

DECLARATION OF JUDGE *AD HOC* COT

[*Translation*]

Specific circumstances of the western Caribbean — Multilateral management through a network of bilateral treaties — Rights of third States affected by the Judgment — Overly complicated nature of the course of the delimitation — Status of States not parties to the 1982 Convention with respect to the delimitation of the continental shelf beyond 200 nautical miles.

1. In the main, I am in agreement with the Judgment of the Court. However, I have serious reservations about certain points.

2. On the question of the rights of third States and of the multilateral management of the western Caribbean, it is my view that the Court's strictly bilateral approach to the dispute leads to unfortunate results.

3. The dispute before the Court in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* is undoubtedly a bilateral one, in which two States are in conflict over issues of sovereignty and maritime delimitation. However, it falls within a wider and very specific geographical framework: that of the western Caribbean.

4. The western Caribbean is made up of 14 coastal States in the area. It is characterized by the density of a range of activities conducted in a relatively confined space. A density and variety of economic activities: to begin with, there is shipping, both to and from the major communications link represented by the Panama Canal. But also fishing, tourism, the collection of guano — which for a long time was an important and much sought-after resource — and the extraction of oil.

5. These activities take place in a fragile environment characterized by atolls and coral reefs, with a remarkable biological diversity. There are a great many threats to this environment: over-exploitation of fishery resources; pollution; risk of a major oil accident, as shown by the Deep-water Horizon oil platform disaster in the Gulf of Mexico in 2010.

6. To take account of these various problems, the coastal States concluded a series of bilateral agreements, not solely relating to maritime delimitation. Those agreements established an informal multilateral management régime, an application of the “public order of the oceans”, to borrow the expression used by McDougal and Burke¹. In addition to the delimitation of maritime spaces, they addressed the protection of the marine environment, the sharing of fish stocks, the exploitation of resources, scientific research, the fight against drug trafficking, etc.

¹ Myres S. McDougal and William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, New Haven, New Haven Press, 1987.

7. The Court cannot ignore these overall characteristics of the region or their legal consequences, in particular the need for joint management of this fragile area by the States concerned. Regrettably, the Court's Judgment overturns this regional framework and redraws the political geography of the western Caribbean.

8. With regard to the rights and interests of third States, I voted against Costa Rica's request to intervene, for reasons associated with the sound administration of justice. I took the view that Costa Rica had fully asserted its legal interests during the proceedings relating to the Application for permission to intervene, and that the Court had been sufficiently informed to rule with a full knowledge of the facts and with respect for Costa Rica's rights. This is not to say that I thought that Costa Rica had no rights to assert in this case. The Court must take account of the rights of third States, whether the latter have asserted them through intervention proceedings or not (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p. 421, para. 238).

9. Having examined the case on the merits, I believe that the rights of third States are affected by the Judgment. In view of the approach taken by the Court, Article 59 of the Statute of the Court does not afford them adequate protection in this case.

10. To be more specific, the Court decided to end the line delimiting the Parties' maritime spaces where that line reached an area delimited by an agreement concluded with a third State. The problem is that those treaty-based delimitations no longer exist, since their object disappears with the substitution of Nicaragua for Colombia as the holder of sovereignty or of sovereign rights in the spaces concerned.

11. The Judgment records — and rightly so from its perspective — the nullity *ab initio* of every single provision of the agreements made by Colombia with its neighbours, where Nicaragua takes Colombia's place as a contracting party. The Court recognizes that situation when it rejects the request for a declaration made by Nicaragua in its second submission: "The Court observes that Nicaragua's request for this declaration is made in the context of proceedings regarding a maritime boundary which had not been settled prior to the decision of the Court." (Judgment, para. 250.)

12. As a result of the disappearance of those agreements, none of the provisions contained therein, particularly those relating to the delimitation of maritime spaces, can be binding on Nicaragua in its relations with the third States. Equally, no third State is bound by those provisions in its relations with Nicaragua. In particular, those States' maritime delimitation claims cannot be subject to an agreement, which has become null and void or ceased to exist, that was agreed on the basis of different political and geographical information, and, in particular, on different baselines, with Colombia.

13. It would have been more judicious for the Court to end the delimitation line between the two Parties at the point where third States could

not advance a claim under general international law, leaving to one side the previously concluded agreements, now, however, null and void and thus of no relevance to the present dispute.

14. As to the delimitation effected between the mainland coast of Nicaragua and the San Andrés Archipelago, I find it overly complicated. The Court would have been well advised to follow its earlier jurisprudence in the matter of maritime delimitation between opposing coasts, in particular the *Libya/Malta* and *Jan Mayen* cases (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, p. 13 and *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, *I.C.J. Reports 1993*, p. 38). It could have proceeded by selecting three base points on the respective coasts of each Party, as indicated in the Judgment handed down by the Court in the case concerning the *Maritime Delimitation in the Black Sea*², and used these to draw a simplified provisional median line made up of two straight lines forming an angle of approximately 130° to the west of the island of Providencia. It could then have transposed that line eastwards by approximately 25 minutes, adjusting it to take account of the considerable disproportion between the coast lengths.

15. That adjusted median line, reflecting the general direction of Nicaragua's mainland coast, would have had the merit of simplicity. It would have included only one turning point instead of the four adopted by the Court (see sketch-map No. 11 "Course of the maritime boundary", p. 714). It would have followed the Court's previous jurisprudence more closely. It would not have compelled the Court to give bizarre weightings to its chosen base points in order to plot a strange sinusoid (see sketch-map No. 9 "Construction of the weighted line", p. 711). It would not have led the Court to then transform that line into a group of straight-line segments, which will not be easy to locate at sea for the purpose of navigation or the exploitation of resources in the area.

16. The result of a simplified and transposed median line would not have been very different from that achieved by the Court. But it would have been clearer, and both simpler to explain and to justify in terms of maritime delimitation law. Because of its simplicity, a delimitation line following such a course would have been easier for the many and varied players in the Caribbean Sea to locate and thus to respect.

17. Finally, I find the Court's statements on the proceedings instituted by Nicaragua before the Commission on the Limits of the Continental

² *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 105, para. 127:

"In this stage of the delimitation exercise, the Court will identify the appropriate points on the Parties' relevant coast or coasts which mark a significant change in the direction of the coast, in such a way that the geometrical figure formed by the line connecting all these points reflects the general direction of the coastlines. The points thus selected on each coast will have an effect on the provisional equidistance line that takes due account of the geography."

Shelf somewhat muddled. The Court rightly underlines the importance of the Convention :

“The Court recalls that UNCLOS, according to its Preamble, is intended to establish ‘a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources’. The Preamble also stresses that ‘the problems of ocean space are closely interrelated and need to be considered as a whole’.” (Judgment, para. 126.)

18. I applaud this! However, it is the following sentence that I find problematic: “Given the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention.” The Court observes that several of the Convention’s provisions reflect rules which today are incorporated into general customary law. It notes, in particular, the Parties’ agreement that Articles 74 and 83 of the Convention, and Article 121, are to be considered declaratory of customary international law (*ibid.*, para. 138). The Court confirms that Article 121, relating to the legal status of islands, forms an indivisible régime and has the status of customary international law (*ibid.*, para. 139).

19. However, I remain sceptical of the Court’s finding that Nicaragua is bound, vis-à-vis Colombia, to respect its obligations under Article 76, paragraph 8, of the Convention, in order to delineate the outer limit of its continental shelf beyond 200 nautical miles. That obligation must undoubtedly be respected in relations between Nicaragua and the other States parties to the Convention. However, in my view, it is not pertinent in the present case. It is difficult to regard paragraph 8 as an expression of customary law. The provision institutes a specific procedure which is not accessible to non-member States. Article 76, paragraph 8, is thus *res inter alios acta* for Colombia.

20. The point is worth emphasizing from a regional perspective. Some important coastal States (Colombia, Venezuela, the United States of America), which have sovereignty over a good half of the mainland coast surrounding the Caribbean Sea, are not parties to the Convention. They cannot be affected by the procedures provided for therein for the determination of the outer limit of the continental shelf. In the present case, the Court should have confined itself to examining the evidence set forth during the judicial proceedings in order to reject Nicaragua’s claim for a delimitation of its continental shelf beyond 200 nautical miles. On this point, I fully support the views expressed by Judge *ad hoc* Mensah.

(Signed) Jean-Pierre COT.
