



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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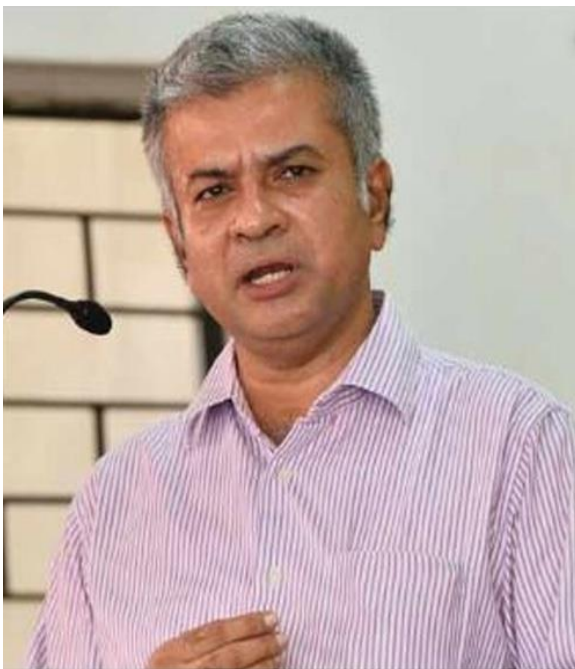
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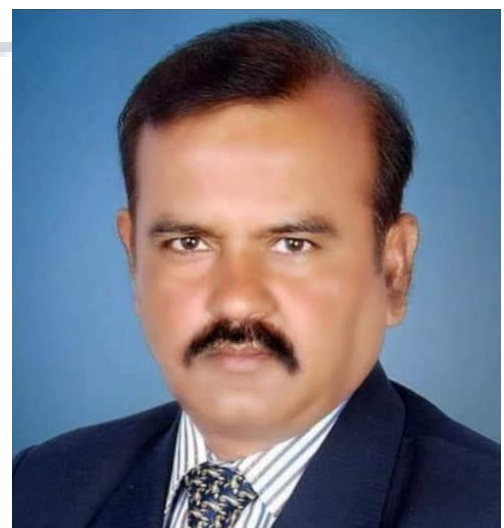
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Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.

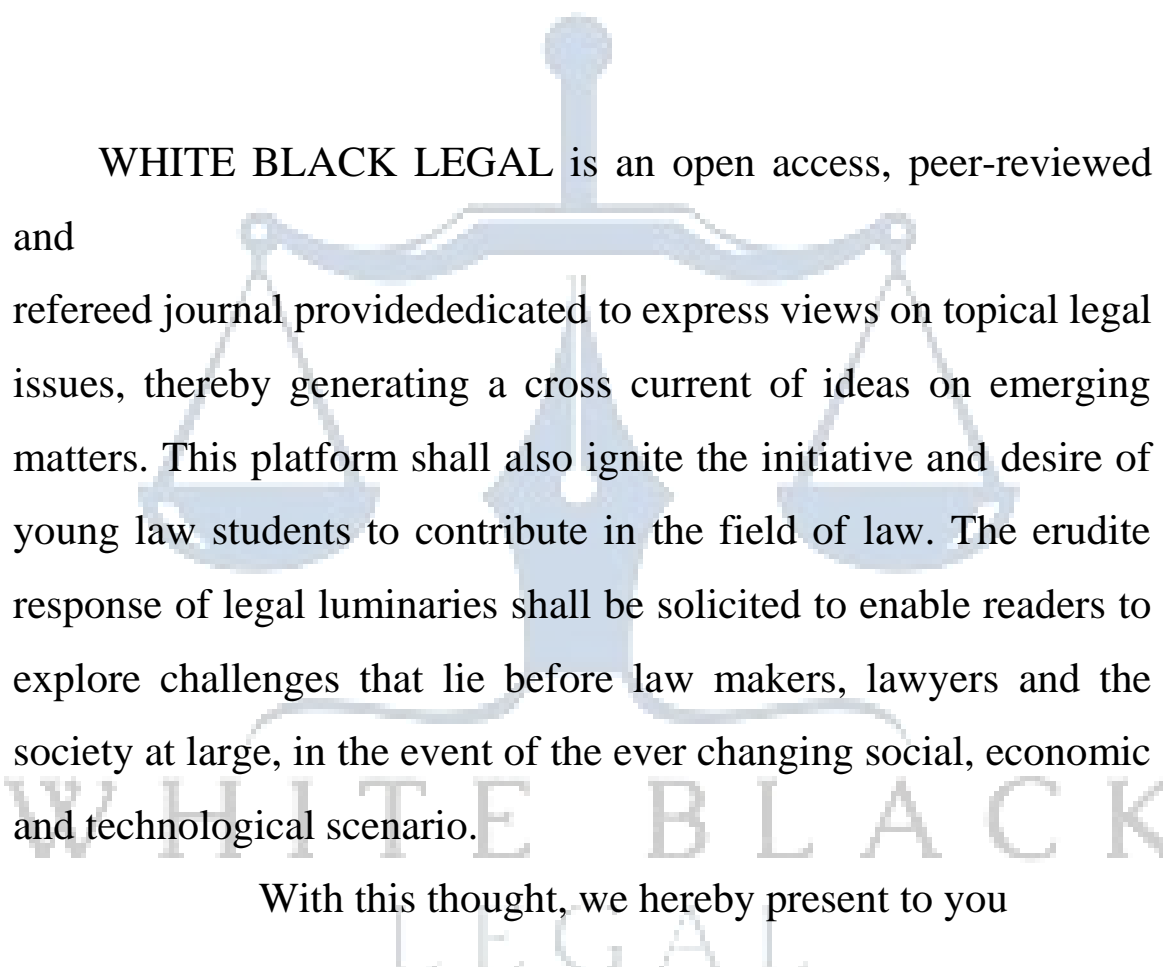


Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

NICARAGUA V. COLOMBIA: TERRITORIAL AND MARITIME DISPUTE

AUTHORED BY - TANISHA RANJAN

INTRODUCTION

The case of Nicaragua v. Colombia, which concerns the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast, was decided by the International Court of Justice on July 13, 2023¹. By a decision of 13 to 4, the Court came to the conclusion that, in accordance with customary international law, a State's claim to a continental shelf that extends beyond 200 nautical miles cannot be located within 200 nautical miles of another State's baselines. You may see an analysis of the Court's decision on the merits and unanswered questions here. The methodology used by the Court in paragraph 77 to determine whether customary international law exists will be criticized in this post². I'll discuss why the majority's strategy is an important departure from its earlier jurisprudence with regard to the law and its application to facts³.

FACTS OF THE CASE

Nicaragua filed a lawsuit against Colombia in 2013, asking the International Court of Justice to draw a line between its asserted right to the outer continental shelf and Colombia's maritime rights. The ICJ subsequently determined in 2016 that Nicaragua's main arguments were admissible and were under its purview. However, the Court opted to split the proceedings on the merits for the first time in its history, apparently to Nicaragua's annoyance, before hearing the parties' oral arguments on the merits. Prior to possibly considering intricate technical and scientific issues, the Court deemed "it necessary to decide on certain questions of law." Thus, the Court ordered the parties to discuss two legal issues "exclusively." The first query, which

¹ "The ICJ's Judgment in Nicaragua v. Colombia: Back to the Basics," *Opinio Juris*, 2023 available at: <https://opiniojuris.org/2023/08/16/the-icjs-judgment-in-nicaragua-v-colombia-back-to-the-basics/> (last visited December 30, 2024).

² "The ICJ's Judgment in Nicaragua v. Colombia: Back to the Basics," *Opinio Juris*, 2023 available at: <https://opiniojuris.org/2023/08/16/the-icjs-judgment-in-nicaragua-v-colombia-back-to-the-basics/> (last visited December 30, 2024).

³ "Territorial and Maritime Dispute (Nicaragua v. Colombia)," available at: <https://www.icj-cij.org/case/124> (last visited December 30, 2024).

ultimately determined the outcome of the case, was:

Can a State's right to a continental shelf that is more than 200 nautical miles from the baselines used to define the width of its territorial sea extend within 200 nautical miles of another State's baselines under customary international law?

PROCEDURAL HISTORY

In a December 13, 2007, ruling, the Court affirmed its jurisdiction to settle the issue. In a ruling issued on May 4, 2011, the International Court of Justice rejected Costa Rica and Honduras' 2010 request for authorization to intervene. 'Nicaragua/Colombia' refers to the judgment that was issued on November 19, 2012, following public hearings and the ultimate adjudication of the 2001 allegations. It rejected Nicaragua's claim to the vast continental shelf, defined a single maritime boundary in favor of Colombia, and unanimously acknowledged Colombia's sovereignty over all seven islands.

ISSUE

Whether Nicaragua have the right to define the boundaries of its expanded continental shelf?⁴

LEGAL BACKGROUND

The modification of Nicaragua's claim and the single continental shelf principle Nicaragua's new claim was deemed to be within the purview of the dispute by the International Court of Justice (ICJ). Despite having no justification, the ruling is consistent with the expanded continental shelf concept. It is disheartening that such an important principle was ignored by the court.

Nicaragua v. Honduras case was heard by the International Tribunal for the Law of the Sea (ITLOS) at the United Nations Court of Justice (ICJ) in The Hague. The ICJ's succinct reading of UNCLOS Article 76 was appropriately criticized by Judge ad hoc Mensah.

⁴ "6 Case Laws On Maritime Law," available at: <http://legalserviceindia.com/legal/article-10310-6-case-laws-on-maritime-law.html> (last visited December 30, 2024).

RELEVANT LAWS

Both Colombia and Nicaragua acknowledged that "Article 76 respects well-established norms of customary international law." In its initial brief answer, Colombia said that only treaty commitments are followed when applying Article 76, paragraphs 4 to 9. Colombia consequently included the coastal states and CLCS delineation criteria and procedure in the treaty commitments.

Nicaragua cited the concept of "automatic appurtenance of the continental shelf" from the well-known North Sea Continental Shelf cases to show that Article 76, paragraphs 4 to 7⁶, had the standing of customary international law⁷. Therefore, it used the demarcation of the continental shelf's geographical range of coastal states to connect this concept to the delineation of the continental shelf instead of the rights. The historical and legal⁸ importance of Articles 76 and 77⁹ seem to be confused by this method¹⁰.

ARGUMENTS

Nicaragua then made a compelling case, claiming that almost universally accepted accords might really lay the foundation for the growth of customary international law. The International Court of Justice (ICJ) has already noted that the participation of the different nations in the case, is sufficient stance for the establishment of customary international law¹¹.

The UNCLOS' broad ratification could be a sign of the development of customary international law. At the same time, it was expected from Nicaragua to investigate the non-party participation and take action on on participation for the establishment of customary law in the event of a

⁵ "The Nicaragua v. Colombia Continental Shelf Judgment: Short but Significant | ASIL,"available at: <https://www.asil.org/insights/volume/27/issue/9> (last visited December 30, 2024).

⁶ "6 Case Laws On Maritime Law,"available at: <http://legalserviceindia.com/legal/article-10310-6-case-laws-on-maritime-law.html> (last visited December 30, 2024).

⁷ "6 Case Laws On Maritime Law,"available at: <http://legalserviceindia.com/legal/article-10310-6-case-laws-on-maritime-law.html> (last visited December 30, 2024).

⁸ ibid

⁹ ibid

¹⁰ "6 Case Laws On Maritime Law,"available at: <http://legalserviceindia.com/legal/article-10310-6-case-laws-on-maritime-law.html> (last visited December 30, 2024).

¹¹ "6 Case Laws On Maritime Law,"available at: <http://legalserviceindia.com/legal/article-10310-6-case-laws-on-maritime-law.html> (last visited December 30, 2024).

dispute between a party and a non-party state. Furthermore, looking at the technicality of Article 76, paragraphs 4-6, and the notable distinctions between CLCS and state implementation and interpretation of these paragraphs, such research should concentrate on state implementation practices rather than merely claiming that UNCLOS has been incorporated into state domestic legislation.¹².

JUDGMENT

As there was no evidence defining the boundaries beyond the continental shelf, ICJ denied Nicaragua's request to demarcate its continental shelf border with Colombia. in light of the continuing dispute between the same two parties over the delineation of the extended continental shelf before the ICJ.

A fundamental tenet of Article 76 says that the CLCS's actions cannot influence issues pertaining to the demarcation of borders between states with neighboring or opposing shores. In cases where there is a land or marine dispute, the delineation exercise cannot proceed without the prior permission of "all states that are parties to such dispute." Non-party states can take part in the demarcation process thanks to this ambiguous phrasing. Consequently, it offers potential disagreement scenarios between UNCLOS parties as well as between UNCLOS parties and non-party states.

In response, Colombia made a clear reservation to Nicaragua's "entire text" and emphasized that Colombia's sovereign rights over its continental shelf would not be impacted by any action or inaction by the CLCS. Because of this, the demarcation process is presently at a standstill, and it is quite hard to believe that the CLCS has considered Nicaragua's case even in such a challenging circumstances.

The public order of oceans and the demarcation process because Colombia is a non-party state, the International Court of Justice (ICJ) has decided that Nicaragua must adhere to the CLCS demarcation technique. Notwithstanding the Court's finding that "the fact that Colombia is not a party" does not absolve Nicaragua of its obligations under UNCLOS Article 76¹³.

¹² "6 Case Laws On Maritime Law," available at: <http://legalserviceindia.com/legal/article-10310-6-case-laws-on-maritime-law.html> (last visited December 30, 2024).

¹³ "6 Case Laws On Maritime Law," available at: <http://legalserviceindia.com/legal/article-10310-6-case-laws-on-maritime-law.html> (last visited December 30,

OBSERVATION

Uncertainty surrounds the identification of *opinio juris*. States frequently refrain from explicitly declaring that "the rule is X under customary international law."¹⁴ For instance, neither custom nor international law are mentioned once in the Truman Proclamation, which signaled the start of the evolution of customary international law governance of the continental shelf.

States as well as judicial authorities must decide whether law applies in a particular scenario, even if there are no legal norms that specify the level of confidence required to classify a statement or action as reflecting *opinio juris*¹⁵. The simplest answer for a legal counsel is to let the client know about the uncertainty. The client will then need to weigh the risks associated with the uncertainty before making a decision. However, unless it is willing to commit the heresy of declaring a *non liquet*, a judicial body in a contentious proceeding must decide whether or not the pertinent state practice precedents are supported by the required *opinio juris* in order to make a determination regarding the existence or nonexistence of customary international law rules.

There is no legal burden or standard of proof that applies when proving the existence of a state's *opinio juris*. However, in a separate situation, the ICJ uses a preponderance approach when asked to decide a legal question, specifically whether it has jurisdiction. It looks at whether "the force of the arguments militating in favor of jurisdiction is preponderant." Given that both cases involve a state's adoption of a legal rule or arrangement and that no other criteria have been presented, the preponderance criterion also appears to be suitable for determining whether a state has actually expressed *opinio juris* on a particular issue.

The Court's conclusion of *opinio juris* in this case is dubious, assuming that a preponderance test is applied. Policy considerations are crucial in helping states decide how to operate within their rights, even while it may be reasonable to suppose that a legal responsibility serves as a red line in daily decisions (cf *Jurisdictional Immunities*, para 55).¹⁶ Therefore, states frequently

2024).

¹⁴ "The ICJ's Judgment in *Nicaragua v. Colombia: Back to the Basics*," *Opinio Juris*, 2023 available at: <https://opiniojuris.org/2023/08/16/the-icjs-judgment-in-nicaragua-v-colombia-back-to-the-basics/> (last visited December 30, 2024).

¹⁵ "The ICJ's Judgment in *Nicaragua v. Colombia: Back to the Basics*," *Opinio Juris*, 2023 available at: <https://opiniojuris.org/2023/08/16/the-icjs-judgment-in-nicaragua-v-colombia-back-to-the-basics/> (last visited December 30, 2024).

¹⁶ "The ICJ's Judgment in *Nicaragua v. Colombia: Back to the Basics*," *Opinio Juris*, 2023 available at:

do not fully use their powers, as Judge Iwasawa suggested. I would submit that the arguments made by Judge Tomka and others to cast doubt on the existence of *opinio juris* are preponderant in this particular case and are relevant examples of why a state would not fully exercise its rights. However, considering the situation in which the law governing entitlement to an outer continental shelf developed—which is presented in the judgment almost like a prelude to the Court’s inference of *opinio juris*—it is entirely within the realm of reasonableness to perceive things differently¹⁷.

ANALYSIS

It appears that the court's ruling is pertinent and necessary based on an analysis and interpretation of the pertinent laws pertaining to the *Nicaragua v. Colombia* issue.

CONCLUSION

The Court may have made the most authoritative remarks on defining customary international law in the *North Sea Continental Shelf* ruling several decades ago, which were even included in the ILC's Draft Conclusions. But in this instance, the Court disregards the Draft Conclusions' wealth of guidance. Or did the Court believe that the case's circumstances called for a more adaptable strategy than the one outlined in the Draft Conclusions?

The States' response to the Draft Conclusions and how it aligns with the Court's methodology should now be briefly discussed. Several delegations reaffirmed the two-element method of determining customary international law during the discussions in the General Assembly's Sixth Committee. They demanded a strict process to determine customary international law so that it cannot be readily established or deduced.

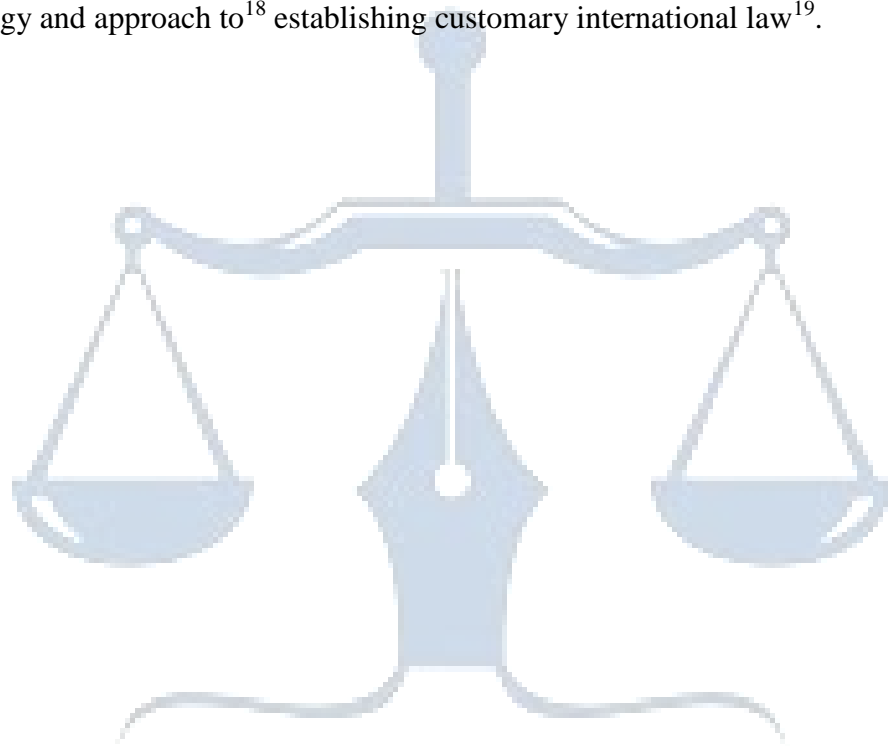
Furthermore, a number of delegations cautioned that a practice's inaction over time could be seen as proof of *opinio juris*. They noted that such a failure might only be the result of political factors in the absence of explicit proof of the rationale behind the decision to not react. States will, in my opinion, find it appropriate to use a similar justification for refraining from a certain action, which is that, in the absence of proof of a State's intentions, such abstentions may be

<https://opiniojuris.org/2023/08/16/the-icjs-judgment-in-nicaragua-v-colombia-back-to-the-basics/> (last visited December 30, 2024).

¹⁷ “The *Nicaragua v. Colombia* Continental Shelf Judgment: Short but Significant | ASIL,” available at: <https://www.asil.org/insights/volume/27/issue/9> (last visited December 30, 2024).

appreciated by political expediency rather than a sense of legal obligation.

Last but not least, an increasing number of governments are bringing issues before the ICJ that often include customary international law. One such case is the Alleged Violations of State Immunities case, in which Canada may invoke the alleged "terrorism exception" to sovereign immunity. It will be interesting to observe future rulings pertaining to the Court's methodology and approach to¹⁸ establishing customary international law¹⁹.



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¹⁸ "The ICJ's Judgment in Nicaragua v. Colombia: Back to the Basics," *Opinio Juris*, 2023 available at: <https://opiniojuris.org/2023/08/16/the-icjs-judgment-in-nicaragua-v-colombia-back-to-the-basics/> (last visited December 30, 2024).

¹⁹ "The ICJ's Judgment in Nicaragua v. Colombia: Back to the Basics," *Opinio Juris*, 2023 available at: <https://opiniojuris.org/2023/08/16/the-icjs-judgment-in-nicaragua-v-colombia-back-to-the-basics/> (last visited December 30, 2024).