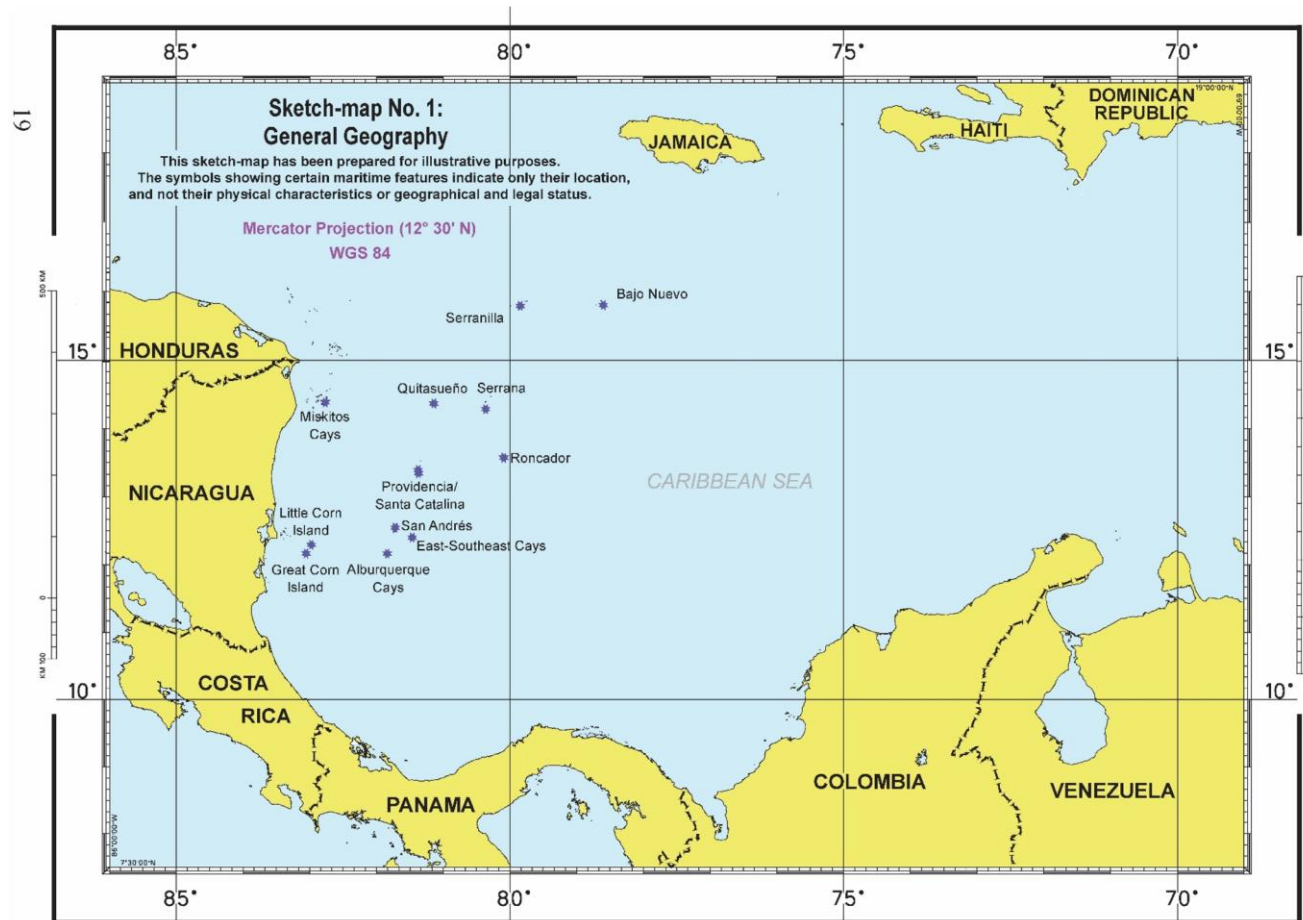


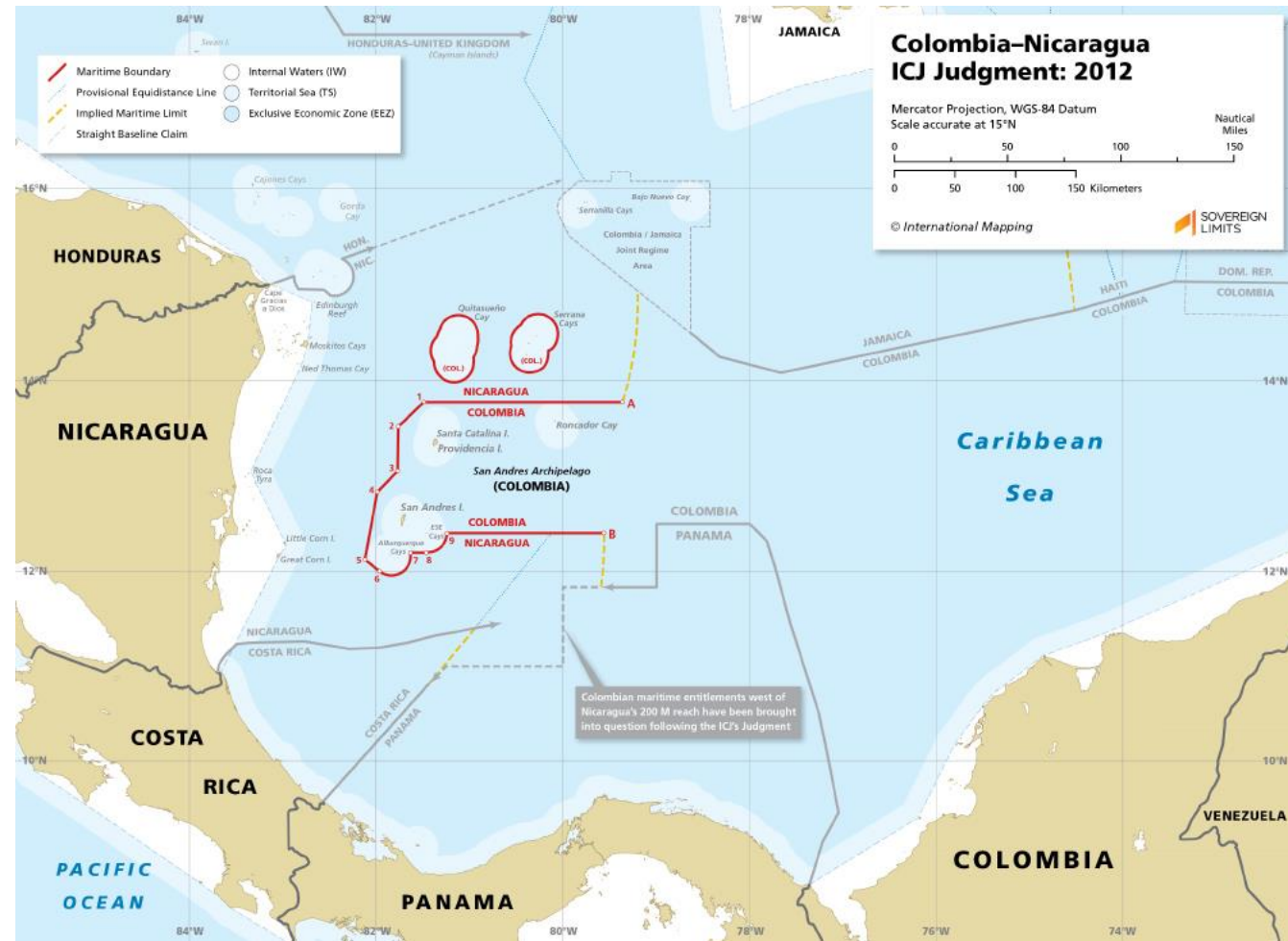
# Nicaragua v Colombia

[2023] ICJ Reps (13 July 2023, Judgment)



# Background

- Caribbean Sea
- Maritime Boundary Delimitation
- EEZ/Continental Shelf
- Status of Caribbean Islands
  - Sovereignty?
  - Islands or rocks?
  - Maritime entitlements?
- Partial maritime boundary
- 2012 ICJ judgment



# Timeline

- 16 September 2013 – Nicaragua commences case
- 9 October 2015 – Preliminary objections hearings
- 17 March 2016 – ICJ finds it has jurisdiction
- 4 October 2022 – ICJ identifies 2 questions for resolution
- December 2022 – Public hearings
- 10 July 2023 - Judgment

# Key Legal Issues

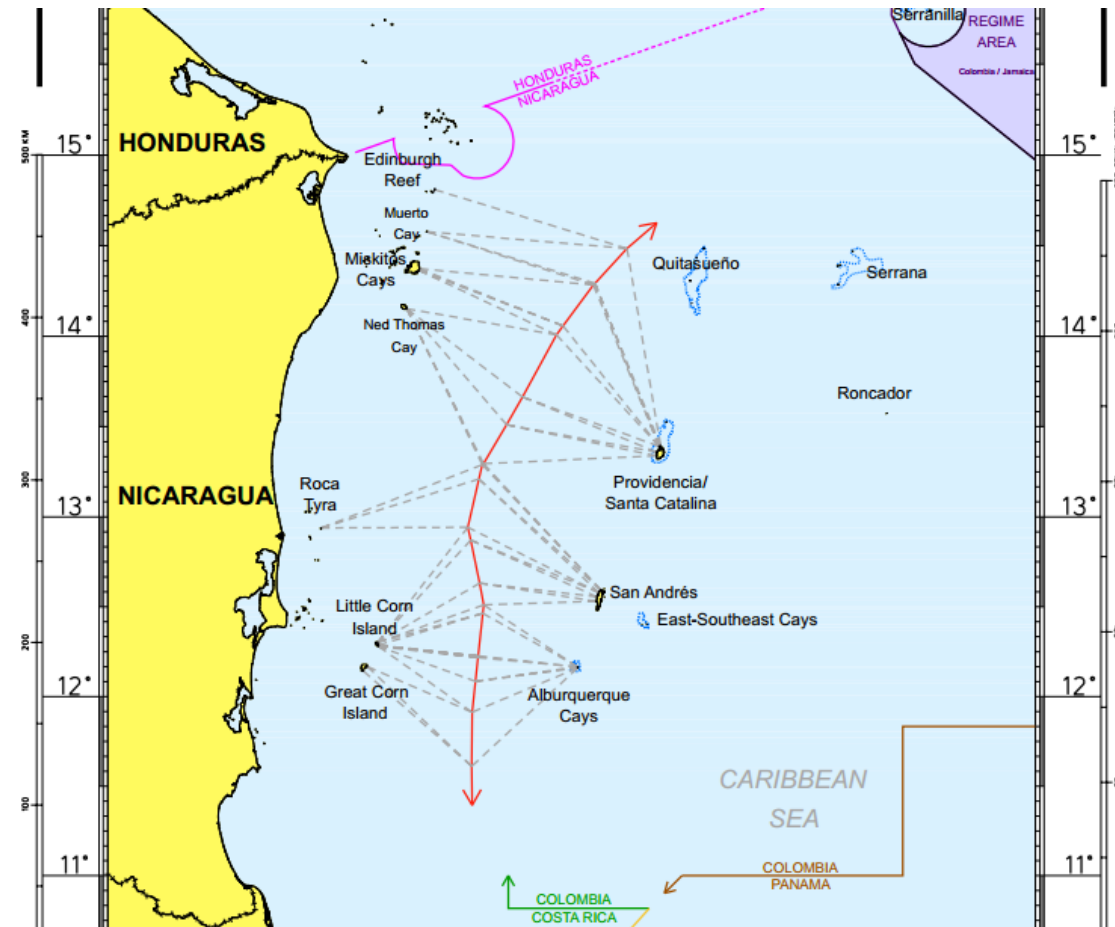
Nicaragua requested the ICJ to:

1. Determine the precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf beyond boundaries determined by the court in 2012
2. Outline the principles and rules of international law that determine the rights and duties of the two States in relation to the areas of overlapping continental shelf

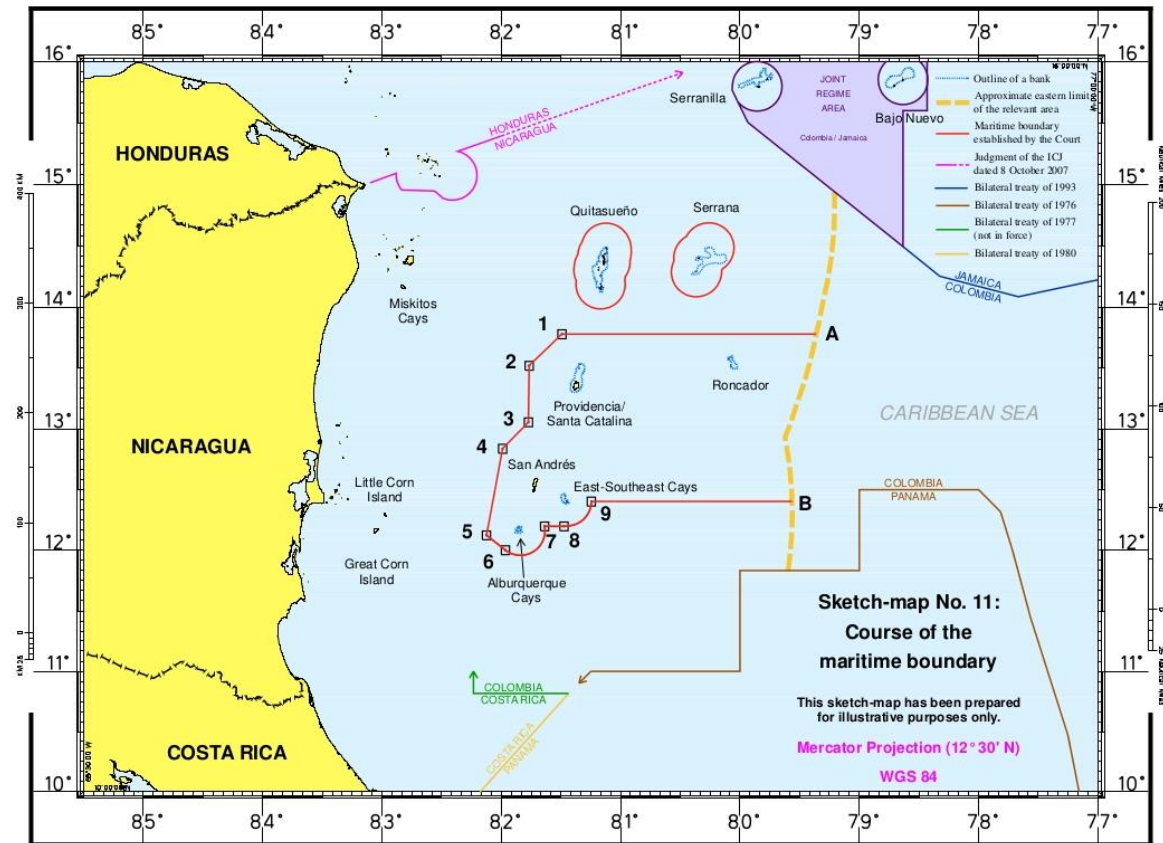
# What the ICJ asked the parties to address

1. Under customary international law, may a State's entitlement to a continental shelf beyond 200nm from the baselines from which the breadth of its territorial sea is measured extend within 200nm from the baselines of another State?
2. What are the criteria under customary international law for the determination of the limit of the continental shelf beyond 200nm from the baselines from which the breadth of the territorial sea is measured and, does Article 76 (2-6) LOSC reflect customary international law?

# Nicaragua v Colombia (2012)



# Nicaragua v Colombia (2012)



# Task for ICJ in 2023

1. Reflect the 2012 judgment regarding Caribbean Sea entitlements
2. Reflect that Colombia is not a LOSC party
3. Seek to determine the status of customary international law regarding the continental shelf
4. Determine
  - a. The extent of the juridical continental shelf in customary international law
  - b. The methodology for delimiting overlapping continental shelf entitlements beyond 200nm



# Customary International Law

## North Sea Continental Shelf (1969) Denmark, Netherlands, West Germany

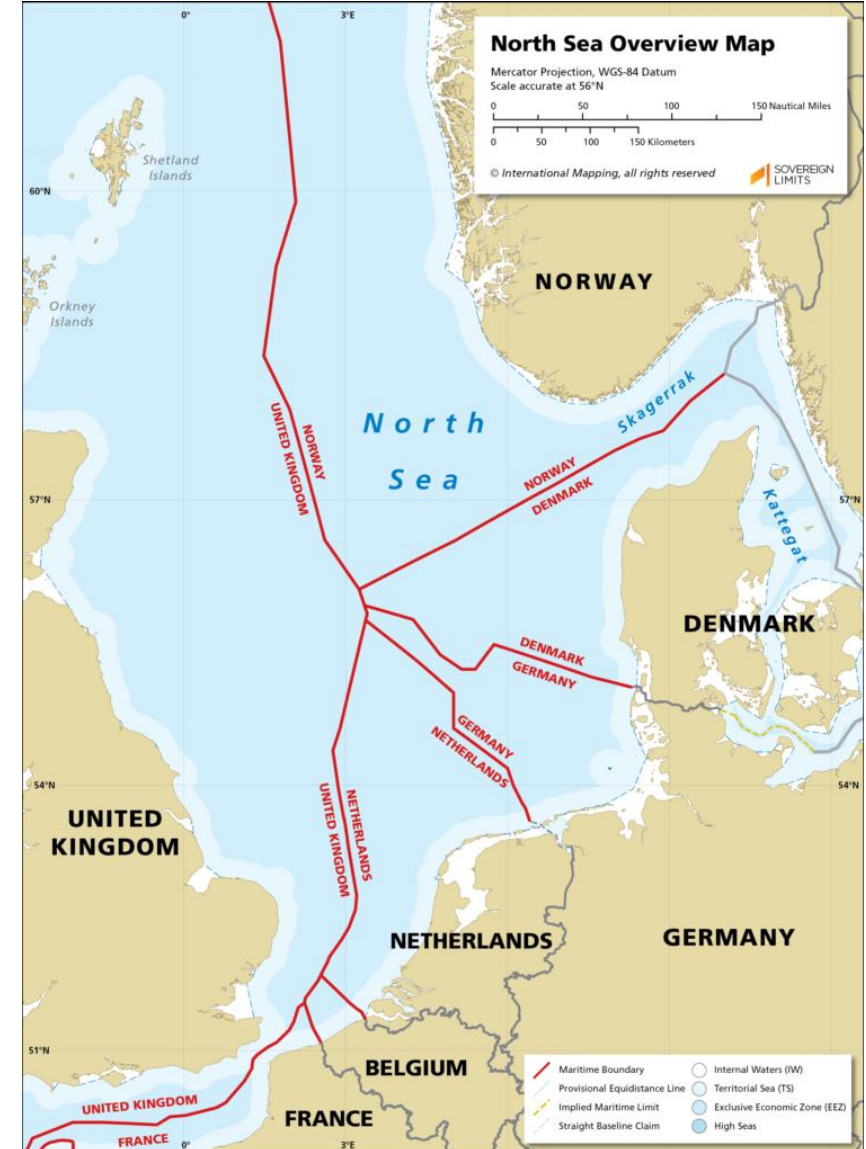
Elements to be established

### 1. State Practice

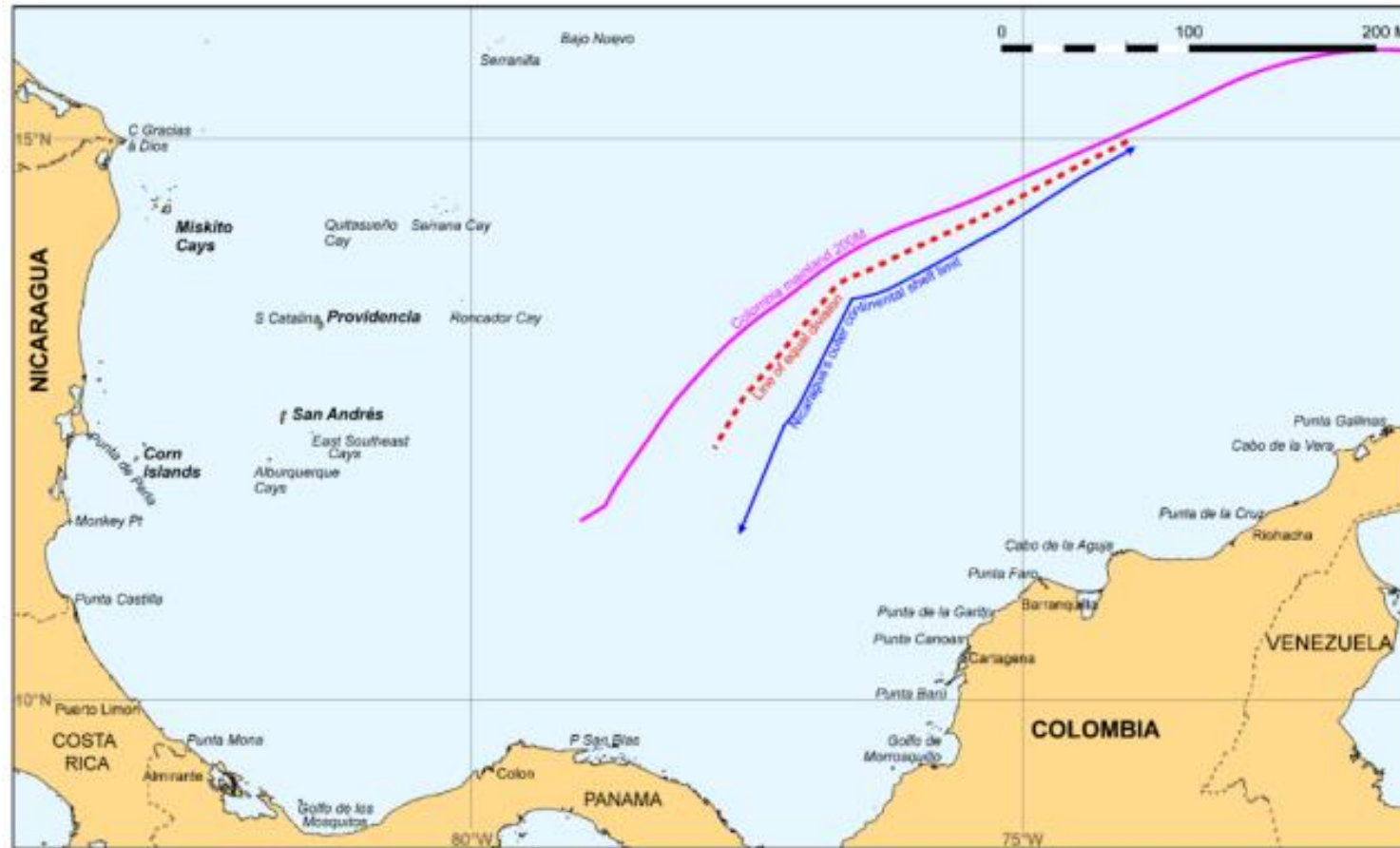
- Consistent
- Widespread
- Uniform

### 2. Opinio Juris

## Nicaragua Case (1986)



# Caribbean Sea: Area of overlapping continental shelf



# Main Findings

1. **As a preliminary question; determining if there is an area of overlap between the entitlements of 2 States [42-43]**

## Approach

- Is there an area of overlap between the two coastal States founded on a distinct legal title

## Issues arising

- a. What is the distinct legal title?
  - LOSC
  - Customary international law
- b. What distance separates the two coastal States?
- c. How much does this rest upon the coastal State's baselines: Art 7/Art 47?
- d. Is land from which a CS entitlement claimed a juridical island or juridical rock?
- e. How can this be determined absent completion of CLCS processes and deposit of charts with UN S-G?

# Main Findings

## 2. State practice of CLCS submissions not extending within 200nm of baselines of other States = opinio juris

### Approach

Consequences arising from making CLCS submissions

- Which States have made CLCS submissions?
- Which States have not?

### Issues Arising

- Significance of CLCS submissions
- Multiple variables
- Is existing state practice comprehensive?
- How is the state practice actually determined?

# Main Findings

**3. A State's entitlement to a Continental Shelf beyond 200nm may not extend within 200nm from baselines of another State [79]**

## Approach

- There is a single continental shelf
- Based on minimum 200nm, or natural prolongation of 200nm: A76
- Significance of A82 LOSC
- Importance of state practice

## Issues Arising

- How does this sit with state practice?
- Raises questions as to whether SP is at variance with LOSC and ICJ
- Whether the CLCS logjam will see States begin to act independently of A76 processes

# Main Findings

## 4. Status of Customary International Law

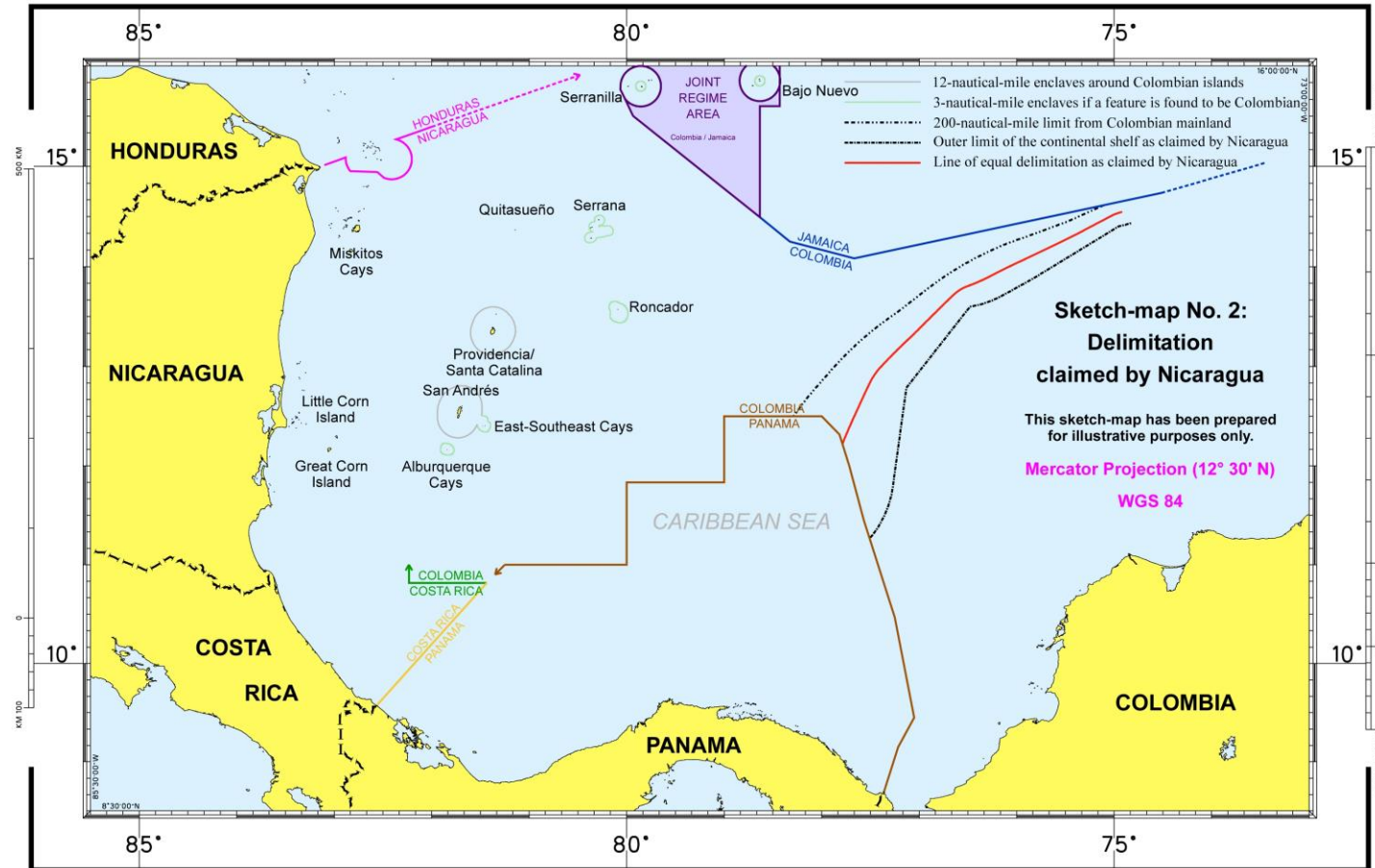
### Approach

- Article 76 (1) forms part of CIL: *Nicaragua v Colombia* (2012)
- Article 76 entitles a coastal State to a continental shelf extending beyond 200nm
- That a continental shelf extending beyond 200nm may not extend within a continental shelf that is 200nm from the baselines of another State

### Issues Arising

- That customary international law recognises a continental shelf beyond 200nm
- Importance for the US as it is not a party to LOSC

# Delimitation Claimed by Nicaragua



# Customary International Law

- What relevant LOSC articles/parts of articles are CIL?
  - Article 76 (1) – as per *Nicaragua v Colombia* (2012)
  - What is the status of the remainder of Art 76
- Analysis as to what is CIL based on CLCS submission and state interpretations of A76 is not extensive other than *Gulf of Maine* [77]
- Tomka accepts A76 as reflected of CIL and directly references the AJIL article by Kevin Baumert [21] – implications for US +200nm claim
- ‘What has been agreed by the States in the ‘package deal’ remains in the text of the treaty. What is not included should continue to be governed by CIL’ Xue [17]
  - What are the implications of this statement for other parts of LOSC?
  - Offshore archipelagos?



# Separate and Dissenting Opinions

## Judge Tomka

- Significant criticism ‘This judgment is disquieting’ [1] ‘does not provide any serious analysis of State practice nor the required opinio juris. It limits itself to a simple assertion of ‘customary rule’ [3]
- ‘This finding (on CIL) rests on a curated selection of State practice’ [64]
- The facts faced by the ICJ are not new or uncommon based on Cases + SP

## Judge Charlesworth

- Indicates doubts over courts interpretation of A82 and weight given to it [15]
- Gives weight to CLCS submissions as evidence of SP and opinio juris BUT is this conclusive with respect to CIL? [30-31]

# Regional Implications: Indo-Pacific

## Existing State Practice

- Australia/Indonesia + Australia/PNG [Judge Xue] but cf negotiated <LOSC
- Australian position on natural prolongation in Timor Sea Conciliation but negotiated the 2018 Timor Sea Treaty a permanent boundary: Judge Xue [31]
- East Asia/SE Asia - CLCS is precluded from considering certain submissions due to territorial and other disputes:
  - Malaysia/Vietnam (2009); Vietnam (2009); Malaysia (2019)

# Mainland & Southland scenarios

1. Mainland asserts a claim to a 200+ CS which extends into Southland's CS area – what occurs if the Southland CS is partly founded on an island which Mainland contests as to its status?
  - i. Noting that Southland would not have been required to make a CLCS submission as its CS claim only extends to 200nm
  - ii. Can Mainland unilaterally claim a 200+CS asserting it believes there is no valid legal basis in Southland's claim the feature is a juridical island?
2. What occurs if both Mainland and Southland assert a 200+CS which overlaps and M asserts there is no legitimate basis in A76 for Southland's claim; can Southland use this purely as a CLCS blocking procedure?

## **Negotiated settlement remains possible**

- Judge Xue [36] accepts the potential of negotiated 'special arrangements'

# Concluding Remarks

1. What are the implications for the December 2023 US +200nm CS claim based on CIL assertions by the ICJ?
2. Determination of the limits of the CS were based on UNCLOS III compromise and CHM was a consideration [76]
  - BUT understanding of the Art 76 CS has significantly changed
  - Is the CLCS really equipped to play this watchdog role?
  - What consequences flow from states not acting on CLCS recommendations?
  - How can CLCS play this role if some States – US – circumvent CLCS?

# Concluding Remarks

3. Was too much weight given to what UNCLOSIII did not consider when A 76 was negotiated – assumption of only 30 ECS claims being made? – note Judge Tomka

- How complete can A76 be considered in light of assumptions made at time of negotiation and the reality of ‘natural prolongation’ science broad margin States have relied on?

4. Answer to 2<sup>nd</sup> Q - is there an implied ICJ deference to CLCS? [82]

- Tomka [4]