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Article 76 of the UN Convention on the Law of the Sea: Parties and Non-Parties

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on the Law of the Sea:
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I. INTRODUCTION

Article 76 of the 1982 UN Convention on the Law of the Sea defines the continental shelf and sets forth detailed rules for determining its outer limits.¹ It also introduces the Commission on the Limits of the Continental Shelf (CLCS), a body of scientific experts that can play an important role in helping coastal States finalize their continental shelf limits. The CLCS is one of three institutions created by the Convention, alongside the International Seabed Authority and International Tribunal for the Law of the Sea (ITLOS). Four decades after the Convention's adoption, it can confidently be asserted that Article 76 stands among its signature accomplishments, along with other landmark achievements such as the exclusive economic zone, the transit passage regime, provisions for archipelagic States, and fixing the maximum breadth of the territorial sea at twelve nautical miles.

A goal of the Convention's drafters was to settle "all issues relating to the law of the sea" through a "new and generally acceptable Convention on the law of the sea."² The Convention may be fairly regarded as "generally acceptable," considering that it has 168 parties and, importantly, many of its provisions reflect customary international law because the Convention either codifies a pre-existing rule of international law or has given rise to a general and consistent practice of States that is accepted as law. Where customary international law mirrors the Convention, it binds non-parties such as the United States and binds Convention parties in their relations with non-parties. At the same time, it remains clear that not all provisions of the Convention are universally applicable as customary international law.

This article addresses the universality of Article 76, in particular the degree to which its provisions are legally applicable to all States, including non-parties to the Convention. In doing so, the article considers the recent jurisprudence of the International Court of Justice (ICJ) pertaining to the continental shelf. Parts II and III provide context and background: Part II provides a brief history of the development of the juridical regime of the continental shelf, and Part III provides an overview of Article 76 of the Convention. In the context of the ICJ's recent case law, Part IV considers whether Article 76 is part of customary international law and thus applicable to all

1. United Nations Convention on the Law of the Sea art. 76, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

2. *Id.* pmbl. paras. 1, 2.

States. Part V focuses on the CLCS and the manner in which the ICJ has addressed issues between Convention parties and non-parties.

II. A BRIEF HISTORY

The origins of the continental shelf as a legal concept are typically traced to the Truman Proclamation of 1945, in which the United States asserted that the natural resources of the continental shelf contiguous to its coasts are “subject to its jurisdiction and control.”³ This U.S. proclamation was followed by other States making similar claims of authority over the seabed off their coasts, such that the basic concept of the continental shelf was rapidly accepted as part of customary international law applicable to all States.⁴ However, in the decade following the Truman Proclamation, uncertainty persisted as to both the type of jurisdiction that could be lawfully claimed and also the geographic extent of that jurisdiction (i.e., the outer limits).

The inevitable inconsistencies in continental shelf assertions made by coastal States were partially addressed in the 1958 Continental Shelf Convention, which marked the first articulation of continental shelf law in treaty form.⁵ The 1958 Convention included key provisions that remain doctrinally significant, in particular its Article 2. This article provided for exclusive, “sovereign rights” related to the exploration and exploitation of natural resources of the shelf.⁶ As stated in Article 2(3), “[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.”⁷ In its landmark 1969 *North Sea* judgment, the ICJ called Article 2 “the most fundamental of all the rules of law relating to the continental shelf,” and elaborated as follows:

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, and as an extension of it in an exercise of sovereign rights for the purpose of

3. Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 10 Fed. Reg. 12,303 (Sept. 28, 1945).

4. See, e.g., MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 107–22 (2013).

5. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

6. *Id.* art. 2.

7. This provision is reiterated in UNCLOS, *supra* note 1, art. 77(3).

exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted.⁸

The continental shelf is therefore both a legal construct and a physical feature; legal rights inherently flow from the fact that the shelf is the physical continuation beneath the sea of the land territory of a State.

The 1958 Convention fell short in one important respect: it did not provide for a clear outer limit of the continental shelf. Article 1 of the 1958 Convention suggested that the shelf could extend to any water depth or distance from shore provided that “exploitation of the natural resources of the said areas” was possible.⁹ Under an extreme interpretation of the “exploitability” criterion, the jurisdiction of coastal States might eventually extend to the entire ocean floor, in line with their growing technological capacity to exploit seabed resources. Although this was not the intent of the drafters,¹⁰ the indeterminacy of the boundary between national jurisdiction (i.e., continental shelf) and areas beyond national jurisdiction needed attention in light of the growing interest in the 1960s in the potential mineral riches of the deep seabed beyond national jurisdiction. This interest in the deep seabed increased the significance of the outer limit of the continental shelf, since it would also constitute an *inner limit* of the Area beyond national jurisdiction.¹¹

In 1969, the UN General Assembly stated that Article 1 of the 1958 Convention “does not define with sufficient precision the limits [of the continental shelf] . . . and that customary international law on the subject is inconclusive.”¹² Defining the seaward extent of the continental shelf with “sufficient precision” became a priority of the Third United Nations Conference on the Law of the Sea, 1973–1982 (UNCLOS III). Article 76 of the 1982 Convention is the fruit of that effort.

8. North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.), Judgment, 1969 I.C.J. 3, ¶ 19 (Feb. 20).

9. Convention on the Continental Shelf, *supra* note 5, art 1.

10. Bernard H. Oxman, *The Preparation of Article 1 of the Convention on the Continental Shelf*, 3 JOURNAL OF MARITIME LAW & COMMERCE 245, 250–51 (1972).

11. UNCLOS, *supra* note 1, art. 1(1) (defining the “Area” as “the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”), Part XI (setting forth provisions pertaining to “The Area”).

12. G.A. Res. 2574 (XXIV) (Dec. 15, 1969).

III. ARTICLE 76

Article 76 is among the most complex articles of the 1982 Convention. For this reason, this Part briefly explains Article 76, drawing attention to certain concepts addressed in later parts of this article.

Paragraph 1 of Article 76 states:

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or 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.

Paragraph 1 sets forth the general definition of a coastal State's entitlement to continental shelf based on (1) the natural prolongation of its land territory to the outer edge of the continental margin (continental margin criterion), or (2) a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (200 nautical mile criterion). A coastal State can use whichever of these two criteria is most favorable. While the latter (200 nautical miles) is straightforward, the former is not, and is subject to additional rules and procedures described below.

Paragraphs 2 to 7 of Article 76 provide dense and intricate rules for how a coastal State is to delineate the outer limits of its continental shelf using the continental margin criterion referred to above (i.e., in areas beyond 200 nautical miles). These provisions read as follows:

2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:

(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 percent of the shortest distance from such point to the foot of the continental slope; or

(ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

Some basic observations about these paragraphs are warranted. First, paragraph 4 provides two formulas for establishing the “outer edge of the continental margin.” Thus, paragraph 4 directly implements paragraph 1. Second, paragraph 5 describes two “constraints,” one that is 350 nautical miles from the territorial sea baselines (distance constraint) and the other that is 100 nautical miles from the 2,500 meter isobath, which is a line connecting the depth of 2,500 meters (depth constraint). Paragraph 5 provides that the outer limits of the continental shelf “either shall not exceed” the distance constraint “or shall not exceed” the depth constraint. Third, paragraph 7 provides rules for the overall delineation of the outer limits of the

continental shelf in areas beyond 200 nautical miles from the territorial sea baselines.

The interplay between the provisions above illustrates that the “outer edge of the continental margin” is not necessarily the “outer limit of the continental shelf.” Taking paragraphs 1 to 7 together, the outer limits of the continental shelf can be based on 200 nautical miles or the outer edge of the continental margin, as defined in paragraph 4. It can also, however, be based on constraints in paragraph 5: 350 nautical miles or 100 nautical miles from the 2,500 meter isobath. The result in any particular instance will depend on the shape and other physical characteristics of the seabed and subsoil.

Paragraphs 8 and 9 of Article 76 state:

8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

9. The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto.

Paragraph 8 introduces the CLCS, a treaty body made of up scientific experts. The rationale for the CLCS is rooted in the complexities of paragraphs 1 to 7, the application of which requires scientific data pertaining to the seabed and subsoil. Independent expert review of continental shelf limits, it is hoped, will help establish a widely accepted boundary between seabed areas within and beyond national jurisdiction. Drawing from paragraph 8, Annex II of the Convention, and the Commission’s Rules of Procedure, the submission process can be summarized in three key steps:

1) *Submission by Coastal State.* A coastal State intending to establish the outer limits of its continental shelf beyond 200 nautical miles “shall submit

particulars of such limits to the CLCS along with supporting scientific and technical data.”¹³

2) *Recommendation by the CLCS*. Submissions are “queued in the order they are received” and, once at the top of the queue, are considered by sub-commissions made up of seven members of the CLCS. After considering the submission, the full CLCS makes its recommendations to the coastal State.¹⁴

3) *Establishment of outer limits*. As stated in paragraph 8, “[t]he limits of the shelf established by a coastal State on the basis of these recommendations [by the CLCS] shall be final and binding.”¹⁵ Once the coastal State establishes those outer limits, they are to be deposited with the Secretary-General, pursuant to paragraph 9, who then publicizes them.¹⁶

Several observations regarding the CLCS process merit emphasis. First, paragraph 8 describes a mandatory obligation: information “*shall* be submitted by the coastal State.” Second, the CLCS itself is a *recommendatory* body; it is the coastal State and not the CLCS that actually establishes the outer limit of its continental shelf. Third, recommendations are to be provided to “coastal States” (as opposed to “States parties”). Fourth, despite its recommendatory character, the CLCS’s role has a legal dimension because “*if* an outer limit claim is based on the Commission recommendations, *then* the outer limit is final and binding.”¹⁷ While this does not obligate a coastal State to establish its outer limits on the basis of the CLCS’s recommendations, outer limits established or otherwise asserted that are *not* on the basis of the CLCS’s recommendations are accordingly *not* “final and binding,” leaving it up to other States to evaluate the credibility of such limits. In any case, the

13. UNCLOS, *supra* note 1, annex II, art. 4.

14. *Id.* annex II, arts. 3(1)(a), 6(1), 6(3); Comm’n on the Limits of the Continental Shelf, *Rules of Procedure of the Commission on the Limits of the Continental Shelf*, r. 51(5), 53, U.N. Doc. CLCS/40/Rev.1 (Apr. 17, 2008).

15. UNCLOS, *supra* note 1, art. 76(8).

16. *Id.* arts. 76(9), 84.

17. Ted L. McDorman, *The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World*, 17 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 301, 314 (2002) (considering the “most straightforward reading” of the final sentence of paragraph 8 to be an “if/then clause”). This accords with the U.S. view. *See also* Message from the President of the United States transmitting United Nations Convention on the Law of the Sea (with Annexes and 1994 Agreement), at VII–VIII, S. Treaty Doc. 103-39 (1994) (concerning the 1994 Agreement) (“The coastal State is not bound to accept these recommendations, but if it does, the limits of the continental shelf established by a coastal State on the basis of these recommendations are final and binding on all States Parties to the Convention and on the International Sea-bed Authority.” *Id.* at 56–57.).

Convention respects the sovereign prerogative of a coastal State to establish its outer limits.

Paragraph 10 of Article 76 states: “The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.” This provision is a savings clause dealing with continental shelf boundary delimitation between neighboring States. It makes the key distinction between continental shelf *delineation* (Article 76) and *delimitation* (continental shelf boundaries), which is addressed in Article 83 of the Convention. Article 83 provides that continental shelf delimitation between States with opposite or adjacent coasts “shall be affected by agreement on the basis of international law . . . in order to achieve an equitable solution.”¹⁸ That article pertains to the delimitation of the continental shelf both within and beyond 200 nautical miles.¹⁹

IV. ARTICLE 76 AND CUSTOMARY INTERNATIONAL LAW

This Part examines whether Article 76 of the Convention has the status of customary international law. Three parts of Article 76 are considered below: paragraph 1 (the basic rule), paragraphs 2 to 7 (the detailed rules), and paragraph 8 (the CLCS).²⁰

In recent proceedings before the ICJ between Nicaragua and Colombia, the Court has considered whether parts of Article 76 reflect customary international law. While Nicaragua is a party to the Convention, Colombia is

18. UNCLOS, *supra* note 1, art. 83.

19. *See, e.g.*, Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012 ITLOS Rep. 4, ¶ 361 (noting that Article 83 and other articles do not make “any distinction being made between the shelf within 200 nm and the shelf beyond that limit”); Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf, 27 R.I.A.A. 147, ¶ 213 (Perm. Ct. Arb. 2006) (stating that “there is in law only a single ‘continental shelf’ rather than an inner continental shelf and a separate extended or outer continental shelf”).

20. Paragraph 9 appears to pertain to treaty functions and is not likely amenable to forming customary international law. Paragraph 10, which is in the nature of a savings clause, appears to describe the relationship between delineation and delimitation (see discussion *supra*, Part III) in a manner that would be accurate for all coastal States, whether they are parties to the Convention or not, i.e., delineation of continental shelf limits are without prejudice to continental shelf delimitation between neighboring coastal States.

not. Accordingly, the law to be applied by the Court is customary international law rather than the Convention *per se*.²¹ Like any treaty, the Convention creates rights and obligations only between its parties, and creates no such rights and obligations that are opposable between parties and non-parties.²² Thus, before giving legal effect to a provision in the Convention in a case involving a non-party, the Court must first satisfy itself that the provision reflects customary international law.

For customary international law to form there must be “evidence of a general practice accepted as law,” as described in the ICJ Statute.²³ This formulation reflects the two elements required for the formation of customary law: State practice and *opinio juris*. The formation of customary international law requires the relevant State practice to be general and consistent; it must be “settled practice,” as described by the ICJ.²⁴ Moreover, it must also have “occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved” (*opinio juris*).²⁵ The International Law Commission has noted that an empirical assessment of State practice and *opinio juris* may be aided, with appropriate caution, by a measure of deductive reasoning, such as “when concluding that possible rules of international law form part of an ‘indivisible regime.’”²⁶ As discussed below, the Court has invoked this concept in the proceedings between Nicaragua and Colombia to find that certain provisions in the Convention are part of customary international law.²⁷

21. Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624, ¶ 118 (Nov. 19) [hereinafter *Nicar. v. Colom. I*].

22. Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *VCLT*].

23. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060.

24. North Sea Continental Shelf Cases, *supra* note 8, ¶ 77. *See generally* Int’l Law Comm’n, Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10, Part Three (conclusions 4–8), at 130–38 (2018) [hereinafter *ILC Draft Conclusions*].

25. North Sea Continental Shelf Cases, *supra* note 8, ¶¶ 74, 77. *See generally* ILC *Draft Conclusions*, *supra* note 24, Part Four (conclusions 9–10), at 138–140.

26. ILC *Draft Conclusions*, *supra* note 24, at 126.

27. *See infra* note 38, and accompanying text.

A. Paragraph 1

In 2012, the ICJ stated in *Nicaragua v. Colombia I* that it considers the entirety of paragraph 1 of Article 76 to be “part of customary international law.”²⁸ Although the Court did not describe the relevant State practice and *opinio juris*, the conclusion reached was relatively uncontroversial. Both parties to the case agreed that paragraph 1 is part of customary international law, and there is an abundance of evidence to support this view.²⁹

Even if uncontroversial, the conclusion is significant. It indicates that all coastal States are entitled to a continental shelf extending to either of the two criteria in paragraph 1: the outer edge of the continental margin or 200 nautical miles, whichever is more seaward. This finding by the Court is helpful in extinguishing the misperception that the continental shelf of a non-party is limited to 200 nautical miles—in other words, that a non-party has no “extended continental shelf.” This misperception is based on an assumption that the continental shelf was at one point limited to 200 nautical miles, and then the 1982 Convention “extended” the shelf further seaward. In fact, from the 1950s to the 1970s, prior to the negotiation of Article 76, the juridical concepts invoked to determine the extent of the continental shelf pertained to depth, exploitability, natural prolongation, and the continental margin, none of which align with a 200 nautical mile maximum breadth. The vital accomplishment of the Convention was not to broaden the shelf beyond 200 nautical miles, but rather to bring precision and clarity to the determination of its maximum seaward limit, which had never been based on 200 nautical miles or any distance from shore. While some negotiating States at UNCLOS III favored a continental shelf that extended no more than 200 nautical miles (in line with the emerging 200 nautical mile exclusive economic zone), this view was firmly rejected by other States. The historical evolution of the continental shelf regime demonstrates unequivocally that there has never been a customary international law rule that the continental shelf is limited to 200 nautical miles.³⁰

28. *Nicar. v. Colom. I*, *supra* note 21, ¶ 118.

29. Kevin A. Baumert, *The Outer Limits of the Continental Shelf under Customary International Law*, 111 AMERICAN JOURNAL OF INTERNATIONAL LAW 827, 838–45 (2017).

30. For a more detailed development of the points made in this paragraph, *see id.* at 831–45.

B. Paragraphs 2 to 7

At the time of the 2012 judgment in *Nicaragua v. Colombia I*, the Court considered that “it does not need to decide” whether subsequent provisions of Article 76 form part of customary international law.³¹ This appears to have changed. In October 2022, as part of a subsequent case between the same parties, *Nicaragua v. Colombia II*,³² the Court requested that Nicaragua and Colombia present arguments on two questions of law, one of which was the following:

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?³³

While perhaps a minor matter, it is not apparent why the Court refers to paragraphs 2 to 6 rather than paragraphs 2 to 7. As discussed in Part III, paragraph 7 is integral to the determination of continental shelf limits beyond 200 nautical miles, as it provides the technical rules for the actual delineation of the outer limits. Nevertheless, the thrust of the Court’s question is clear, and because paragraph 4 expressly refers to paragraph 7, it can perhaps be inferred that the Court is inquiring about the status of the full suite of rules in Article 76 for determining the outer limits of the continental shelf.

The view already taken by this author, based on a thorough examination of State practice and *opinio juris*, is that paragraphs 2 to 7 are part of customary international law.³⁴ Five observations related to this conclusion are offered below in connection with the Court’s consideration of the matter.

First, it is important to appreciate the relevance of the Court’s prior determination that paragraph 1 is part of customary international law. Since

31. *Nicar. v. Colom. I*, *supra* note 21, ¶ 118.

32. *See* Application of Nicaragua, Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (*Nicar. v. Colom.*) (Int’l Ct. Justice, Sept. 16, 2013), <https://www.icj-cij.org/public/files/case-related/154/17532.pdf>.

33. Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (*Nicar. v. Colom.*), Order (Int’l Ct. Justice, Oct. 4, 2022), <https://www.icj-cij.org/public/files/case-related/154/154-20221004-ORD-01-00-EN.pdf>.

34. Baumert, *supra* note 29, at 849–57.

paragraph 1 is part of customary international law, the situation demands some “criteria,” as the Court put it, to determine the continental shelf limits beyond 200 nautical miles. The manner in which the Court poses the question suggests that it may not be satisfied with an assertion that merely denies that paragraphs 2 to 6 are part of customary international law. Rather, if the relevant customary international law rules are *not* paragraphs 2 to 6 (or 2 to 7), then what are they? The reality is that there are no other plausible alternatives, and no State has identified its continental shelf limits based on criteria other than those in Article 76.³⁵

A second consideration also relates to paragraph 1, namely the textual relationship between paragraph 1 and paragraphs 2 to 7. Paragraphs 2 to 7 do not merely implement the continental margin criterion in paragraph 1, they substantively alter it. In other words, implementation of paragraphs 2 to 7 does not necessarily result in continental shelf limits that reach the extent of the “outer edge of the continental margin,” as stated in paragraph 1. Paragraph 4 contains the specific formulas for determining the “outer edge of the continental margin,” and paragraph 5 contains “constraints” that “in fact involve cutting off from national jurisdiction parts of the [continental] margin.”³⁶ Thus, if paragraph 1 is part of customary international law but the subsequent provisions are not it could confer an advantage on non-parties in determining their continental shelf limits. If unconstrained by paragraphs 4 and 5, a non-party might be able to determine the “outer edge of the continental margin” using criteria other than those found in paragraph 4 while entirely avoiding the potential cut-off effect of paragraph 5. Bernard Oxman calls such a prospect an “audacious contention” that confers an “exceptional benefit” on non-parties.³⁷ Were a non-party to determine its outer limits based solely on paragraph 1, it seems likely that it would be greeted by objections from other States.

Because of this tight relationship between paragraphs 1 to 7, the Court could consider these provisions to collectively constitute an “indivisible regime.” Although it is not entirely clear what constitutes an indivisible regime, the Court invoked this concept to reach the conclusion that the entirety of

35. *Id.* at 853–54.

36. See 17 OFFICIAL RECORDS OF THE THIRD UN CONFERENCE ON THE LAW OF THE SEA 24, U.N. Doc. A/CONF.62/SR.186 (1982) (statement by Ireland’s delegation).

37. Bernard H. Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 411 (Donald Rothwell et al. eds., 2015).

Article 121 (“Regime of Islands”) of the Convention has the status of customary international law. Having previously concluded that paragraph 2 of Article 121 is part of customary international law, the Court considered that paragraph 3 (pertaining to islands that are “rocks”) “provides an essential link” to the contents of paragraph 2.³⁸ The connectedness of paragraphs 1 to 7 of Article 76 is even stronger. Paragraph 1 refers to the “outer edge of the continental margin.” Paragraph 4 then clarifies how this “outer edge” is to be determined. As ITLOS has confirmed, paragraphs 1 and 4 “refer to the same area.”³⁹ The provisions are further intertwined: paragraph 2 refers to paragraphs 4, 5, and 6; paragraph 4 refers to paragraph 7; paragraph 6 refers to paragraph 5. Collectively, paragraphs 2 to 7 implement the continental margin criterion established in paragraph 1. These provisions are certainly an “indivisible regime,” as drafted in the Convention, in that it would not be acceptable to use some of these provisions and not others.

Third, although the Court would surely consider the State practice and *opinio juris* of all relevant States, the views of the United States—a major non-party with a continental shelf that extends beyond 200 nautical miles in numerous areas—may be especially pertinent to the question posed to Nicaragua and Colombia. The practice and views of the United States, dating from the conclusion of the Convention in 1982, align strongly with a conclusion that paragraphs 1 to 7 are part of customary international law.⁴⁰ The United States adopted this position formally in 1987.⁴¹ In the decades since, the United States has publicly taken substantial steps to implement paragraphs 1 to 7 with seemingly no international objection. To implement the formulas and constraints in paragraphs 4 and 5, the United States has conducted at-sea data collection since 2002, including dozens of bathymetric and seismic surveys of U.S. continental margins.⁴² As stated on the U.S. government’s Extended Continental Shelf Project website:

38. *Nicar. v. Colom. I*, *supra* note 21, ¶ 139.

39. *Bangl. v. Myan.*, *supra* note 19, ¶¶ 434, 435, 437.

40. See statements and U.S. practice in Baumert, *supra* note 29, at 849, 857.

41. U.S. DEP’T OF STATE, OFFICE OF THE LEGAL ADVISER, CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 1981–1988, at 1878–79 (1993) (citing State Department memorandum dated Nov. 17, 1987, stating “that the delimitation provisions of Article 76 . . . reflect customary international law and that the United States will use these rules when delimiting its continental shelf and in evaluating the continental shelf claims of other countries” and variously referring to paragraphs 1 to 7 of Article 76).

42. U.S. Extended Continental Shelf Project, Missions and Data, <https://www.state.gov/missions-and-data-u-s-extended-continental-shelf-program/> (last visited Dec. 7, 2022).

Like other countries, the United States is using Paragraphs 1 through 7 of Article 76 to determine its continental shelf limits, and considers these provisions to reflect customary international law. As a matter of customary international law, the United States also respects the continental shelf limits of other countries that abide by Article 76.⁴³

The United States has delineated its continental shelf limits in seven different regions off its coasts using paragraphs 1 to 7,⁴⁴ the details of which may soon be released publicly.⁴⁵

It also is possible that the Court would consider, though perhaps not expressly, the broader law of the sea implications that flow from a potential finding regarding the customary international law status of paragraphs 2 to 7. Observations four and five, below, pertain to such broader implications for both Convention parties and non-parties. There is more at stake than a few paragraphs in Article 76.

Fourth, the outer limits of the continental shelf of all coastal States, collectively, form the inner limit of the Area beyond national jurisdiction, in which non-living resource exploration and exploitation is administered by the International Seabed Authority.⁴⁶ Thus, if parties and non-parties are not bound by the same rule-set regarding the determination of continental shelf limits, it would prevent a geographic definition of the Area that is applicable to all States. It is not apparent how the Seabed Authority would administer certain resource activities in the Area if international law itself precludes a universal definition of the Area.

Fifth, and finally, the question posed by the Court implicates the opposability of continental shelf limits as between parties and non-parties. If paragraphs 2 to 7 are not part of customary international law, the implication for Convention parties could be that their own continental shelf limits are not opposable to non-parties. In other words, that continental shelf limits

43. U.S. Extended Continental Shelf Project, Frequently Asked Questions, <https://www.state.gov/frequently-asked-questions-u-s-extended-continental-shelf-project/> (last visited Dec. 7, 2022).

44. U.S. Extended Continental Shelf Project, About the U.S. Extended Continental Shelf Project, <https://www.state.gov/about-the-u-s-extended-continental-shelf-project/> (last visited Dec. 7, 2022).

45. Evan T. Bloom & Jeremy Greenwood, *Securing U.S. Territorial Rights in the Arctic: New Actions to Protect America's Continental Shelf*, BROOKINGS INSTITUTION (July 2022), <https://www.brookings.edu/research/securing-us-territorial-rights-in-the-arctic-new-actions-to-protect-americas-continental-shelf/>.

46. UNCLOS, *supra* note 1, pt. XI (defining the “Area” and establishing the International Seabed Authority).

determined under paragraphs 2 to 7 would have legal force only as between Convention parties. Of course, any judgment of the Court on this matter binds only Nicaragua and Colombia. But the Court's determinations as to the content of customary international law carries broader implications for the international community. For example, could a Convention party have continental shelf limits based on paragraphs 2 to 7 vis-à-vis one neighbor that is also a party to the Convention, but limits based on some other criteria vis-à-vis another neighbor that is not?

In this regard, it is appropriate to give attention to the practices and attitudes of Convention parties in relation to non-parties. The expectation of Convention parties is surely that *all States*, including non-parties to the Convention, must respect their exclusive continental shelf rights out to the limits provided for under paragraphs 2 to 7. Considering that continental shelf rights by their nature—under both customary and treaty law—are *exclusive* to the coastal State, it seems implausible that any Convention party would regard its continental shelf limits determined pursuant to paragraphs 2 to 7 as having legal force only against other Convention parties. This is indeed the case for all maritime claims made by Convention parties, including with respect to the territorial sea and exclusive economic zone. A review of State practice undertaken by this author did not identify any instances in which a Convention party claims the Convention's territorial sea, exclusive economic zone, or continental shelf rights solely against other parties to the Convention.⁴⁷ Instead, the seemingly universal practice of coastal States—whether parties or not—is to assert their maritime rights and jurisdiction *erga omnes* (“against all”). Because this practice is widespread and generally conforms to the Convention's provisions related to maritime zones it creates a force for the development of customary international law aligned with the Convention's provisions.

To conclude this discussion, it is worth emphasizing that the Court is not simply asking a binary question as to whether paragraphs 2 to 6 are part of customary international law. Rather, if they are *not* part of customary international law, the open-ended question posed by the Court demands an alternative: *what are the criteria under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles?* The question itself perhaps appreciates the lack of alternatives and the deleterious consequences that would follow if paragraphs 2 to 7 are not regarded as part of customary

47. Baumert, *supra* note 29, at 855.

international law. Those consequences pertain not just to non-parties, but to all parties in their relations to non-parties.

C. Paragraph 8

The question posed to Nicaragua and Colombia, discussed above, did not inquire as to the customary international law status of paragraph 8, perhaps because it is already apparent. There is scant evidence of State practice and *opinio juris* to support the view that this provision, which has a largely procedural character, has become part of customary international law.⁴⁸ As of late 2022, more than seventy-five countries had submitted information on their continental shelf limits with the CLCS pursuant to the first paragraph of Article 76.⁴⁹ This practice, however, appears to lack the requisite *opinio juris* to constitute evidence of customary international law formation. As stated by the International Law Commission, “[i]t is important that States can be shown to engage in the practice not (solely) because of the treaty obligation, but out of a conviction that the rule embodied in the treaty is or has become a rule of customary international law.”⁵⁰ The submissions of all coastal States were filed with the CLCS after the Convention entered into force for those States, and it is therefore not apparent that the practice of filing a submission with the CLCS is anything other than implementation of a treaty obligation by its parties. The view that paragraph 8 is not part of customary international law is also in accord with the declarations and separate opinions of four judges in the ICJ proceedings between Nicaragua and Colombia.⁵¹

48. *Id.* at 861. The procedural provisions in paragraph 8 may also lack the kind of “norm-creating character” that the Court in *North Sea* considered necessary for a treaty provision to pass into customary international law. *North Sea Continental Shelf Cases*, *supra* note 8, ¶ 72.

49. U.N. Division for Ocean Affairs and the Law of the Sea, *Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, Pursuant to Article 76, Paragraph 8, of the U.N. Convention on the Law of the Sea* (last updated Oct. 25, 2022), https://www.un.org/Depts/los/clcs_new/commission_submissions.htm.

50. ILC *Draft Conclusions*, *supra* note 24, at 144.

51. *Nicar. v. Colom. I*, *supra* note 21, at 759, ¶ 28 (separate opinion by Donoghue, J.) (opining that non-parties have “no duty to make submissions to the Commission”); *Id.* at 764–65, ¶ 8 (declaration by Mensah, J.) (opining that paragraph 8 is a “treaty obligation” that “cannot be considered as imposing mandatory obligations on all States under customary international law”); *Id.* at 771, ¶¶ 19–20 (declaration of Cot, J.) (“It is difficult to regard paragraph 8 as an expression of customary law”); Question of the Delimitation of the Con-

V. THE CLCS AND PARAGRAPH 8 OF ARTICLE 76

This Part considers the relevance of paragraph 8 of Article 76 to non-parties to the Convention. The content below builds off the legal conclusions discussed in the Part IV, namely that paragraphs 1 to 7 are part of customary international law but paragraph 8 is not. Thus, the legal situation is somewhat disjointed: on one hand, the substantive rules for determining the spatial extent of the continental shelf (i.e., its outer limits) are the same for parties and non-parties to the Convention, but only a State party is subject to the requirement to submit information on the outer limits of its continental shelf to the CLCS.

With this starting point, might paragraph 8 and the CLCS nevertheless be relevant in the relations between parties and non-parties? Surely the answer is yes. An easy example illustrates: if a Convention party were to file a submission to the CLCS, receive its recommendations, and then establish its outer limits on the basis of those recommendations, then those outer limits are almost certainly opposable to a non-party under customary international law. But this conclusion does not flow from paragraph 8, under which the outer limits are “final and binding,” since that provision does not apply under customary international law. Instead, the legal effect flows from the fact that paragraphs 1 to 7 are part of customary international law. Even though the CLCS’s views have no formal status under customary international law, and no State is obligated to follow its recommendations, this expert body nevertheless plays a role as “legitimator” of continental shelf delineation, giving some confidence that paragraphs 1 to 7 have been appropriately followed.⁵² Indeed, the United States has already stated that it “respects the continental shelf limits of other countries that abide by Article 76.”⁵³ The CLCS can be an important factor in enabling a non-party such as the United

tinental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Judgment on Preliminary Objections, 2016 I.C.J. 100, 211–12, ¶ 11 (Mar. 17) [hereinafter *Nicar. v. Colom. II*] (declaration by Robinson, J.), <https://www.icj-cij.org/public/files/case-related/154/judgment-17-march-2016-robinson.pdf> (Article 76(8) and Annex II “are obviously special, contractual and confined to States parties to UNCLOS”).

52. McDorman, *supra* note 17, at 319 (also noting that “legitimation must be understood not in terms of black or white (legitimate or illegitimate) but as a spectrum between greater legitimacy and lesser legitimacy”).

53. U.S. Extended Continental Shelf Project, Frequently Asked Questions, *supra* note 43.

States to determine whether another State is acting in conformance with Article 76.

Questions presented to the ICJ, however, tend to be less straightforward, and the Court has struggled with paragraph 8 and the CLCS. The judgments in the proceedings between Nicaragua and Colombia, as well as the declarations and separate opinions of several judges, raise important issues relating to how paragraph 8 applies to both parties and non-parties. Reflections on two of these issues are offered in the following sections.

A. Paragraph 8 and Opposability to Non-Parties

The first issue raised in the Court's treatment of paragraph 8 is whether this provision is opposable to Colombia, a non-party to the Convention.⁵⁴ In other words, does paragraph 8 have legal effect in the relations between a Convention party and a non-party? Assuming that paragraph 8 is *not* part of customary international law, then the answer appears to be clear: implementation (or lack thereof) of paragraph 8 by a party (such as Nicaragua) is not opposable to a non-party (such as Colombia). Notwithstanding this, in the proceedings between Nicaragua and Colombia, which have been decided on the basis of customary international law, the Court has given substantial weight to the filing of a submission with the CLCS.

In *Nicaragua v. Colombia I*, decided in 2012, the Court delimited a maritime boundary within 200 nautical miles, but considered that it could not delimit a continental shelf boundary between the parties in areas beyond 200 nautical miles from Nicaragua. The Court considered that it could not delimit a continental shelf boundary between the two parties because Nicaragua had not yet fulfilled its obligations in paragraph 8 by filing a full submission to the CLCS.⁵⁵ In 2013, Nicaragua filed a submission with the CLCS, thus fulfilling

54. For a useful discussion of opposability in international law, see Eirik Bjorge, *Opposability and Non-Opposability in International Law*, BRITISH YEARBOOK OF INTERNATIONAL LAW (2021), <https://doi.org/10.1093/bybil/brab006>.

55. This view of the Court was clarified in the preliminary objections proceedings in *Nicar. v. Colom. II*, *supra* note 51, where an evenly split Court (eight to eight, with the president casting the deciding vote) held that

Nicaragua's claim [in *Nicar. v. Colom. I*] could not be upheld . . . because [Nicaragua] had yet to discharge its obligation, under paragraph 8 of Article 76 of UNCLOS, to deposit with the CLCS the information on the limits of its continental shelf beyond 200 nautical miles required by that provision and by Article 4 of Annex II of UNCLOS.

Id. at 132, ¶ 84.

its obligation under paragraph 8 of Article 76. It then reinstated ICJ proceedings against Colombia (*Nicaragua v. Colombia II*), again asking the Court to delimit a continental shelf boundary between the two parties.⁵⁶ Because Nicaragua made a submission to the CLCS in 2013, according to the majority, Nicaragua cured the previous defect, and its case could proceed with the Court. The proceedings in *Nicaragua v. Colombia II* are still ongoing as of the end of 2022.

There is much to take in from this brief recitation of the *Nicaragua v. Colombia* proceedings. In the most basic sense, and to return to the question posed above about the opposability of paragraph 8, it is puzzling why the Court would consider a treaty obligation of Nicaragua applicable in a case decided on the basis of customary international law. As Judge Robinson explained in his declaration accompanying a joint dissenting opinion of seven judges (which he also joined), the “majority’s interpretation today adopts a conclusion that runs roughshod over a fundamental principle of the Law of Treaties.”⁵⁷ Nicaragua’s obligation under paragraph 8 is owed to other Convention parties, not non-parties. In the Court’s view, “the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76 of that Convention.”⁵⁸ While surely this is true, it does not naturally follow that Nicaragua has an obligation under paragraph 8 that is opposable to Colombia. In any case, the Court left no doubt as to its view, stating that the filing of a submission with the CLCS by Nicaragua, as required by paragraph 8, is a “prerequisite” for the Court to delimit the continental shelf beyond 200 nautical miles with Colombia, a non-party to the Convention.⁵⁹

It is difficult to foresee the implications, if any, for Convention parties and non-parties that flow from the Court’s approach. Judge Robinson saw the enforcement of paragraph 8 against Colombia as “akin to a benefit [for a non-party, Colombia] under UNCLOS,” that was not legally justifiable.⁶⁰ Other judges were concerned that the Court’s approach might unjustifiably

56. See Application of Nicaragua, *Nicar. v. Colom. II*, *supra* note 32.

57. *Nicar. v. Colom. II*, *supra* note 51, at 214, ¶ 18 (declaration by Robinson, J.), <https://www.icj-cij.org/public/files/case-related/154/154-20160317-JUD-01-07-EN.pdf>.

58. *Nicar. v. Colom. I*, *supra* note 21, at 669, ¶¶ 126–27.

59. *Nicar. v. Colom. II*, *supra* note 51, at 136, ¶ 105 (“The Court held, in its 2012 Judgment, that Nicaragua had to submit such information as a prerequisite for the delimitation of the continental shelf beyond 200 nautical miles by the Court”).

60. *Id.* at 214, ¶ 18 (declaration by Robinson, J.), <https://www.icj-cij.org/public/files/case-related/154/154-20160317-JUD-01-07-EN.pdf>.

benefit parties vis-à-vis non-parties.⁶¹ Implications are hard to gauge because the Court's handling of paragraph 8 is misaligned with the Convention itself and the practice of States, such that it raises numerous questions and doubts, even for cases solely involving Convention parties. Several observations are warranted.

First, and most fundamentally, the Court confuses process with substance. The mere act by Nicaragua of filing its submission in 2013 could not have, as the majority asserted, “established that it has a continental margin” of sufficient breadth to justify boundary delimitation by the Court.⁶² Communicating a submission to the CLCS is a procedural act that itself proves nothing substantive.

Second, the task thrust upon the Court is *delimitation* of the continental shelf between a Convention party and non-party. An actual prerequisite for

61. Judge ad hoc Cot emphasized a regional perspective, namely:

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.

Nicar. v. Colom. I, *supra* note 21, at 771, ¶ 20 (declaration by Cot, J.), <https://www.icj-cij.org/public/files/case-related/124/124-20121119-JUD-01-07-EN.pdf>. Judge ad hoc Mensah criticized the Court's emphasis on the CLCS process in a case involving a non-party:

placing emphasis on the procedure set out in Article 76 of UNCLOS (including the role of the [Commission] appears to leave little or no room for a State which is not a party to UNCLOS to assert its right to a continental shelf beyond 200 nautical miles vis-à-vis third States, whether or not such third States are parties to UNCLOS, since it is at least arguable that this procedure is not available (certainly not as of right) to non-parties to UNCLOS. . . . In my view, there is no legal justification for such a proposition [that non-parties are not entitled to continental shelf beyond 200 nautical miles].

Id. at 764, ¶¶ 6–7 (declaration of Mensah, J.), <https://www.icj-cij.org/public/files/case-related/124/124-20121119-JUD-01-06-EN.pdf>.

62. Nicar. v. Colom. II, *supra* note 51, at 132, ¶¶ 86–87. This point is most clearly evidenced by the submission of the United Kingdom with respect to Ascension Island. For that submission, the CLCS recommended, on the basis of the scientific and technical evidence presented, that the United Kingdom *not* establish outer limits beyond 200 nautical miles in the area around Ascension Island. See CLCS, *Summary of Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by the United Kingdom of Great Britain and Northern Ireland in Respect of Ascension Island on 9 May 2008*, at 14–15 (Apr. 15, 2010), https://www.un.org/Depts/los/clcs_new/submissions_files/gbr08/gbr_asc_is_l_rec_summ.pdf.

this or any other maritime boundary delimitation—whether by negotiation or judicial determination—is overlapping *entitlements*. The Court confusingly places the CLCS process, which pertains to *outer limits* and not entitlement *per se*, at the center of its reasoning. As ITLOS stated in a case between Convention parties, the Convention’s requirements related to the CLCS do “not imply that entitlement to the continental shelf depends on any procedural requirements.”⁶³ Along similar lines, ITLOS observed that “[a] coastal State’s entitlement to the continental shelf . . . does not require the establishment of outer limits.”⁶⁴ ITLOS’s views accord with the practice of States, which includes numerous examples of delimitation of the continental shelf beyond 200 nautical miles without submissions to or recommendations by the CLCS.⁶⁵ ITLOS’s views also align with the ICJ’s seminal jurisprudence on the continental shelf from *North Sea*, that entitlement to continental shelf rights is inherent and not dependent upon any procedure.⁶⁶ For the ICJ to move in another direction in the *Colombia v. Nicaragua* cases sews confusion about the role of the CLCS.⁶⁷

That said, boundary delimitation is highly fact dependent. It is no doubt possible that, in certain cases, a court or tribunal will be unable to undertake a continental shelf delimitation—which requires achieving an “equitable solution”—without knowing the outer limits of the area to be divided. The

63. *Bangl. v. Myan.*, *supra* note 19, ¶ 408 (citing UNCLOS, *supra* note 1, art. 77).

64. *Id.* ¶ 409 (emphases added).

65. See Bjarni M. Magnússon, *Is There a Temporal Relationship Between the Delineation and the Delimitation of the Continental Shelf Beyond 200 Nautical Miles?*, 28 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 465, 471–72 (2013) (noting that there are at least fourteen boundary treaties involving nineteen different coastal States “in which the outer continental shelf [i.e., beyond 200 nautical miles] is delimited before making a submission to the CLCS or receiving any recommendations from the Commission”). See also Baumert, *supra* note 29, at 863 (identifying additional practice).

66. See *supra* note 8 and accompanying text.

67. The origins of the Court’s struggle with the role of the CLCS may be traced to its 2007 judgment in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Honduras)*, Judgment, 2007 I.C.J. 659 (Oct. 8), in which it “noted” the following observation about the boundary that it established between the parties to the case: “in no case may the [boundary] line be interpreted as extending more than 200 nautical miles from the baselines . . . ; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.” *Id.* at 759, ¶ 319. The CLCS is not a “claims” process, and the view that continental shelf rights beyond 200 nautical miles must be “reviewed by the Commission on the Limits of the Continental Shelf” is consistent neither with the Convention nor the practice of States. It is likewise inconsistent with the Court’s own jurisprudence in the *North Sea Continental Shelf Cases*, *supra* note 8.

majority in *Nicaragua v. Colombia II* appears to appreciate this, remarking “that the two operations [boundary delimitation and outer limits] may impact upon one another.”⁶⁸ Thus, a judicial body could consider that it needs scientific and technical assistance, perhaps in the form of CLCS recommendations, in order to undertake a delimitation. But such a need did not motivate the majority’s reasoning in *Nicaragua v. Colombia II*. The prerequisite described by the Court is the mere *filing* of a submission, with no apparent regard to the evidentiary value of its content. Further, receiving a recommendation from the CLCS is “not a prerequisite” because, according to the majority, “the delimitation of the continental shelf beyond 200 nautical miles can be undertaken independently of a recommendation from the CLCS.”⁶⁹ While true, the reasoning fails to illuminate, since the same is true for filing a submission to the CLCS, which the Court did regard as a prerequisite.⁷⁰

The prerequisite established by the majority is, as Judge Donoghue wrote in dissent, a “judicial policy entirely of the Court’s own making.”⁷¹ Considering that the proceedings are still ongoing, a course-correction may be hoped for in the Court’s continued consideration of the case. To be sure, the problems described above would have been avoided by regarding the filing of a submission under paragraph 8 as a treaty obligation that is not directly pertinent in a boundary case decided on the basis of customary international law.

B. *Non-Party Participation in the CLCS Process*

The second issue reflected upon here was raised in separate opinions and declarations of the Court’s judges in the proceedings between Nicaragua and Colombia: is the CLCS process exclusive to the parties to the Convention

68. *Nicar. v. Colom. II*, *supra* note 51, ¶ 113.

69. *Id.* ¶ 114.

70. *See* *Nicar. v. Colom. II*, *supra* note 51, at 156–57, ¶ 51 (joint dissenting opinion of Yusuf, Cançado Trindade, Xue, Gaja, Bhandari, Robinson, and Brower, J.), <https://www.icj-cij.org/public/files/case-related/154/judgment-17-march-2016-joint-dissenting-opinion.pdf> (“If delimitation can be effected without recommendations from the CLCS, it can certainly be effected also without submission of information to the CLCS”).

71. *See* *Nicar. v. Colom. II*, *supra* note 51, at 201, ¶ 51 (Donoghue, J., dissenting), <https://www.icj-cij.org/public/files/case-related/154/154-20160317-JUD-01-04-EN.pdf>; *Id.* at 213–14, ¶¶ 18–18 (declaration by Robinson, J.), <https://www.icj-cij.org/public/files/case-related/154/judgment-17-march-2016-robinson.pdf> (referring to the majority’s “invention of a procedural condition”).

or, alternatively, may a non-party participate? As an initial matter, this question does not arise directly in the proceedings between Nicaragua and Colombia. Colombia, as a non-party, is not seeking access to the CLCS. Nevertheless, because of the Court's treatment of paragraph 8, discussed above, several judges took positions on the question. Judge ad hoc Cot stated that paragraph 8 "institutes a specific procedure which is not accessible to non-member States."⁷² Judge Robinson agreed with this view. Judge ad hoc Mensah was more measured, stating that "it is at least arguable that this procedure is not available (certainly not as of right) to non-parties to UNCLOS."⁷³

Judges Cot and Robinson appear to associate the non-accessibility of the CLCS for non-parties with the fact that paragraph 8 is not part of customary international law.⁷⁴ This appears misplaced, as one conclusion does not inevitably lead to the other. To be sure, the fact that paragraph 8 is not part of customary international law has legal consequences: a non-party has no legal obligation to submit information pertaining to its outer limits to the CLCS. A non-party also has no treaty "right," as Judge ad hoc Mensah indicated, to participate in the treaty's procedures.⁷⁵ These conclusions follow from the basic principle of treaty law, *pacta tertiis*, reflected in the Vienna Convention on the Law of Treaties, that rights and obligations created by a treaty pertain only to its parties.⁷⁶ To be equally sure, however, this same principle dictates that a treaty does not have a preclusive legal effect on a non-party. In other words, a treaty does not create a legal prohibition for a non-party.⁷⁷ Thus, it

72. *Nicar. v. Colom. I*, *supra* note 21, at 771, ¶ 19 (declaration of Cot, J.), <https://www.icj-cij.org/public/files/case-related/124/124-20121119-JUD-01-07-EN.pdf>.

73. *Nicar. v. Colom. I*, *supra* note 21, at 764, ¶ 6 (declaration of Mensah, J.), <https://www.icj-cij.org/public/files/case-related/124/124-20121119-JUD-01-06-EN.pdf>.

74. *Nicar. v. Colom. I*, *supra* note 21, at 771, ¶ 19 (declaration of Cot, J.), <https://www.icj-cij.org/public/files/case-related/124/124-20121119-JUD-01-07-EN.pdf> ("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."). *Nicar. v. Colom. II*, *supra* note 51, at 211–12, ¶ 11 (declaration by Robinson, J.), <https://www.icj-cij.org/public/files/case-related/154/judgment-17-march-2016-robinson.pdf> (concurring with Judge ad hoc Cot).

75. *Nicar. v. Colom. I*, *supra* note 21, at 764, ¶ 6 (declaration of Mensah, J.), <https://www.icj-cij.org/public/files/case-related/124/124-20121119-JUD-01-06-EN.pdf>.

76. VCLT, *supra* note 22, art. 34 ("A treaty does not create either obligations or rights for a third State [i.e., non-party] without its consent").

77. To conclude otherwise, that a submission by a non-party is legally prohibited, would seem to disturb a basic principle of treaty law, *pacta tertiis*. The treaty *qua* treaty (i.e., Convention) cannot create a legal prohibition for non-parties. VCLT, *supra* note 22.

is not a violation of the Convention, or any rule of international law, for a non-party to voluntarily submit information on its continental shelf limits to the CLCS.

The foregoing is significant because the second sentence of paragraph 8, as well as Annex II of the Convention, describe the mandate of the CLCS as pertaining to “coastal States” and not “States parties.” This may have been overlooked by Judge Robinson, who stated:

Many other treaties reflect a similar approach [as the Convention], whereby provisions contained in the treaty may mirror norms of customary international law, *but particular procedural mechanisms established in respect of those provisions are peculiar to the treaty and States parties to that treaty*; for example, generally, the rights set out in the International Covenant on Civil and Political Rights to which persons are entitled and the procedure by which persons may petition the Human Rights Committee alleging a breach of those rights.⁷⁸

The “procedural mechanism” of the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR), however, is textually confined to dealings with “States parties” to that treaty.⁷⁹ Thus, the Law of the Sea Convention and the ICCPR do not have a “similar approach” when it comes to the mandate of their respective treaty bodies. As a matter of *treaty law*, the Convention charges the CLCS with providing advice and recommendations to “coastal States,” whether party to the Convention or not. As the tribunal remarked in the *Chagos Marine Protected Area Arbitration*, “[t]his term is not defined in the Convention, although its usage in the text [of the Convention] makes evident that it was intended to denote a State having a sea coast, as distinct from a land-locked State.”⁸⁰ This accords with the plain meaning of paragraph 8 and Annex II, namely that the mandate of the CLCS is to make recommendations and provide advice to any “State having a sea coast.”⁸¹

78. *Nicar. v. Colom. II*, *supra* note 51, at 211–12, ¶ 11 (declaration by Robinson, J.), <https://www.icj-cij.org/public/files/case-related/154/judgment-17-march-2016-robinson.pdf> (emphasis added).

79. International Covenant on Civil and Political Rights arts. 40–45, Dec. 16, 1966, T.I.A.S. 92-908, 999 U.N.T.S. 171 (describing the roles of the Human Rights Committee).

80. For additional discussion, *see* Baumert, *supra* note 29, at 866–69.

81. UNCLOS, *supra* note 1, art. 76(8), annex II, art. 3(1) (setting forth the functions of the CLCS).

The matter of non-party participation in the CLCS process also merits consideration through a broader lens that encompasses more than strictly legal considerations. Numerous observers have considered the issue from the perspective of what is sensible and beneficial to the orderly and consistent application of the international law of the sea. Of particular note, providing a clear geographic definition to the Area beyond national jurisdiction would militate in favor of the CLCS considering all submissions made by coastal States. As Judge Treves has observed, “[e]verybody has an interest in a precise definition of states’ limits, including limits of States that are not parties to the LOS [Convention].”⁸² Judge Tuerk has stated that “if a non-party wishes to engage in such a course of action [i.e., “file a submission with the CLCS”], it would not make sense from the point of view of the interests of the international community to prevent that State from doing so.”⁸³ Other observers have taken similar views, including that a non-party submission “should be welcomed for its contribution to the delineation and stability of global boundaries”⁸⁴ and that making a submission helps a non-party “show its commitment to the principles and legal framework of [the Convention] and present its entitlement to the continental shelf in a format that is well established.”⁸⁵ The UN General Assembly has affirmed on multiple occasions that “it is in the broader interest of the international community that *coastal States* with a continental shelf beyond 200 nautical miles submit information on the outer limits of the continental shelf” to the CLCS.⁸⁶

VI. CONCLUSIONS

Article 76 of the Convention is an enduring contribution to the international law of the sea. It has, essentially, solved a problem that needed solving: establishing clear rules for determining the outer limits of the continental shelf,

82. Tullio Treves, *Remarks on Submissions to the Commission on the Limits of the Continental Shelf in Response to Judge Marotta’s Report*, 21 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 363, 364 (2006).

83. Helmut Tuerk, *Questions Relating to the Continental Shelf Beyond 200 Nautical Miles: Delimitation, Delineation, and Revenue Sharing*, 97 INTERNATIONAL LAW STUDIES 232, 249 (2021).

84. Alexei A. Zinchenko, *Emerging Issues in the Work of the Commission on the Limits of the Continental Shelf*, in LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS 235 (Myron H. Nordquist et al. eds., 2004).

85. Bjarni M. Magnússon, *Can the United States Establish the Outer Limits of its Extended Continental Shelf Under International Law?*, 48 OCEAN DEVELOPMENT & INTERNATIONAL LAW 1, 7 (2017).

86. *See, e.g.*, G.A. Res. 70/235, at 5 (Dec. 23, 2015) (emphasis added).

which also form the inner limits of the Area beyond national jurisdiction. However, the “problem” is not fully solved unless the rules set forth in Article 76 are regarded universally as authoritative.

The ICJ has already found that paragraph 1 of Article 76 is part of customary international law, and this article argues that there would be no compelling basis for deciding differently for paragraphs 2 to 7. Fortunately, the practices and attitudes of States—both parties and non-parties—have long been shaping customary international law such that it aligns with the rules set forth in the Convention relating to maritime zones, including with respect to the rules for determining the outer limits of the continental shelf.

At the same time, the rules in Article 76 are complex, and their application requires scientific data pertaining the depth, shape, and other geophysical characteristics of the seabed and subsoil. Recognizing this, the Convention’s drafters established an expert body, the CLCS, to assist coastal States in delineating their continental shelf limits. However, paragraph 8 of Article 76 pertaining to the CLCS is unlikely to become part of customary international law. This creates a legal situation under which the rules for determining the spatial extent of the continental shelf (i.e., its outer limits) are the same for parties and non-parties to the Convention, but only States parties are subject to the requirement to submit information on the outer limits of its continental shelf to the CLCS.

The ICJ has struggled with how to apply, or not, treaty provisions relating to the CLCS in cases between Nicaragua and Colombia, which are decided on the basis of customary international law. In the view of this author, the Court has sown confusion regarding the role played by the CLCS in continental shelf delimitation, as well as the relationship between continental shelf entitlement and outer limits. Ironically, the missteps of the Court motivated several judges to express views that lead to a different concern, namely limiting the mandate of the CLCS to “States parties,” notwithstanding the absence of this limitation in the Convention itself.

Some perspective is warranted. Determining the limits and boundaries of the continental shelf beyond 200 nautical miles is a long game, and it is not yet even halftime. A majority of the submissions made to the CLCS have not yet been considered. For those that have been reviewed and recommended upon, most coastal States have not completed the process of establishing their final outer limits. Non-parties have not yet presented their continental shelf limits determined under Article 76. Many, if not most, continental shelf boundaries in areas beyond 200 nautical miles also remain un-

delimited. One can expect both the CLCS and international courts and tribunals to be busy addressing delineation and delimitation challenges faced by coastal States for many decades. Current proceedings discussed in this article are ongoing, and future ones will likely come before the Court, presenting opportunities for course correction that can enable the Court to better contribute to the peaceful resolution of continental shelf disputes, for both Convention parties and non-parties.