affords a strong basis for the conclusion that the outer continental shelf of a State may not extend within 200 nautical miles of another State.

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8. With regard to the identification of customary international law, the Court has stated that it must be "looked for primarily in the actual practice and *opinio juris* of States" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 29, para. 27).

9. In the present case, the Court observes that "in practice, the vast majority of States parties to the Convention that have made submissions to the CLCS have chosen not to assert, therein, outer limits of their extended continental shelf within 200 nautical miles of the baselines of another State". It points out that only a small number of States have asserted in their submissions outer limits that extend within 200 nautical miles of the baselines of another State, and that "in those instances the States concerned have objected to those submissions". As regards the small number of coastal States that are not States parties to the Convention, the Court notes that it "is not aware of any that has claimed an extended continental shelf that extends within 200 nautical miles from the baselines of another State". The Court thus concludes that, "[t]aken as a whole, the practice of States may be considered sufficiently widespread and uniform", and that "this State practice may be seen as an expression of *opinio juris*" (paragraph 77 of the Judgment).

10. In describing the consistency of State practice, the Court employs the terms widespread and uniform. It has used these terms in previous cases (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 102, para. 205; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 703, para. 141; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 100, para. 296).

11. While the International Law Commission has concluded that "[e]ach of the two constituent elements [general practice and *opinio juris*] is to be

separately ascertained"[1], it has accepted that the two elements "may be intertwined in fact" and that in certain circumstances "the same material may be used to ascertain practice and acceptance as law (*opinio juris*)"[2]. In the present case, both Colombia and Nicaragua have explicitly accepted that State practice may be evidence of *opinio juris*. Colombia stated that "it is important to note that practice may sometimes be evidence of acceptance as law (*opinio juris*)", and that "a general practice may, indeed, indicate a conviction as to what the law is, especially when the matter at issue is clearly governed by international law or where the conduct in question is against the interests of the acting State" (CR 2022/26, pp. 29-30, paras. 31-32 (Wood); CR 2022/28, p. 14, paras. 13-14 (Wood)). Nicaragua embraced these statements by Colombia as a matter of legal principle, declaring that "[State] practice provides ample evidence" to support a belief, and that, "as Sir Michael forcefully asserted, 'it is important to note that practice may sometimes be evidence of acceptance as law (*opinio juris*)'" (CR 2022/27, p. 26, para. 14 (Pellet)). Indeed, *opinio juris* may be inferred in certain circumstances from the general practice of States. The Court accepts this as a matter of principle, stating that, in light of "its extent over a long period of time", State practice may be seen as an expression of *opinio juris* (paragraph 77 of the Judgment).

12. As concerns the practice of States before the CLCS, Nicaragua argues that the practice of refraining from asserting outer limits that extend within 200 nautical miles from the baselines of another State "is motivated by considerations other than a sense of legal obligation, in particular a desire to avoid the possibility of their submission giving rise to a dispute with the result that the CLCS would not consider it" (see paragraph 57 of the Judgment). This is mere speculation which is unsubstantiated. States usually do not curtail themselves when they believe that they have a right. If an issue is regulated by international law and States abstain from certain conduct in a way that is inconsistent with their own interests, it may be presumed that their abstention is motivated by a sense of legal obligation. Nicaragua did not submit any evidence capable of rebutting such a presumption.

13. In fact, this sense of legal obligation has been expressly indicated by some States that have refrained from extending an outer continental shelf within 200 nautical miles of the baselines of another State. For example, Ecuador stated in the executive summary of its submission to the CLCS that "[t]his action was taken with great caution in order to avoid any potential

[1] Report of the International Law Commission on the work of its seventieth session, *Yearbook of the International Law Commission (YILC)*, 2018, Vol. II, Part Two, p. 90, Conclusion 3, para. 2.

[2] *Ibid.*, p. 96, paras. 6 and 8 of the Commentary to Conclusion 3.

prejudice to the determination of the outer limits of any maritime spaces *under the national jurisdiction* of Perú at a distance of 200 nautical miles" (Ecuador, Submission, 1 March 2022, Executive Summary, Section 6, p. 16; emphasis added). Similarly, Costa Rica and Ecuador stated in the executive summary of their joint submission to the CLCS that "[t]his action was taken with great caution in order to avoid any potential prejudice to the determination of the outer limits of any maritime spaces *under the national jurisdiction* of Colombia" (Costa Rica and Ecuador, Joint Submission in the Panama Basin, 16 December 2020, Executive Summary, Section 6, p. 18; emphasis added). Furthermore, Indonesia stated in the executive summary of its submission to the CLCS that "[t]he outer limit has taken into consideration the following *constraint*[] namely: . . . [t]he projection of 200 M of the continental shelf of Christmas Island, Australia" (Indonesia, Submission in respect of the Area of South of Java and South of Nusa Tenggara, 11 August 2022, Executive Summary, Section 7, p. 5; emphasis added). These examples illustrate that, in their submissions to the CLCS, States have refrained from extending an outer continental shelf within 200 nautical miles of the baselines of another State out of a sense of legal obligation.

14. In addition, the invariable protests of States affected by submissions made to the CLCS by other States seeking to extend an outer continental shelf within 200 nautical miles of the baselines of the former States are also good evidence of *opinio juris* that such an extension is not permissible under international law. Indeed, *opinio juris* "is to be sought with respect to both the States engaging in the relevant practice and those in a position to react to it"[3].

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15. With regard to the request contained in Nicaragua's second submission, the Court recalls that the Parties agreed in 2012 that San Andrés, Providencia and Santa Catalina "are entitled to a territorial sea, exclusive economic zone and continental shelf" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 686, para. 168). In its 2012 Judgment, the Court then declared that, "[i]n principle, that entitlement is capable of extending up to 200 nautical miles in each direction" and, in particular, that it extends to the east "to an area which lies beyond a line 200 nautical miles from the Nicaraguan baselines" (*ibid.*, pp. 686 and 688, para. 168) (see paragraph 90 of the Judgment).

16. Importantly, the Court also stressed that

> "San Andrés, Providencia and Santa Catalina should not be cut off from their entitlement to an exclusive economic zone and continental shelf to

[3] *YILC*, 2018, Vol. II, Part Two, pp. 102-103, paragraph 5 of the commentary to Conclusion 9. See also *ibid.*, p. 96, paragraph 7 of the Commentary to Conclusion 3.

> their east, including in that area which is within 200 nautical miles of their coasts but beyond 200 nautical miles from the Nicaraguan baselines" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 716, para. 244).

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17. With respect to the request contained in Nicaragua's third submission, the Court sets out two possibilities and points out that,

> "[i]n either case, as a consequence of the Court's conclusion in relation to the first question . . . , within 200 nautical miles from the baselines of Serranilla and Bajo Nuevo, there can be no area of overlapping entitlement to a continental shelf to be delimited in the present proceedings" (paragraph 99 of the Judgment).

The Court therefore concludes 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" (paragraph 100 of the Judgment).

18. The second possibility set out by the Court is that "Serranilla or Bajo Nuevo are not entitled to exclusive economic zones or continental shelves" and thus "do not generate any maritime entitlements in the area in which Nicaragua claims an extended continental shelf". The Court concludes that, in such a case, there can be no area of overlapping entitlement to a continental shelf to be delimited (paragraph 99 of the Judgment).

19. In finalizing its analysis with this conclusion, the Court does not answer the question whether, in such a case, Nicaragua would be entitled to an outer continental shelf in the area to the east of the 200-nautical-mile line of the Colombian islands of San Andrés, Providencia and Santa Catalina. In this area, there is a small maritime space which is outside the 200-nautical-mile entitlements of the Colombian islands, the Colombian mainland, Jamaica, Panama and Haiti (see figure 6.1 of the Reply of Nicaragua).

20. Even though this space is outside the 200-nautical-mile entitlement of any State, Nicaragua cannot legally claim an outer continental shelf there. This conclusion derives from the interpretation of Article 76, paragraph 1, of UNCLOS. This space is entirely disconnected from Nicaragua's coast and from its continental shelf within 200 nautical miles by the continental shelves within 200 nautical miles of other States. The continental shelf in this space cannot be regarded as a natural prolongation of the submerged land territory of Nicaragua and thus cannot constitute an "extended" continental shelf of Nicaragua.

21. Accordingly, regardless of whether Serranilla and Bajo Nuevo are enclaved and granted a territorial sea of 12 nautical miles, Nicaragua has no entitlement in this space. Given the Court's answer to the first question, the request contained in Nicaragua's third submission no longer has any object. It is in this sense that it cannot be upheld (paragraph 102 of the Judgment).

22. In its judgment in the *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* case, the Special Chamber of the International Tribunal for the Law of the Sea endorsed the interpretation of Article 76, paragraph 1, of UNCLOS set out above. In that case, Mauritius claimed an extended continental shelf formed by the natural prolongation of certain islands which extended to the foot of the continental slope. The Special Chamber declared that "a coastal State cannot validly claim an entitlement to a continental shelf beyond 200 [nautical miles] based on the natural prolongation through another State's uncontested continental shelf", and concluded that,

> "[a]s the . . . route presented by Mauritius passes within the continental shelf of the Maldives within 200 [nautical miles] that is uncontested by Mauritius, it cannot form a basis for Mauritius' natural prolongation to the critical foot of slope point and thus for its entitlement to the continental shelf beyond 200 [nautical miles]".

The Special Chamber based its conclusion on Article 76, paragraph 1, of UNCLOS and paragraph 2.2.3 of the Scientific and Technical Guidelines of the CLCS. It clearly stated that Mauritius' claim was "impermissible on legal grounds under article 76 of the Convention" (*Judgment of 28 April 2023*, paras. 442-444 and 449).

(Signed) IWASAWA Yuji.