

## **ANSWER TO THE QUESTION PUT BY JUDGE SIMMA TO NICARAGUA**

Question put by judge Simma

“In yesterday’s hearings in the reply to the question posed by Judge Keith, on the hypothesis underlying this question, Nicaragua presented a sketch-map which showed the cays claimed by Honduras lying to the south of the bisector line argued by Nicaragua as enclaves having 3-mile territorial seas. I refer to sketch-maps CAG 2-10 and AP 2-4 and to the pleading of Professor Pellet in paragraph 30.

“My question is: What are the reasons for the indication by Nicaragua of 3-mile territorial seas around these cays while both Parties to the present dispute in general claim 12-mile territorial seas?”

On this point it should first be pointed out that Honduras itself is aware that in certain circumstances the territorial sea of certain maritime features has to be smaller than the full 12 mile normal limit. As indicated in Nicaragua’s reply to the question put forth by Judge Keith, Honduras itself has indicated that it does not claim a full 12 mile territorial sea for the cays located nearer the 15<sup>th</sup> Parallel if the full attribution of the 12 miles would result in the creation of territorial sea areas for these cays south of this 15<sup>th</sup> parallel.

The views of Nicaragua, generally, are as follows. As indicated in the Nicaraguan Reply (3.12-3.21), the cays located in the area in dispute, due to their size and other conditions cannot sustain human habitation and thus have no continental shelf or economic zone. This does not mean that these cays automatically are entitled to a 12-mile territorial sea and therefore this question must also be decided in the context of maritime delimitation and on the basis of equitable criteria

Nicaragua requested that the line of delimitation based on the general direction of the mainland coast of both Parties, or any other line drawn by the Court based on equitable principles, should also serve as a line of attribution of sovereignty over the cays in the area in dispute. The reason for this was that the minor maritime features located in the area had not been the object of clear and significant acts of sovereignty by either Party. As a matter of fact, neither Party can give a reliable account of the maritime features involved in the area, much less claim sovereignty over features whose existence they cannot even attest to.

In the light of these considerations, the attribution of maritime spaces to these features must be seen in the context of the single maritime delimitation that Nicaragua has requested. If a full 12 mile territorial sea were attributed to these features, and they were attributed to Honduras, then this would result in giving a disproportionate amount of the maritime areas in dispute to Honduras. Besides, if these features were attributed to Honduras even a territorial sea under 12 miles would also cause inconvenient results for navigational purposes. Furthermore, not only would the 12 mile territorial sea of some of these features cut across the bisector line proposed by Nicaragua or any other equitable line decided by the Court, but perhaps more significantly it would certainly cut across the Main Cape Channel.

Honduras has attempted to prove it has exercised acts of sovereignty over only 4 of these features whilst in the area there may be hundreds of such similar features of which neither Party or any other Authority can give a clear and certain account since there are no current surveys of the area. As was indicated in the answer to Judge Keith, “Nicaragua does not know how many islands and features are involved or their locations since the basic surveys of this area date from the first half of the nineteenth century and this is an area where these features emerge and disappear periodically and often.” (CR 2007/11, p. 27, par. 69 [Arguello]) This is also true for Honduras and it has certainly not attempted to give information on any but the four cays it has repeatedly mentioned in its pleadings.

If no acts of sovereignty have been claimed and documented by Honduras apart from those relating to the 4 cays in question, then there is no reason to presume that the other cays and rocks in the area appertain to Honduras. If this is so, then what criteria should be used to bless some rocks and cays with 12 miles and others (mostly unknown) to leave unblessed?

On the other hand, even the acts of sovereignty Honduras claims it has exercised over these 4 cays are not coupled with any evidence that the use of the waters surrounding these cays was a significant part of those alleged acts of sovereignty over the cays in question. There are no fishing activities documented around the waters of these cays nor any oil activities directly involving the area of the cays. Furthermore, even the witnesses Honduras has brought forth as supposedly using these cays (many Jamaicans, for example), do not claim to use the waters around them as fishing grounds.

It should be noted that irrespective of the direct acts of sovereignty over the cays in question, it is indisputable that Nicaragua has conclusively demonstrated acts of sovereignty over the waters around the area of the cays. Without going into an extensive review of this question it is enough to recall the innumerable maritime incidents occurring in the maritime area in dispute. In this respect, there can be no question that the waters around the cays were patrolled and fished by Nicaraguan authorities or fishermen.

Judge Simma’s question is addressed to the hypothetical result that these cays were to be attributed to Honduras since if they were attributed to Nicaragua no problems would arise since they would be located to the south of the bisector and no effect north of this bisector would be attributed to them. In this respect, it is necessary to recall:

Nicaragua’s position is that up to the critical date of 1977, or even up to the 1979 date suggested by Honduras, the main acts of sovereignty in the area in dispute were executed by Nicaragua. This was based on

1. The question of the control of fisheries in the area as exemplified by the turtle fisheries agreement with the United Kingdom that implied the real, effective and constant use of the cays themselves as “crawls” or pens for herding the turtles until their shipment elsewhere. There were no comparable and duly proven acts by Honduras up to the critical date.
2. The long standing control and sovereignty over the only maritime port in the area: that of Cabo Gracias a Dios. This fact, coupled to the artisanal and

rudimentary fishing capacity of the population, emphasizes the control of the maritime spaces implied by the sovereignty over the only maritime port in the area.

3. The adjacency or proximity of these cays to the Nicaraguan mainland. The generally accepted charts of the area based on surveys conducted around the time of independence, prove that these cays were located nearer to the Nicaraguan coastline. This fact must also be coupled to the uninterrupted succession of cays located generally under 6 miles from each other and stemming from the Nicaraguan mainland further south of the area in dispute and running up to the cays south of the Mainland Navigation Channel, that implies that facilitated the movement even of artisanal fishermen in rudimentary crafts moving from one cay to the other. This option was not open to Honduran fishermen operating from the mainland who would have to traverse more than 24 miles of open sea.

Finally, it may be noted that there are examples in case law that confirm that small islands need not receive all their territorial sea entitlement in a maritime delimitation involving other coasts beyond 12 nautical miles. Two recent ones are the cases of Qatar/Bahrain and Eritrea/Yemen. (See also CR 2007/11, p.43, par. 31 [Pellet])