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COMMENTS ON THE ICJ JUDGMENT ON DELIMITATION OF THE CONTINENTAL SHELF BETWEEN NICARAGUA AND COLOMBIA BEYOND 200 NAUTICAL MILES FROM THE NICARAGUAN COAST (NICARAGUA V. COLOMBIA) ON 13 JULY 2023

Abstract: This paper offers a critical analysis of the *International Court of Justice* (ICJ) judgment of 13 July 2023 in the *Nicaragua v. Colombia* (NICOL II) case, situating it as a crucial but controversial decision in the development of the law of the sea. Focusing on the Court's interpretation of Article 76 of the United Nations Convention on the Law of the Sea, the paper examines how the ICJ identified a customary rule prohibiting a State from extending its continental shelf within 200 nautical miles of another State's baselines, thereby prioritizing the distance criterion over natural prolongation. The crucial question for international law is whether the Court, in formulating this rule, interpreted existing customary law or effectively created a new one. This article focuses on the position of the Court establishing that the right to an extended continental shelf beyond 200 nautical miles may not encroach upon another State's exclusive economic zoneor continental shelf, and explores its broader implications for maritime delimitation and state practice. The paper concludes that, although the *NICOL II* judgment holds significant importance for the settlement of future disputes concerning the continental shelf and may contribute to ending maritime conflict between Nicaragua and Columbia, it simultaneously blurs the line between interpretation and law-making in the ICJ's approach to customary international law.

Keywords: continental shelf, delimitation of maritime areas, the International Court of Justice (ICJ), customary international law, grey areas

1. Introduction

The judgment of the International Court of Justice (ICJ or the Court) of 13 July 2023 issued in the case concerning the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast (Nicaragua v. Colombia)[1], commonly referred to as the *NICOL II* judgment, constitutes another (following the 2012 *NICOL I* judgment[2]) ICJ decision in the long-standing territorial dispute between these two Latin American states without a shared land border.

The incentive to comment on this ruling, delivered in a protracted territorial dispute between the said states, stems not only from the factual circumstances of the case but, above all, from its potential implications for the understanding of the rules governing the delimitation of the continental shelf extending beyond 200 nautical miles from the baselines, including the interpretation of Article 76 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the relevant norms of customary international law. In the *NICOL II* judgment, the Court addressed a number of issues of considerable significance for the application and interpretation of the law of the sea concerning the continental shelf (CS). These issues were examined from the perspective of the customary norms governing them, as only one of the parties to the dispute (Nicaragua) was a party to UNCLOS. Consequently, the ICJ expressed its views on e.g. the extent to which UNCLOS reflects certain customary law principles. The Court also considered, among other matters, the possibility of creating so-called 'grey areas',that is, maritime zones in which State A exercises jurisdiction solely over the exclusive economic zone (EEZ), while the seabed beneath that zone forms part of the extended continental shelf (ECS) belonging to State B, and the legal relationship between states in situations where such overlapping maritime zones arise. However, the most crucial issue examined was whether customary international law permits the extended continental shelf of one state, that is, the CS extending beyond 200 nautical miles from its baselines, to encroach upon the 200-nautical-mile zone measured from the baselines of another coastal state. The importance of this question is evidenced by

1 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2023, 413.

2 *Territorial and Maritime Dispute* (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, 624.

the considerable number of academic commentaries published within a relatively short period following the release of the judgment in question.[3]

2. Facts

In the first case between Nicaragua and Colombia, concluded by the 2012 judgment (*NICOL I*), the ICJ established the maritime boundaries between the two states, granting Colombia sovereignty over the disputed islands in the Caribbean Sea: Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana, and Serranilla while simultaneously recognising Nicaragua's rights to almost 75,000 km² of the contested maritime area. The Court established a single maritime boundary delimiting the areas of the continental shelf and the exclusive economic zones of the states concerned, up to the 200-nautical-mile limit measured from the baselines from which the breadth of Nicaragua's territorial sea is determined. However, the ICJ did not determine the precise location of the eastern endpoints of the maritime boundary, as Nicaragua had not yet notified the UN Secretary-General of the location of its baselines in accordance with Article 16(2) of UNCLOS. Consequently, these points were shown only approximately on the sketch map attached to the judgment[4].

The ICJ also stated in the *NICOL I* judgment that it could not uphold Nicaragua's claim requesting that the Court adjudge and declare that '[t]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia,

3 Publications: Alexianu, "The Nicaragua v. Colombia Continental Shelf Judgment: Short but Significant"; Tanaka, *Recent Developments in the Jurisprudence Concerning the Delimitation of the Continental Shelf Beyond 200 Nautical Miles: Analysis of the Mauritius/Maldives and Nicaragua v. Colombia Cases*, 74-111; Leung, "The Extended Continental Shelf in Nicaragua v Colombia: Identifying a Customary Rule Based on CLCS Submissions?", 206-233; Woker, *Challenging the Notion of a "Significant Continental Shelf"*, 375-392.
Peña, *Comentario a la Sentencia de 13 de julio de 2023 de la Corte Internacional de Justicia enelasunto de la delimitación de la plataforma continental entre Nicaragua y Colombia másallá de 200 millas marinas de la Costa Nicaraguense (Nicaragua C. Colombia)*; Online commentaries: Evans and Ioannides, *A Commentary on the 2023 Nicaragua v Colombia case*; Kunoy, *The Recognition of a Customary Rule of International Law in NICOL II – A Redundant Exercise?*; de Lucia, "On the Question of *opinio iuris* in Nicaragua vs. Colombia (Judgement 13 July 2023)"; Woker, *Preliminary reflections on the ICJ Judgment in Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia) of 13 July 2023*.

4 *Territorial and Maritime Dispute* (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012, 713 (para. 237).

is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties'.[5] The Court further stressed that Nicaragua had not fulfilled the requirements set out in Article 76(8) of UNCLOS, as it had submitted to the Commission on the Limits of the Continental Shelf (CLCS) only 'Preliminary Information', which 'fell short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical miles'[6] that were to be provided pursuant to that Article.

Nevertheless, the Nicaraguan government decided to maintain its claim to the natural prolongation of its continental shelf extending well beyond 200 nautical miles, and therefore, on 16 September 2013, it filed a new application in the ICJ Registry, instituting new proceedings against the Republic of Colombia. This application concerned a dispute relating to

> the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia.[7]

It also fulfilled the requirements regarding the information on the extended continental shelf to be submitted to the CLCS.

On 4 October 2022, the Court issued an order stating that, before proceeding to examine the technical and scientific issues relating to the subject matter of the case, it was necessary,after hearing the parties, to determine certain questions of law. The Court therefore requested the parties to submit arguments exclusively on two questions concerning the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, that is, the extended continental shelf. First, the Court asked whether a state's entitlement to an extended continental shelf may extend within 200 nautical miles from the baselines of another state. Then, it considered the criteria that should apply for determining the outer limit of the extended continental shelf. In this regard, the ICJ also asked the parties to express their views on whether paragraphs 2 to 6 of Article

5 *Territorial and Maritime Dispute* (Nicaragua v. Colombia), 719 (para. 251).

6 *Territorial and Maritime Dispute* (Nicaragua v. Colombia), 669 (para. 127).

7 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2023, 420 (para. 1).

76 of UNCLOS reflect customary international law (para. 14). It should be emphasised that both questions concerned the determination of the customary international law rules applicable to the case, since only Nicaragua was a party to UNCLOS, although both parties were signatories to the Convention.

Nicaragua argued that, under customary international law, a state's entitlement to an extended continental shelf may extend within 200 nautical miles from the baselines of another state, as reflected in paragraphs 2 to 6 of Article 76 of UNCLOS. Colombia, on the contrary, contended that, according to customary international law, both its continental territory and its Caribbean islands (to which rights had been granted in 2012) had the right to a 200-nautical-mile exclusive economic zone together with its 'accompanying' continental shelf (para. 28).

Furthermore, Colombia emphasised that a coastal state's right to a continental shelf beyond 200 nautical miles must be based on the natural prolongation of its land territory, as confirmed by the geological and geomorphological characteristics of the seabed. It further argued that, in the case in question, several fundamental geomorphological disruptions and geological discontinuities in the continental shelf interrupted the natural extension of Nicaragua's land territory well before reaching the 200-nautical-mile limit from its coast (para. 32). Consequently, Colombia maintained that, regardless of its own claim to a 200-nautical-mile continental shelf, Nicaragua's shelf failed to meet the criteria for extension beyond 200 nautical miles from the baselines. The resolution of the case therefore appeared to require appropriate scientific research and expert geological analysis.

2.1. Decision of the Court

In seeking to answer the first of the questions posed, the ICJ had first to consider whether there existed any customary international law rules of relevant scope. The Court observed that UNCLOS had led to the crystallisation of certain customary norms in the law of the sea, one of which is the rule embodied in Article 56 of the Convention, defining the rights and duties of coastal states in the exclusive economic zone (para. 50).[8] The Court also indicated that the definition of the continental shelf set out in Article 76(1) is likewise part

8 In this context, the ICJ referred to its position taken in its 2022 judgment (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2022 (I), 297-298 (para. 57)).

of customary international law (para. 52).[9] However, the Court stressed that this does not automatically mean that a state's entitlement to a continental shelf beyond 200 nautical miles from its baselines is, under customary law, valid in situations where it extends into an area lying within 200 nautical miles of the baselines established by another state. This question therefore required separate examination (para. 53).

The Court pointed out that the legal regimes governing the status of the exclusive economic zone (EEZ) and of the continental shelf of a coastal state within 200 nautical miles of its baselines are closely interrelated. Within the EEZ, the rights concerning the seabed and its subsoil are to be exercised in accordance with the regime applicable to the continental shelf (Article 56(3) of UNCLOS), and the coastal state exercises sovereign rights over its continental shelf for the purpose of exploring and exploiting its natural resources (para. 70).

The Court also reviewed earlier cases concerning delimitation. In one such precedent, ITLOS delimited the 200-nautical-mile zones of two adjacent states by constructing a provisional equidistance line, which it then adjusted.

The ICJ rejected Nicaragua's argument concerning the possible creation of a grey area,that is, an area in which one of the parties would be granted rights to the continental shelf, while the other would exercise rights over the water column above it, in accordance with the jurisdiction of a coastal state in the EEZ (Grey Area). Nicaragua cited the precedent-setting judgments delivered respectively by ITLOS and an Annex VII Arbitral Tribunal in the disputes Bangladesh v. Myanmar[10] and Bangladesh v. India,[11] arguing that these cases provided relevant guidance.[12] The Court, however, found that in the two Bay of Bengal cases referred to by Nicaragua, the emergence of such Grey Areas constituted merely an incidental result of the adjustment of the provisional equidistance line adopted during the delimitation of the 200-nautical-mile zones of two adjacent states. The circumstances of the *Nicaragua v. Colombia* case were quite different, as here, one state claimed an ECS that would encroach upon the CS of another state, i.e. within

9 In this regard, the ICJ reiterated its position taken in a judgment issued in 2012 (*Territorial and Maritime Dispute* (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012 (II), 666 (para. 118)).

10 *Delimitation of the Maritime Boundary in the Bay of Bengal* (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, 4-118 (paras. 460-462).

11 *Bay of Bengal Maritime Boundary Arbitration* (Bangladesh v. India), Award of 7 July 2014, RIAA, Vol. XXXII 3-147 (para. 498).

12 Overfield, "Reflecting the Law of the Sea: In Defense of the Bay of Bengal's Grey Area".

less than 200 nautical miles of that state's baselines. Consequently, the ICJ held that the Bay of Bengal decisions were of no assistance in answering the first of the legal questions posed in the present case. The Court reached a similar conclusion regarding the relevance of another judgment invoked by Nicaragua, namely the ICJ judgment of 2021 in *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*[13] (paras. 71-73).

While examining the potential existence of a customary rule allowing the continental shelf of one state to extend into maritime zones of another, the Court referred to the genesis and purpose of the relevant provisions introduced during the codification of the law of the sea. It observed that the rules governing the outer limits of the continental shelf beyond 200 nautical miles, contained in Article 76 of UNCLOS, were the result of a compromise reached during the final sessions of the Third United Nations Conference on the Law of the Sea. However, the possibility of a continental shelf of one state extending within 200 nautical miles of another's baselines was never debated at that conference. Moreover, the Court noted that Article 82(1) of UNCLOS contains provisions addressing the matter of payments or contributions in kind to be made by the coastal state in connection with the exploitation of non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Hence, 'such a payment would not serve the purpose of this provision in a situation where the extended continental shelf of one State extended within 200 nautical miles from the baselines of another State'. The Court further emphasised that the 'aim was to avoid undue encroachment on the seabed, the ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, considered the 'common heritage of mankind' and referred to in UNCLOS as the 'Area'.' (para. 76).

Turning to state practice, the Court noted that the vast majority of states-parties to UNCLOS that had made submissions to the CLCS chose not to assert that the outer limits of their extended continental shelves extended within 200 nautical miles of another state's baselines. It was also noted that among the small number of coastal states that were not parties to UNCLOS, the Court was not aware of any that had advanced such claims (para. 77).

After analysing the matter, the Court concluded that the basis for entitlement to a continental shelf within 200 nautical miles of a state's

13 *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya) Judgment, I.C.J. Reports 2021, 206.

baselines differs from that for entitlement beyond 200 nautical miles. The Court held that, under customary international law, a state's entitlement to a continental shelf extending beyond 200 nautical miles from its baselines 'may not extend within 200 nautical miles from the baselines of another State' (para. 86).

The Court also noted that, regardless of the criteria used to determine the outer limit of the extended continental shelf, no such entitlement can overlap with the continental shelf within 200 nautical miles from another state's baselines. Consequently, the Court could not proceed to maritime delimitation, since in the present case there were no overlapping entitlements over the same maritime area. As a result, the ICJ held that it was unnecessary to address the second question, as it was not relevant to the resolution of the dispute (para. 82).

The Court further considered Nicaragua's submissions concerning the precise delimitation of the maritime boundary with Colombia in the continental shelf zone. Referring to its earlier findings, it held that, irrespective of any scientific or technical considerations, Nicaragua had no right to an extended continental shelf within 200 nautical miles of the Colombian mainland baselines. Accordingly, as there were no overlapping entitlements to maritime areas, there were no grounds for granting Nicaragua's second request (para. 92).

The Court also rejected another Nicaraguan submission concerning the delimitation of maritime areas in relation to the Caribbean islands awarded to Colombia in the *NICOL I* judgment, holding that, in light of the above, this claim likewise could not be upheld (para. 102).

Finally, the Court found that there was no need for further proceedings, including oral hearings, as requested by Nicaragua (para. 103).

2.2. Dissenting Opinions

The Court's judgment did not meet with unanimous approval. Thirteen judges voted in favour of the answers to the first two questions; four voted against: Peter Tomka, Hilary Charlesworth, Patrick Lipton Robinson, and Judge *ad hoc* Leonid Skotnikov. The most critical and certainly the most extensive dissenting opinion was put forward by Judge Tomka. In his view, the Court's analysis was incomplete,[14] it insufficiently established the existence

14 *Dissenting opinion of Judge Tomka*, NICOL II Judgment, I.C.J. Reports 2023, 470 (para. 44).

of the asserted customary rule, and the outcome produced an 'inequitable result'.[15] The other dissenting opinions likewise disputed that a distance-based title to the continental shelf should prevail over a title founded on natural prolongation of land territory. They also questioned the Court's rejection ofGrey Areas and its interpretation of the UNCLOS provisions on the continental shelf. Judge Skotnikov further alleged procedural shortcomings on the Court's part.[16]

3. Legal analysis

The significance of *NICOL II* can be considered from several perspectives. Surely, the Court adopted a bold and controversial position that will likely serve as a reference point in future disputes regarding the delimitation of extended continental shelves.

First, the Court set a hierarchy between titles to the continental shelf, advancing a new way of interpreting Article 76 of UNCLOS: in its view, an entitlement to a continental shelf beyond 200 nautical miles cannot extend within 200 nautical miles of another state's baselines even where, under Article 76(5), the constraint lines defining the outer limit would otherwise reach more seaward points.

This stance is debatable. On the one hand, it can be seen as equitable, protecting the equality of states by preventing excessive ECS claims at the expense of another state's shelf. Limiting the ECS at the 200-nautical-mile line from another state's baselines removes claims to overlapping continental shelf areas which, as H. Leung notes, may reduce the incidence of new disputes in practice.[17] The structure of Article 76 of UNCLOS arguably supports this interpretation: paragraph 1 contains the definition of the continental shelf and its breadth, whereas paragraph 5 contains constraints for fixing the outer limit beyond 200 nautical miles,suggesting that paragraph 5 operates supplementarily to paragraph 1 (which stems to a certain extent from the judgment in question). Similarly, the requirement to submit information to the CLCS appears only in paragraph 8, reinforcing the idea that these

15 *Dissenting opinion of Judge Tomka*, NICOL II Judgment, 481 (para. 75).

16 *Dissenting opinion of Judge ad hoc Skotnikov*, NICOL II Judgment, I.C.J. Reports 2023, 558 (para. 2).

17 Leung, "The Extended Continental Shelf in Nicaragua v Colombia: Identifying a Customary Rule Based on CLCS Submissions?", 207.

mechanisms constrain the outer edge rather than the core entitlement.[18] Read this way, the minimum-width (distance) criterion comes to the fore.

It is important to bear in mind, however, that according to paragraph 1, a state's right to a shelf comprises the seabed and subsoil throughout the natural prolongation of the state's land territory to the outer edge of the continental margin. The distance criterion applies here in an auxiliary manner,for situations where the outer edge does not reach 200 nautical miles from the baselines from which the width of a state's territorial sea is measured. In a 1982 judgment made in a dispute between Tunisia and Libya, the ICJ, commenting on Article 76, stated that '[a]ccording to the first part of paragraph 1 the natural prolongation of the land territory is the main criterion'.[19] Meanwhile, Judge Robinson similarly argues that *NICOL II* Judgment does not establish that, under customary international law, there is a hierarchical relationship between continental shelf entitlements based on the criteria of natural prolongation and distance set out in Article 76 (1) of the Convention.[20] By contrast, Judge Tomka maintains that Article 76(5) permits the ECS to overlap with the shelf within 200 nautical miles of another state (the Convention contains no express prohibition[21]), a view consistent with the long-standing principle (since the 1969 North Sea cases)that the land dominates the sea,[22] and that ECS claims rest on natural prolongation.

Legal commentators addressing the provisions of Article 76(5) of UNCLOS note, among other things, that, in practice, a coastal state has the ability to choose the constraint that will apply in a given region and that will allow it to encompass the largest possible portion of the shelf. S. Persand, commenting on the Scientific and Technical Guidelines published by the CLCS in 1999, points out that a coastal state appears to have the freedom to choose the method of establishing the continental shelf that is most advantageous to it. There is also no mention here of limitations connected with encroaching upon an area lying within 200 nautical miles of a neighbouring state.[23]

18 Vitzthum, "International Seabed Area", 138.

19 *Case Concerning The Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports, 1982, p. 48 (para. 47).

20 *Dissenting opinion of Judge Robinson*, NICOL II Judgment, I.C.J. Reports 2023, p. 516 (para. 2).

21 *Dissenting opinion of Judge Tomka*, 462-463 (para. 26-27).

22 *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Netherlands/Denmark), Judgment, 51 (para. 96).

23 Persand, *A Practical Overview of Article 76 of the United Nations Convention on the Law of the Sea*, 9, https://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/

Judge Tomka expresses a similar view. He claims that the existence and breadth of the right to a continental shelf beyond 200 nautical miles depend exclusively on geological and geomorphological criteria, which were not considered by the ICJ at all in the case under examination.[24] It appears that, in this ambiguous situation,when it is difficult to determine which rule should take precedence,the territorial dispute ought to have been resolved according to equity.

In the meantime, the Court clearly opted for one of these interpretations, and, what is more, recognised the existence of a customary rule of international law establishing a hierarchical relationship between continental shelf entitlements based on the criteria of natural prolongation and distance set out in Article 76 of UNCLOS. It seems, however, that this position was taken somewhat prematurely. Customary international law must consist of the necessary elements: *usus* and *opinio iuris sive necessitatis*. At the same time, doubts may be raised as to whether, in the judgment in question, the ICJ sufficiently demonstrated the existence of these two elements. It rather appears that both were analysed in an insufficient manner: the examples of *usus* were cited selectively, whereas the part concerning *opinio iuris* does not demonstrate beyond any doubt that such conduct is in fact legally required.

Attention should be drawn to the following passage from the ICJ judgment issued in *NICOL II*

> [t]he Court notes 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, extended limits of their extended continental shelf within 200 nautical miles of the baselines of another State. The Court considers that the practice of States before the CLCS is indicative of *opinio iuris* (para. 77).

However, the ICJ's recognition of state silence as a sufficient manifestation of *opinioiuris* raises certain doubts. There was also contrary practice,[25] which the Court does not in substance discuss, stating only that

fellows_papers/persand_0506_mauritius.pdf (access: 12.10.2025).

24 *Dissenting opinion of Judge Tomka*, 458-459 (para. 14), 481 (para. 73).

25 According to H. Leung's findings on the practice concerning CLCS submissions, bearing in mind that some submissions were made by a single state while others were submitted jointly by several states, there is supportive practice from 42 states and contrary practice from 10,

> only a small number of States that have asserted in their submissions a right to an extended continental shelf encroaching on maritime areas within 200 nautical miles of other States, and in those instances the States concerned have objected to those submissions (para. 77).

It is also reasonable to add here that a decision not to submit statements on the natural prolongation of the continental shelf beyond 200 nautical miles in a manner encroaching upon an area lying 200 nautical miles from the coast of another state or states may likewise have been motivated by the political consequences of an international dispute arising on that basis,delaying, for example, the delimitation of maritime areas between the states concerned and, consequently, the exploitation of other parts of the disputed area. Also noteworthy is the complexity of the technical issues that must be demonstrated in order to assert rights to the ECS effectively. The determination of the geomorphological and geological characteristics of submarine land masses, even for relatively small, disputed areas,is undoubtedly complex and time-consuming. By way of example, L. Person pointed out that not only international courts and tribunals but also, more notably, the CLCS prior to 2010 largely avoided taking natural prolongation into account as a contributing element in determining entitlement to the continental shelf because this term had not been defined by UNCLOS.[26] He also added that the CLCS elaborated its understanding of this term only in the 2010 recommendations on the United Kingdom's submission regarding Ascension Island.[27]

Judge Tomka drew attention to the importance of the motive that guided a state when it refrained from asserting claims to an extended continental shelf encroaching into another state's 200-nautical-mile zone. He stated that a state may do so

> (a) to put off a diplomatic row; (b) to avoid the objection procedure 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.[28]

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out of a total of 50 states. Leung, "The Extended Continental Shelf in Nicaragua v Colombia: Identifying a Customary Rule Based on CLCS Submissions?", 212.

26 Parson, "Art. 76. Definition of the continental shelf", 593 [24].

27 Parson, "Art. 76. Definition of the continental shelf", 593 [25].

28 *Dissenting opinion of Judge Tomka*, 474-475 (para. 53).

Refraining from pursuing certain claims may therefore be motivated not by an existing *opinioiuris* that such omission is obligatory, but rather by a political choice. Thus, although what is important for the emergence of a new rule of customary international law is acts, and in this case their absence,the motive underlying state practice is not without significance. In the case at hand, however, this issue was essentially not considered. The ICJ merely stated that it considers the practice of states as '... indicative of *opinioiuris*, even if such practice may have been motivated in part by considerations other than a sense of legal obligation' (para. 77). It seems open to doubt whether, in the instant case, the question of motive was not treated too lightly by the ICJ, whereas its thorough examination would have made it possible to avoid the allegation of a hasty finding,or perhaps even the creation, of a new customary rule of international law.

The judgment in question should therefore be regarded as controversial for two reasons. Not only was it recognised that, beyond 200 nautical miles from a state's baselines, a continental shelf title based on natural prolongation is hierarchically subordinate to a shelf title based on the distance criterion measured from another state's baselines, but this principle was also recognised as a norm of customary law.

Attention should also be drawn to the ICJ's omission of the possibility of creating a Grey Area in the present case. The case law of international tribunals indicates that such solutions are applied in international practice.[29] What is more, less than three months before the NICOL II judgment was delivered, the International Tribunal for the Law of the Sea did not question the possibility of a Grey Area in the judgment issued in the dispute concerning the delimitation of the maritime boundary in the Indian Ocean.[30]

However, in the judgment under comment, the ICJ rejected this possibility, pointing out that the cases referred to,concerning, among others, the Bay of Bengal, concerned the delimitation of areas belonging to adjacent

29 *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment of 12 July 2021*, I.C.J. Reports of Judgments, Advisory Opinions and Orders, 2021, 277 (para. 197); *The Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, *Award of 7 July 2014*, United Nations, Reports of International Arbitral Awards (RIAA), 2019, No. XXXII, 147 (para. 498); *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), List of cases: No. 16. Judgment of 14 March 2012*, ITLOS Reports, 2012, 119 (para. 463).

30 *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), List of cases: No. 28. Judgment of 28 April 2023*, ITLOS Reports, 2023, 100 (para. 267).

states, where the Grey Areas covered overlapping entitlements arising from CS and EEZ rights. Besides, the Grey Areas thus created were relatively small and constituted, as the Court put it, an incidental result of the adjustment of an equidistance line in delimitation between adjacent states (para. 72).

However, in the present case, the ICJ rejected that possibility, ruling out that the right to an extended continental shelf of State A applies within 200 nautical miles of the baselines belonging to State B, which lies opposite State A at a distance exceeding 400 nautical miles between the baselines of those states. This solution eliminated the need to designate Grey Areas due to the absence of overlapping maritime areas. In such a situation, the continental shelf of State A may only be extended to the verge of the 200-nautical-mile-wide continental shelf belonging to State B. The reasoning behind this decision was criticised in a dissenting opinion by Judge Tomka, who noted that it was '... not a model of clarity'.[31] Judge Robinson, on the other hand, emphasised that the ICJ, in the judgments concerning the delimitation of the Bay of Bengal, indicated that the creation of a Grey Area implies a situation in which the two states 'must co-operate'.[32] He also pointed out that the 'obligation to co-operate should not be undervalued'.[33] It is hard to resist the impression that perhaps it was a good thing that the Grey Area was not created in this case because cooperation between the two particular adversaries in question would seem rather problematic, and the establishment of such a specific maritime zone without a clear division of mutual rights and obligations would easily spark a new conflict. Suffice it to say that the 2022 ICJ judgment called on Colombia to immediately cease authorising fishing activities in Nicaragua's EEZ and 'interfering with fishing and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels in the Republic of Nicaragua's exclusive economic zone'.[34] The reason for this decision was Colombia's failure to comply with the 2012 ICJ judgment, which incidentally, is a different situation from the cases concerning the Grey Areas established in the Bay of Bengal, where the states concerned accepted the rulings. In our case, the basis of disagreement can also be found in non-legal issues, including the favourable attitude of the Nicaraguan authorities towards

31 *Dissenting opinion of Judge Tomka*, 466 (para. 36).
32 *Dissenting opinion of Judge Robinson*, 517 (para. 6).
33 *Dissenting opinion of Judge Robinson,* 518 (para. 6).
34 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2022 (I), 340 (para. 195), 366 (para. 2-4).

the Revolutionary Armed Forces of Colombia (Spanish: *Fuerzas Armadas Revolucionarias de Colombia*, FARC), a guerrilla group that has fought the Colombian government for years and is considered by Colombia to be a terrorist organisation.

There is one more issue that deserves to be mentioned here. Judge Tomka began his dissenting opinion by wondering why the ICJ did not dismiss Nicaragua's claims to the extended continental shelf already in the first case adjudged in 2012, on the basis of the alleged customary rule that it identified in the NICOL II judgment.[35] He pointed out that, in accordance with the principle *iuranovit curia*, it is assumed that the court knows the law, and the customary rule that the Court identified,on the basis of evidence of state practice presented in the judgment,had probably existed already a decade ago. However, this reasoning does not seem accurate. M. Alexianu aptly notes that, in general, 'most courts, both international and domestic, prefer to avoid difficult legal questions where possible to limit mistakes, prevent overreach, and conserve court resources'.[36] Hence, it seems that, in 2012, the Court limited itself to demonstrating that the obligations deriving from UNCLOS Article 76(8), concerning the information on the extended continental shelf to be submitted to the CLCS, had not been fulfilled, and simply did not pursue the matter at that stage, anticipating that the case would probably return once the procedural requirements had been met. However, it cannot be ruled out that this interval allowed for the crystallisation of a customary rule, the existence of which the Court recognised in 2023.

4. Conclusions

The judgment considered here may serve as an important point of reference for both theorists and for practitioners. And although it is binding only between the parties and in relation to this particular case, its implications may also be significant for states that are not parties to the United Nations Convention on the Law of the Sea. Such states will face a dilemma: whether to comply with the customary rule identified by the ICJ, or to seek to challenge the reasoning that underpins it.

It cannot be denied that the Court adopted an extremely controversial position. V. de Lucia even stated that 'the Court, affected by 'methodological

35 *Dissenting opinion of Judge Tomka,* 455 (para. 4).
36 Alexianu, "The Nicaragua v. Colombia Continental Shelf Judgment: Short but Significant", 3.

indeterminacy', pulls 'fantastical opinioiuris' out of its hat'.[37] The matter was also addressed strongly by Judge ad hoc Skotnikov, who observed that the Court's finding in this regard 'is not in accordance with existing rules of international law' and that it was an 'attempt to legislate instead of interpreting and applying the existing law'.[38] It seems indeed that, given the ICJ's crucial role in the process of interpreting public international law, the Court should have exercised rather greater restraint in identifying rules of customary law. It is difficult to resist the impression that the Court exceeded its powers under Article 38(1)(b) of the Statute of the ICJ, according to which the Court applies (and does not create) international custom as evidence of a general practice accepted as law. Meanwhile, this judgment,regardless of the desirability of the rule adopted,comes dangerously close to creating, rather than decoding, the existence of a rule of customary international law.

Nevertheless, even if the existence of the rule in question may appear debatable, the authority of the ICJ may influence state practice in this field, resulting in the continued restraint of states from submitting claims to an extended continental shelf extending within 200 nautical miles of another state's baselines. Such practice, reinforced by the authority of the Court, may in turn lead to the consolidation or crystallisation of a new customary norm, in a manner similar to the evolution, once equally controversial, of the right of the coastal state to draw straight baselines, recognised as a customary norm by the ICJ in the Fisheries Case (1951).[39]

It should, however, be emphasised that, regardless of the doubts concerning the customary nature of the rule of international law at issue, the judgment delivered by the ICJ is binding and should be regarded as 'the most authoritative statement on the matter and accepted as law'.[40] The customary rule identified, though open to discussion, will undoubtedly have significant importance for the settlement of future disputes concerning the continental shelf. Finally, leaving aside the strictly legal aspects, it must be acknowledged that the solution adopted in NICOL II may in fact be a just one, bringing a peaceful end to the long-standing delimitation dispute between Colombia and Nicaragua. In contrast, the possible adoption of an arrangement introducing Grey Areas would probably have constituted only

37 de Lucia, "On the Question of *opinio iuris* in Nicaragua vs. Colombia (Judgement 13 July 2023)".

38 *Dissenting opinion of Judge ad hoc Skotnikov*, 562 (para. 18).

39 *Fisheries case* (Great Britain vs Norway), Judgment, I.C.J. Reports 1951, p. 131.

40 Buergenthal, "Lawmaking by the ICJ and Other International Courts", 403-404.

an interim solution,and a potential arena for further conflict over the manner of cooperation between the states concerned in that maritime zone.

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