

DECLARATION OF JUDGE ODA

Bakassi Peninsula — Lake Chad — Unnecessary precision of Court's boundary delimitation — Land boundary from Lake Chad to the Bakassi Peninsula — Withdrawal of armed forces, police and administration from "occupied" territory — State responsibility — Counter-claims — Future treatment of Nigerian nationals — Maritime boundary — Procedural error by Applicant — Definition of "legal dispute" under Article 36, paragraph 2, of the Statute — Boundary of territorial sea — Preliminary objections — Alteration of Party's position in the course of proceedings — No legal dispute concerning the territorial sea — Substantive error — Law governing the boundary of the continental shelf — Jurisdiction of the Court in boundary delimitation of the continental shelf — Boundary of the continental shelf is an equity issue, it cannot be subject of legal dispute — Negotiation as guiding principle for boundary of the continental shelf — Third-party authority — "Equidistance and special circumstances" Rule — Continental Shelf in the United Nations Convention on the Law of the Sea, Article 83 — Failure of agreement does not mean that a "dispute" exists — No compulsory procedures entailing binding decisions for the continental shelf boundary.

I. THE BAKASSI PENINSULA AND LAND BOUNDARIES — MAIN ISSUES OF THE PRESENT CASE

1. The present case, as unilaterally presented to the Court in March and June 1994 by Cameroon, is one in which "[t]he dispute relates *essentially* to the question of sovereignty over the Bakassi Peninsula" (Cameroon's Application instituting proceedings, p. 5, para. 1, emphasis added) and

"[the] aspect of the dispute relates *essentially* to the question of sovereignty over a part of the territory of Cameroon in the area of Lake Chad . . . and to the course of the boundary between the Republic of Cameroon and the Federal Republic of Nigeria, from Lake Chad to the sea." (Additional Application, p. 77, para. 1, emphasis added.)

While the present Judgment has my full support in respect of these three questions, which alone constitute the essence of the present case, I wish to express the several reservations set out below.

A. The Bakassi Peninsula (Subparagraph III of the Operative Part of the Judgment)

2. With regard to the status of the Bakassi Peninsula, which is the *main issue* in the present case, I fully agree with the Court's decision in point III (B) of the operative part of the Judgment that "sovereignty over the Bakassi Peninsula lies with the Republic of Cameroon" (Judgment, para. 325 III (B)).

B. Land Boundaries (Subparagraphs I and II of the Operative Part of the Judgment)

3. With regard to the land boundary between Cameroon and Nigeria in Lake Chad and in the area from Lake Chad to the sea, I support the Court's decisions in subparagraphs I and II in the operative part of the Judgment. Yet I have some reservations concerning the Court's determination of the boundary as the straight line "[f]rom a tripoint in Lake Chad lying at 14° 04' 59" 9999 longitude east and 13° 05' latitude north . . . to the mouth of the River Ebeji" (Judgment, para. 325 I (B)). The Court states in paragraph 57 of the Judgment that,

"[f]ollowing that examination [the examination of the Moisel map annexed to the Milner-Simon Declaration of 1919 and the map attached to the Henderson-Fleuriau Exchange of Notes of 1931], it . . . considers that the longitudinal co-ordinate of the tripoint is situated at 14° 04' 59" 9999 longitude east, rather than at 'approximately' 14° 05' east [thus reaching the same conclusions as the LCBC (Lake Chad Basin Commission)]".

It is difficult to understand why the Court has seen fit to speak of such a precise point. In fact, a measurement of 1/10,000 of a second (in other words, the difference between 14° 05' and 14° 04' 59" 9999) in respect of the longitude in this region of low latitude represents less than 3 mm and has no significant effect on any map. It is not meaningful for the Court to specify any spot to 1/10,000 of a second. It would be sufficient for the Court in this respect to refer simply to the "tripoint" as indicated in the report of the Lake Chad Basin Commission.

C. Difference of Positions Taken by the Parties towards Sovereignty over the Bakassi Peninsula and towards the Land Boundaries (Subparagraph V of the Operative Part of the Judgment)

4. I note that the decisions in points V (A), (B), (C) and (D) of the operative part of the Judgment all relate to the issues dealt with in subparagraphs I, II and III of the operative part. These decisions *mainly* concern the status of the Bakassi Peninsula and the boundaries in Lake Chad and in the area from Lake Chad to the sea, but *not* the mari-

time boundaries dealt with in the immediately preceding subparagraph, subparagraph IV. The placement of this subparagraph V not before but after subparagraph IV gives the impression, however, that the Court takes a very different view of the relationship between these paragraphs.

5. It is a matter of course that Nigeria must withdraw its “administration and its military and police forces” (Judgment, para. 325 V (A)) from the area concerned, which the Court now decides is Cameroonian territory, without the need for any further decision by the Court. Yet, the withdrawal should be conducted in accordance with arrangements to be agreed upon by the Parties, due consideration also being given to the orderly repatriation of those Nigerian nationals wishing to leave the area.

6. I assume that the Court’s position (implicit in point V (C) of the operative part) that no State responsibility was engaged in connection with any incidents having occurred in the area which Nigeria previously claimed to be under its sovereignty is based on the reasons stated in paragraphs 323 and 324 of the Judgment. This point should be more clearly expressed in subparagraphs I, II and III of the operative part rather than being dealt with as a separate and independent holding after subparagraph IV of the operative part, dealing with the maritime boundary.

7. The question of Nigeria’s counter-claims, rejected in point V (D) of the operative part, was already decided in the process of the Court’s decisions on territorial sovereignty over the Bakassi Peninsula and on the land boundaries in Lake Chad and in the area from Lake Chad to the sea, as the Court states in the two paragraphs of the Judgment referred to above (paras. 323 and 324).

8. Point V (B) refers to Cameroon’s commitment as to the future treatment of Nigerian nationals on its territory. The Court clearly noted that commitment in paragraph 317 in the reasoning of the Judgment and this matter requires no further decision in the operative part.

II. THE MARITIME BOUNDARIES (SUBPARAGRAPH IV OF THE OPERATIVE PART OF THE JUDGMENT)

9. I have stronger reservations concerning the Court’s decision in subparagraph IV of the operative part on the “maritime boundary” issues. Rather, I share very few of the Court’s views in respect of the “maritime boundary”. I did however vote in favour of points IV (B) and (C), but only because the boundary lines drawn therein, whether concrete or not, are not wholly inappropriate and do not in fact cause any harm.

10. The mishandling of the “maritime boundary” issues by the Court has resulted, I believe, from, first, Cameroon’s misguided presentation of

the case to the Court and, second, the Court's confusion and misunderstanding with regard to the fundamental nature of the law relating to "maritime delimitation". I will point out the *procedural* errors involving the maritime boundary issues in Cameroon's presentation and in the Court's response, before also drawing attention to *substantive* errors in Cameroon's Application and the Court's Judgment, resulting notably from the failure to recognize the difference between areas close to shore and those further out to sea. These *procedural* and *substantive* errors have significantly clouded the issues in this case.

A. Procedural Errors

11. *First*, I must point out that the present case, as referred to the Court on 29 March and 6 June 1994, did not involve any "legal dispute", within the meaning of Article 36, paragraph 2, of the Court's Statute, concerning the "maritime boundary". In its Application of March 1994, Cameroon states (as already noted above) that "[t]he dispute relates *essentially* to the question of sovereignty over the Bakassi Peninsula" (emphasis added) and asks the Court to adjudge and declare on various points relating to the status of the Bakassi Peninsula. Indeed, the Court properly ruled on these points in subparagraphs I, II and III of the operative part of the Judgment. However, the "maritime boundary" issue was not regarded by Cameroon in the March 1994 Application as a question having given rise to a "dispute". The "maritime boundary" is *not* mentioned in the Application as an object of a "dispute" but is referred to in unique terms. The June 1994 (additional) Application says nothing whatsoever about the "maritime boundary".

12. Cameroon, in the section of its March 1994 Application entitled "subject of the dispute", refers as follows to the maritime boundary, without mentioning this as being the subject of a "dispute":

"[T]he maritime boundary between the two States has been the subject of several delimitation agreements, from the Agreement of 11 March 1913 to the Maroua Declaration of 1 June 1975. However, this delimitation has remained a partial one and, despite many attempts to complete it, the two parties have been unable to do so. In order to avoid further incidents between the two countries, the Republic of Cameroon requests the Court to determine the course of the maritime boundary between the two States beyond the line fixed in 1975." (Application of 29 March 1994, p. 5, para. 3.)

As I see it, the words "maritime boundary" in the first line of the quotation above refer to a boundary in the immediate offshore areas. In the latter part of the same quotation, Cameroon refers to the boundary in the vast ocean, the boundary "beyond the line fixed in 1975 [point G]". In

its March 1994 Application, Cameroon does not identify either the “many attempts to complete [the delimitation]” “beyond the line fixed in 1975 [point G]” or the previous “incidents between the two countries” which occurred in that area if indeed “further” incidents are to be prevented. Contrary to the Court’s assertion (paragraph 239 of the present Judgment and paragraph 110 of the 1998 Judgment), no evidence of any incident in the areas beyond point G or of any negotiation to draw the boundary beyond point G was presented to the Court, either in the March 1994 Application itself or during the written and oral proceedings.

13. In connection with the “decision requested” in that Application, Cameroon states under item (*f*) (in wording quite different from that in requests (*a*) to (*e*’)), in which Cameroon asks the Court to “adjudge and declare”), as follows:

“(f) In order to prevent any dispute arising between the two States concerning their maritime boundary, the Republic of Cameroon requests the Court to proceed to prolong the course of its maritime boundary with the Federal Republic of Nigeria up to the limit of the maritime zones which international law places under their respective jurisdictions.” (Application of 29 March 1994, p. 15, para. 20.)

Item (*f*) contains nothing to indicate that there is a “decision requested” of the Court; rather Cameroon here requests the drawing of a boundary course. In my view, in regard to the “maritime boundary” Cameroon cannot be seen to be asking the Court to adjudge and declare on any “legal dispute” within the meaning of Article 36, paragraph 2, of the Court’s Statute.

14. It was natural for Nigeria to raise objections concerning the Court’s jurisdiction in this respect in December 1995. In its 1998 Judgment regarding preliminary objections raised in the present case, the Court however rejected Nigeria’s objections with regard to the delimitation of the maritime boundary (*I.C.J. Reports 1998*, p. 275). With all due respect for the Court’s authority, I still consider that, as stated in my separate opinion appended to that Judgment (*I.C.J. Reports 1998*, p. 328), the Court erred in so deciding. Notwithstanding the Court’s 1998 Judgment, the fact remains that there was in 1994 no “legal dispute” concerning the “maritime boundary” which Cameroon could unilaterally bring to the Court for adjudication under Article 36, paragraph 2, of the Court’s Statute and Article 38 of the Rules of Court.

15. *Secondly*, it must be noted that Cameroon changed the gravamen of the present case (which it brought in March and June 1994) in the submissions subsequently presented in its 1995 Memorial. Cameroon first presented its own maritime boundary claim, identified by map co-ordi-

nates, in its Memorial (Livre I, p. 669). These submissions are far different in nature from the “decision requested” in connection with the “maritime boundary” in the March 1994 Application. I believe that the 1995 submissions did not fall within the purview of the original March 1994 Application. The Court should have taken cognizance of this fundamental and essential alteration of Cameroon’s position in the case during the jurisdictional phase. The Court however failed in 1998 to do so and, *a fortiori*, failed to realize that the 1995 submissions regarding the “maritime boundary” issue had effected an essential change in the complexion of the entire case.

16. As already noted, Cameroon did not describe in the March 1994 Application or even in the 1995 submissions any “legal dispute” between Nigeria and it concerning the “maritime boundary”. Cameroon presented its “maritime boundary” claim in the 1995 submissions. While Nigeria contended in the submissions in its 1999 Counter-Memorial that Cameroon’s “maritime claim” was “inadmissible” for various reasons (Counter-Memorial of Nigeria, Vol. III, p. 834), it was only in 2001, in its Rejoinder, that Nigeria first asserted certain maritime boundary claims in opposition to Cameroon’s claims (Rejoinder of Nigeria, Vol. III, p. 765).

17. In the light of the procedural error on the part of the Applicant, Cameroon, I voted against point IV (A) of the operative part of the present Judgment.

B. Substantive Error

18. After having explained that Cameroon’s referral to the Court of the “maritime boundary” aspects of the present case was highly irregular, I shall now turn to the merits of the case in respect of the “maritime boundary”. Underlying both Cameroon’s mishandling of the case and the Court’s confusion and misunderstanding is, I believe, the failure to recognize the essential difference between the narrow sea-belt around the land, i.e., the expanse of water within the 12-mile territorial sea (which, for the sake of convenience, I shall call the “inner sea”) and the wider offshore area of the continental shelf (which, again for convenience, I shall call the “outer sea”). This difference is reflected in the difference between the two régimes, that of the territorial sea on the one hand and the continental shelf on the other¹. The delimitation of the territorial sea and the delimitation of the continental shelf are radically different in nature and I submit that this difference is completely overlooked in the present Judgment. I shall return to this issue towards the end of this declaration.

¹ The comments below concerning the continental shelf apply in general to the exclusive economic zone as well.

(1) Boundary in the "inner sea" (up to point G)

19. I must point out first of all that the Court does not grasp the true meaning of the "maritime boundary" in the "inner sea" in this case. I would suggest that the disagreement between Cameroon and Nigeria in respect of the "inner sea" is *not*, in fact, an issue concerning the "maritime boundary" *but* is an issue relating *solely* to the status of the Bakassi Peninsula (that is to say, whether the boundary between the two States should lie to the west or to the east of the Bakassi Peninsula). The issue of the "maritime boundary" in the "inner sea", i.e., up to point G, is for all practical purposes resolved in subparagraph III of the operative part, when the Court, by reference to the 1913 Anglo-German Agreement, adjudges that the Bakassi Peninsula is part of Cameroon's territory, thereby determining that the boundary between the two States lies to the west of the Bakassi Peninsula, and once the Court takes note of the 1971 Second Yaoundé Declaration, setting out the compromise reached by the Heads of State of the two countries, and of the 1975 Maroua Declaration signed by the two Heads of State.

20. The Court should have had nothing more to say with regard to the maritime boundary in the "inner sea" (up to point G). Accordingly, I find it senseless for the Court to present the two tables of co-ordinates referring to the "inner sea" as a Court decision in the operative part of the Judgment (Judgment, para. 325 IV (B)). There was no "maritime boundary" issue as such in respect of the "inner sea". Cameroon itself did not put forward any such co-ordinates in its claim or submission; nor did Nigeria raise any such issue.

(2) Boundary of the continental shelf in the "outer sea" (beyond point G)

21. With regard to the "maritime boundary" in the "outer sea", reference must be made again to the March 1994 Application and it is worth quoting Cameroon once more:

"[T]he maritime boundary between the two States has been the subject of several delimitation agreements, from the Agreement of 11 March 1913 to the Maroua Declaration of 1 June 1975. However, this delimitation has remained a partial one and, despite many attempts to complete it, the two parties have been unable to do so. In order to avoid further incidents between the two countries, the Republic of Cameroon requests the Court to determine the course of the maritime boundary between the two States beyond [point G]." (Application of 29 March 1994, p. 5, para. 3.)

As I stated above, notwithstanding this assertion, there has been no incident in the "outer sea" between the two States and no negotiations have

been held to determine the boundary of the continental shelf beyond point G.

22. In point IV (D) of the operative part, the Court in fact does not respond at all to Cameroon's and Nigeria's respective submissions concerning the maritime boundary in the "outer sea" and renders a decision establishing a line different from the Parties' respective claim lines. If the Court now has no more to say on this point than that the boundary "follows a loxodrome having an azimuth of 187° 52' 27\"", as set out in point IV (D) of the operative part, which in no way responds to Cameroon's submissions, then the implication could be that the Court admits that Cameroon's framing of the question of the boundary in the "outer sea" as a *legal* issue is clearly unjustified in this case of unilateral application. Yet the Court "[d]ecides that . . . the boundary . . . follows a loxodrome having an azimuth of 187° 52' 27\"" (Judgment, para. 325 IV (D)).

23. I would question whether the Court gave any thought to the fact that specifying a line with the precision of one second results in a difference of only a few metres, even at the point lying at the 200-mile limit from the coast. The Court does not specify how far the line should extend, whether just several miles from the coast or even 200 miles out to sea. Rather than *deciding* upon the line itself, the Court would appear to suggest that the boundary line should be drawn, as agreed by the Parties, along the equidistance line. It appears to me that the Court's mistaken treatment of the maritime boundary in the "outer sea" may derive from its failure to understand the law governing the determination of the continental shelf boundary.

(3) *Rule governing the boundary of the continental shelf*

24. Cameroon's obvious error in unilaterally submitting to the Court the issue of the maritime boundary in the "outer sea" as the object of a "legal dispute" merits further examination. Unlike land boundaries (including that of the territorial sea), which relate essentially to the question of territorial sovereignty, the boundary of the continental shelf in the "outer sea", not being the subject of a *legal* dispute, cannot, in principle, be determined simply by applying a legal rule or principle. No legal rule or principle mandates recognition of a given line as the *only* one acceptable under international law. The concrete boundary line may be chosen by negotiation from among the infinite number of possibilities falling within the bounds of *equity*. This is the view I propounded, after an extensive analysis of the issues and the *travaux préparatoires*, in my separate opinion appended to the Court's Judgment in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen* (I.C.J. Reports 1993, p. 109).

25. Article 6 of the 1958 Geneva Convention on the Continental Shelf provides “the boundary of the continental shelf . . . shall be determined by agreement between [the parties]”. It is important to note that even at the time of its adoption, this rule was fundamentally different from that applicable to the territorial sea, where recourse to the median line is the governing principle (1958 Geneva Convention on the Territorial Sea, Art. 12). The basic principle that the continental shelf boundary should be agreed upon by negotiation was carried over into the 1982 United Nations Convention on the Law of the Sea (Art. 83).

26. It is certainly true that a provision simply stating that the boundary should be agreed upon by negotiation does not identify any precise boundary line and, in fact, the outcome of negotiations concerning the continental shelf boundary is dictated by the relative bargaining power of the parties. But the 1958 Convention did offer a guiding principle where negotiations fail: “[i]n the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line [in the case of opposite coasts]” and “the boundary shall be determined by application of the principle of equidistance [in the case of adjacent coasts]” (Art. 6, paras. 1 and 2). This so-called “equidistance (median) line + special circumstances” rule could have been applied in various ways aiming at an “equitable solution”.

27. Having realized that this provision did not lay down any objective criteria for drawing the boundary, the drafters of the 1982 United Nations Convention on the Law of the Sea attempted to formulate such criteria but, after much effort over several years, could do no better than come to the compromise solution now found in the 1982 Convention:

“1. The delimitation of the continental shelf . . . shall be effected by agreement on the basis of international law . . . 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 [settlement of disputes].” (Art. 83.)

28. I am afraid that great misunderstanding prevails in academic circles regarding interpretation of these provisions. I must state, *first*, that the provisions of Article 83, paragraph 2, do not constitute a compromissory clause such as is referred to in Article 36, paragraph 1, of the Court’s Statute; *secondly*, the fact that boundary negotiations have failed does not in itself mean that a “(legal) dispute” has arisen; and, *thirdly*, the provisions of Article 83, paragraph 2, should not be interpreted as conferring compulsory jurisdiction on those institutions listed in Article 287 of Part XV. Notwithstanding the title of Section 2 (“Compulsory Procedures entailing Binding Decisions”) of Part XV of the 1982 Convention, it is clear that Section 2, when read in conjunction with Section 3 (“Limitations and Exceptions to Applicability of Section 2”),

does *not* provide for such procedures in a boundary delimitation case referred to any of those institutions, including this Court.

29. It is submitted that the Court could well act as a third-party authority if it were asked *jointly* by the parties to draw such a line. The present case was, however, brought before the Court *unilaterally* by Cameroon. At the time Cameroon initiated the case, Nigeria expressed no desire to entrust to the Court the determination of this segment of the boundary between the two States; in fact, Nigeria expressed its opposition to Cameroon's approach, as manifested by its objection to the Court's jurisdiction in this respect in December 1995.

30. I would like to point out that Cameroon and Nigeria had not even started negotiations to agree upon the delimitation of the continental shelf and understandably so, since the status of the Bakassi Peninsula, from which the continental shelf extends, was not certain. In that context the Court could not initiate compulsory procedures entailing a binding decision. The Court could not "decide" any specific line. The Court could only have determined the line if it had been requested jointly by the Parties to decide upon one specific line; however, this is not such a case. I voted in favour of point IV (D) of the operative part for the reason that the general orientation described by the Court in that paragraph, though misguided in itself as I suggested above in paragraph 22, is not likely to cause any harm.

(Signed) Shigeru ODA.
