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Edited by Sir Elihu Lauterpacht, CBE QC, Sir Christopher Greenwood, CMG QC and Karen Lee

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# TERRITORIAL AND MARITIME DISPUTE

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**International Court of Justice — International maritime boundary delimitation between Nicaragua and Honduras — Dispute regarding boundary line dividing territorial sea, exclusive economic zone and continental shelf in the Caribbean Sea — Effect of islands — Sovereignty over islands**

**International Court of Justice — Admissibility — New claim introduced during proceedings — Whether new claim inherent in original claim**

**Treaties — Interpretation — Multilateral treaty — United Nations Convention on the Law of the Sea, 1982 (“UNCLOS”) — UNCLOS Articles 15, 74 and 83**

**Sea — Delimitation of maritime boundaries — Geographical context — Semi-enclosed sea — Territorial sea — Exclusive economic zone — Continental shelf — Governing law — UNCLOS — UNCLOS Articles 15, 74 and 83 — Establishment of single maritime boundary delimiting several coincident zones — Methods of delimitation — Whether equidistance/relevant circumstances approach suitable in light of circumstances — Relevant coasts — Identification of baselines — Bisector method of delimitation — Relevant geographical circumstances — Principle of *uti possidetis juris* — Whether applicable to delimitation of maritime space**

**Territory — Islands — Sovereignty over minor maritime features — Whether sovereignty established by post-colonial *effectivités* — Application of criteria formulated by Permanent Court of International Justice in *Legal Status of Eastern Greenland* case — Whether activities relied upon established overall pattern of conduct sufficient to demonstrate intention to act as sovereign**

## TERRITORIAL AND MARITIME DISPUTE BETWEEN NICARAGUA AND HONDURAS IN THE CARIBBEAN SEA

(NICARAGUA *v.* HONDURAS)<sup>1</sup>

<sup>1</sup> Nicaragua was represented by HE Mr Carlos José Argüello Gómez as Agent, Counsel and Advocate; and by HE Mr Samuel Santos, Mr Ian Brownlie CBE, QC, FBA, Mr Alex Oude Elferink, Mr Alain Pellet and Mr Antonio Remiro Brotons as Counsel and Advocates. Honduras was represented by HE Mr Max Velásquez Díaz and HE Mr Roberto Flores Bermúdez as Agents; HE Mr Julio Rendón Barnica as Co-Agent; Mr Pierre-Marie Dupuy, Mr Luis Ignacio Sánchez Rodríguez, Mr Christopher

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*International Court of Justice.* 8 October 2007

(Higgins, *President*; Al-Khasawneh, *Vice-President*; Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna and Skotnikov, *Judges*; Torres Bernárdez and Gaja, *Judges ad hoc*)

SUMMARY:<sup>2</sup> *The facts*.—On 8 September 1999, Nicaragua instituted proceedings against Honduras before the International Court of Justice, invoking Article XXXI of the American Treaty on Pacific Settlement and declarations made pursuant to Article 36, paragraph 2 of the Court's Statute.<sup>3</sup> In the Application, Nicaragua requested that the Court draw a single maritime boundary delimiting the territorial sea, continental shelf and exclusive economic zones appertaining respectively to the two coastal States in the Caribbean Sea by applying the bisector method of delimitation in light of special circumstances and in order to achieve an equitable result.<sup>4</sup>

Prior to the end of the Spanish Empire in Central America in 1821, Nicaragua and Honduras had both formed part of the Captaincy-General of Guatemala, which in turn was part of the Vice-Royalty of New Spain (Mexico). Following the dissolution of a short-lived federation, the two States became fully independent. In 1894, they concluded a general boundary treaty (known as the Gámez–Bonilla Treaty), under which sovereignty over territory that had, at the time of independence, constituted the provinces of Nicaragua and Honduras was declared to subsist in the newly established sovereign States in accordance with the principle of *uti possidetis juris*. When a Mixed Commission established under the Gámez–Bonilla Treaty was unable to determine a land boundary between the two States to its full extent, the matter was referred to arbitration before King Alfonso XIII of Spain, who delivered his Arbitral Award in 1906 (“1906 Award”) demarcating a boundary commencing from the mouth of the principal arm of the River Coco at Cape Gracias a Dios

Greenwood CMG, QC, Mr Philippe Sands QC, Mr Jean-Pierre Quéneudec, Mr David A. Colson, Mr Carlos Jiménez Piernas and Mr Richard Meese, as Counsel and Advocates.

<sup>2</sup> Prepared by Mr Joshua Brien.

<sup>3</sup> Article XXXI of the American Treaty on Pacific Settlement (the “Pact of Bogotá”) provided that:

In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

- (a) The interpretation of a treaty;
- (b) Any question of international law;
- (c) The existence of any fact which, if established, would constitute the breach of an international obligation;
- (d) The nature or extent of the reparation to be made for the breach of an international obligation.

<sup>4</sup> Nicaragua requested the Court to declare that the bisector of the lines representing the coastal fronts of the two Parties drawn from a fixed point approximately 3 miles from the mouth of the River Coco in the position 15° 02' 00" N and 83° 05' 26" W constituted the single maritime boundary for the purposes of the delimitation of the territorial sea, exclusive economic zone and continental shelf (see para. 19 of the Judgment).

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on the Caribbean Coast.<sup>5</sup> The validity and binding character of the 1906 Award was later challenged by Nicaragua, and following several failed attempts to settle the dispute, Honduras instituted proceedings in 1960 before the International Court of Justice. The Court ruled that the 1906 Award had been valid and binding and that Nicaragua was under an obligation to give effect to it.<sup>6</sup> Differences persisted regarding the implementation of the 1906 Award, which led in turn to the Inter-American Peace Commission establishing a Mixed Commission in 1962 to determine the contested land boundary. The Mixed Commission determined that the land boundary at the mouth of the River Coco was situated at 14° 59' 8" N latitude ("the 15th parallel") and 83° 08' 9" W longitude.<sup>7</sup>

Differences continued, however, regarding the maritime boundary. Honduras maintained that a maritime boundary had been established which followed the 15th parallel from Cape Gracias a Dios. Nicaragua, however, periodically contested this claim and asserted sovereignty and sovereign rights over the continental shelf and exclusive economic zone in areas north of the 15th parallel. There were periodic maritime incidents, including the capture by Nicaraguan authorities of Honduran fishing vessels operating north of the 15th parallel in 1979, 1982 and 1995, leading to bilateral diplomatic exchanges and protests. Negotiations regarding the maritime boundary were broken off by Nicaragua after Honduras ratified a treaty on maritime boundary delimitation that it had concluded with Colombia in 1986, to which Nicaragua objected on the basis that the Treaty recognized the maritime area north of the 15th parallel as forming part of the maritime space of Honduras.

Before the International Court of Justice,<sup>8</sup> Nicaragua claimed that the single maritime boundary should be constructed using the bisector of an angle at the mouth of the River Coco. Honduras agreed that the Court should establish a single maritime boundary but maintained its claim that there existed a traditionally recognized maritime boundary running along the 15th parallel, as a result of the application of the principle *uti possidetis juris* and the practice of the two States since independence. To this end, Honduras placed particular emphasis on fishing licences, naval patrols and oil concessions to demonstrate the existence of the traditional boundary. Nicaragua contended that no such traditional maritime boundary existed and further that *uti possidetis juris* could be applied to the delimitation of a maritime boundary in the disputed area.

Both Parties also advanced arguments regarding the maritime boundary based upon the assertion that they enjoyed sovereignty over certain maritime features in the disputed area, including four main cays known as Bobel Cay, Savanna Cay, Port Royal Cay and South Cay respectively, all of which were located north of the 15th parallel line relied upon by Honduras and

<sup>5</sup> The operative part of the 1906 Award is reproduced at para. 38 of the Judgment.

<sup>6</sup> 30 ILR 457. <sup>7</sup> 30 ILR 76.

<sup>8</sup> The maritime boundary lines claimed by Nicaragua and Honduras respectively are described at paras. 72-3 and are shown at Sketch-map No 2 at p. 34 below.

south of the bisector line of delimitation advanced by Nicaragua. The Application did not, however, ask the Court to rule upon sovereignty over the islands. Nevertheless, at the commencement of the oral proceedings Nicaragua informed the Court that it wished the Court to make a finding that the islands were Nicaraguan territory. Honduras agreed that the Court should rule upon the issue of sovereignty over the islands but claimed that they belonged to Honduras.

The Parties were in agreement that the provisions of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”) were applicable as the governing law, notwithstanding that Nicaragua had not been a Party to UNCLOS at the time of the filing of its Application.<sup>9</sup>

<sup>9</sup> Nicaragua ratified UNCLOS on 5 May 2000. Honduras ratified UNCLOS on 5 October 1993. Article 15 of UNCLOS provided that:

*Delimitation of the territorial sea between  
States with opposite or adjacent coasts*

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

Article 74 of UNCLOS provided that:

*Delimitation of the exclusive economic zone  
between States with opposite or adjacent coasts*

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

Whereas Article 83 of UNCLOS provided that:

*Delimitation of the continental shelf  
between States with opposite or adjacent coasts*

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.

*Held:*—(1) (unanimously) The Nicaraguan claim relating to sovereignty over the disputed islands was admissible. Although the claim was new as a matter of substance, it was inherent in the original claim relating to the maritime delimitation. Moreover, Honduras had not contested the jurisdiction of the Court to entertain the new claim or its admissibility (paras. 104-16).

(2) (unanimously) Honduras had sovereignty over the disputed islands of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay.

(a) Although the principle of *uti possidetis juris* was capable of applying to offshore possessions and maritime spaces, it was not applicable in the present case, because it had not been shown that the Spanish Crown had allocated the islands to one or other of its colonial provinces at the time of independence. An overall pattern of conduct sufficient to demonstrate its intention to act as sovereign in respect of the disputed islands had been demonstrated by Honduras (paras. 117-67).

(b) The activities (*effectivités*) invoked by Honduras demonstrated a real display of authority and an intention and will to act as sovereign over the disputed islands. In particular, the regulation of immigration matters since the late 1990s, including the granting of work permits and visas, was legally significant since it entailed the exercise of jurisdictional authority and regulatory power by Honduras. The application and enforcement of criminal and civil laws by Honduras, such as the prosecution of criminal complaints and the conduct of drug enforcement operations, were also significant since they were acts of a sovereign character. The licensing of activities relating to fishing on the disputed islands, such as government permission for the construction of houses on Savannah Cay and for the storage of fishing equipment, and the conduct of public works on the islands also provided evidence of the exercise of sovereignty by Honduras (paras. 168-98).

(c) By contrast, the evidence submitted concerning the exercise of legislative control and the conduct of naval patrols by Honduras was not convincing. Nor was the claim of either State supported by the evidence of offshore oil exploration, the cartographic evidence or the conduct of third parties (paras. 199-227).

(3) (Judge ad hoc Torres Bernárdez dissenting) No maritime boundary had been established between Nicaragua and Honduras along the 15th parallel.

(a) Although it was possible that, in certain circumstances, *uti possidetis juris* could play a role in a maritime boundary delimitation, for example in cases involving historic bays and territorial seas, there was no compelling evidence to support the contention by Honduras that such a maritime boundary should have extended from Cape Gracias a Dios along the 15th parallel (paras. 229-35).

(b) There was no tacit agreement in effect between the Parties establishing a legally binding maritime boundary on the 15th parallel. Evidence for the existence of a tacit agreement to that effect would have had to be compelling. The evidence tendered by Honduras did not satisfy that standard. Witness statements had to be approached with a degree of caution, especially

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when they were prepared for the purpose of litigation. While the witness statements of fishermen submitted by Honduras had been so prepared, the Court did not question their credibility. They did not, however, establish the existence of an agreement between the two States; nor did the evidence of practice regarding oil concessions, since Nicaragua had reserved its position regarding the area north of the 15th parallel. The practice of third States and the diplomatic exchanges between the Parties were similarly inconclusive (paras. 236-58).

(4) The law governing the delimitation of maritime boundaries contained in UNCLOS Articles 15, 74 and 83 applied, as agreed by the Parties. Although the equitable principles/relevant circumstances approach had often been applied by the Court to achieve an equitable solution in cases involving the establishment of a single maritime boundary, it did not automatically have priority over other methods of delimitation. In constructing the single maritime boundary delimiting maritime areas off the mainland coasts, the exception provided for under Article 15 operated since special circumstances existed that prevented the Court from applying the equidistance method. Given the configuration and unstable nature of the coast, it was not possible to identify basepoints and construct a provisional equidistance line from the mainland coasts. Nothing in the wording of Article 15 prevented geomorphological problems from being considered special circumstances within the meaning of the exception to the drawing of a median line. Moreover, the exception contained in Article 15 did not operate only as a corrective element to a line already drawn (paras. 261-80).

(5) (by fourteen votes to three, Judges Ranjeva, Parra-Aranguren and Judge ad hoc Torres Bernárdez dissenting) (a) The bisector method would be applied to the delimitation from the mainland but not in the way proposed by Nicaragua.<sup>10</sup> In applying the bisector method, the various circumstances advanced by Nicaragua were not legally determinative for the purposes of the delimitation. Consideration had to be given to the geographical configuration of the coasts and the geomorphological features of the area. The bisector would use the point fixed in 1962 by the Mixed Commission at Cape Gracias a Dios as the point where the Parties' coastal fronts meet. In selecting the coastal fronts for the purpose of drawing the bisector, it was necessary to avoid cutting off Honduran territory and provide a coastal facade of sufficient length to account properly for the coastal configuration in the disputed area. These goals would be achieved by the use of a Honduran front running to Punta Patuca and a Nicaraguan front running to Wouhnta. The resulting bisector had an azimuth of 70° 14' 41.25" (paras. 283-98).

(b) A provisional equidistance line was used to delimit the waters around and between the islands north and south of the 15th parallel where it did not present the problems that applied to the delimitation from the mainland. No special circumstances existed to require adjustment of the provisional line in this sector (paras. 299-304 and Sketch-maps Nos 4 and 5 on pp. 103-4).

<sup>10</sup> See paras. 283-4 and 298 and Sketch-map No 3 at p. 100 below.

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(6) (by fifteen votes to two, Judge Parra-Aranguren and Judge ad hoc Torres Bernárdez dissenting) In order to take account of the ongoing changes to Cape Gracias a Dios and the dispute over title to islands which had recently formed in the mouth of the River Coco, the starting-point of the maritime boundary was commenced at a point 3 nautical miles out to sea from the point identified by the Mixed Commission in 1962 along the azimuth of the bisector determined by the Court (paras. 306-11 and Sketch-map No 6 on p. 107).

(7) The line thus constructed followed the course described in paragraph 321 of the Judgment and illustrated on Sketch-maps Nos 7 and 8 on pp. 110-11.

(8) The boundary extended beyond the 82nd meridian but with no precise endpoint of the boundary specified, so as not to affect the rights of third States (paras. 312 and 319).

(9) (by sixteen votes to one, Judge Parra-Aranguren dissenting) The Parties were to negotiate in good faith on the course of the delimitation line between the endpoint of the land boundary established by the 1906 Award and the starting-point of the single maritime boundary determined by the Court (para. 321).

*Separate Opinion of Judge Ranjeva:* The Court had departed from its established jurisprudence by attributing a rule-making function to “particular circumstances” as distinct from “special or relevant circumstances” to justify the use of the bisector method instead of a provisional equidistance line. There was no basis in UNCLOS or any other body of law for such a departure (pp. 113-22).

*Separate Opinion of Judge Koroma:* The use of the bisector method to determine a single maritime boundary was not unprecedented and had been correctly applied having regard to the pertinent circumstances of the disputed area, as well as the coastal configuration abutting that area. However, it had been incorrect to attribute the maritime areas south of the 15th parallel to Honduras, since Honduras had consistently stated that its territorial sea did not extend south of that parallel. Upholding this position would have been consistent with applicable law and would have eliminated a potential source of future conflict (pp. 122-8).

*Declaration of Judge Parra-Aranguren:* The 1906 Award had determined the sovereignty over the disputed mainland areas but also the continental and insular territorial waters. The award was valid and constituted *res judicata* (pp. 128-9).

*Dissenting Opinion of Judge ad hoc Torres Bernárdez:* (1) The finding that Honduras had sovereignty over the disputed islands was founded upon (a) possession of a legal title to the islands pursuant to the *uti possidetis juris* position in 1821, which applied as between the Parties; (b) the post-colonial *effectivités* exercised by Honduras *à titre de souverain* over the islands and in the territorial

sea around them and the absence of *effectivités* of Nicaragua; and (c) Nicaragua’s acquiescence in Honduras’s sovereignty over the islands (paras. 1-58).

(2) The evidence submitted by Honduras showed that there was a tacit agreement regarding a boundary at the 15th parallel. In addition the Court should not have dismissed out of hand Honduras’s submissions based upon *uti possidetis juris* in respect of the first 6 miles of territorial sea (paras. 59-108).

(3) With the exception of the second section of the line around the islands, the single maritime delimitation contained in the Judgment did not comply with the relevant requirements of UNCLOS. The use of the bisector method was inappropriate given the geography of the area and the result achieved was inequitable (paras. 109-62).

*Declaration of Judge ad hoc Gaja:* The Court could have avoided giving a disproportionate effect to an insignificant maritime feature by accepting the submission consistently stated by Honduras that its territorial sea did not extend to the maritime areas south of the 15th parallel (pp. 177-8).

The text of the Judgment and the Separate and Dissenting Opinions and Declarations is set out as follows:

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[663] 1. On 8 December 1999 the Republic of Nicaragua (hereinafter "Nicaragua") filed in the Registry of the Court an Application dated the same day, instituting proceedings against the Republic of Honduras (hereinafter "Honduras") in respect of a dispute relating to the delimitation of the maritime areas appertaining to each of those States in the Caribbean Sea.

[664] In its Application, Nicaragua seeks to found the jurisdiction of the Court on the provisions of Article XXXI of the American Treaty on Pacific Settlement, officially designated, according to Article LX thereof, as the “Pact of Bogotá” (hereinafter referred to as such), as well as on the declarations accepting the jurisdiction of the Court made by the Parties, as provided for in Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Registrar immediately communicated a certified copy of the Application to the Government of Honduras; and pursuant to paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States (hereinafter “OAS”) the notification provided for in Article 34, paragraph 3, of the Statute. The Registrar subsequently transmitted to this organization copies of the pleadings filed in the case and asked its Secretary-General to inform him whether or not it intended to present observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court. The OAS indicated that it did not intend to submit any such observations.

4. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the United Nations Convention on the Law of the Sea of 10 December 1982 (hereinafter “UNCLOS”) the notifications provided for in Article 63, paragraph 1, of the Statute. In addition, the Registrar addressed to the European Union, which is also party to that Convention, the notification provided for in Article 43, paragraph 2, of the Rules of Court, as adopted on 29 September 2005, and asked that organization whether or not it intended to furnish observations under that provision. In response, the Registrar was informed that the European Union did not intend to submit observations in the case.

5. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise its right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Nicaragua chose Mr Giorgio Gaja and Honduras first chose Mr Julio González Campos, who resigned on 17 August 2006, and subsequently Mr Santiago Torres Bernárdez.