

## Separate Opinion of Judge *ad hoc* Mensah

1. I agree with the Special Chamber that Ghana has not provided sufficiently convincing reasons to establish that there is in fact a tacit agreement between Ghana and Côte d'Ivoire for the delimitation of their territorial sea, exclusive economic zone and continental shelf within and beyond 200 nm, and I agree that Cote d'Ivoire is not estopped from objecting to the "customary equidistance boundary" as the maritime boundary between the maritime areas pertaining respectively to Ghana and Côte d'Ivoire.

2. While the facts and arguments adduced by Ghana, provide a plausible reason for Ghana to believe that the "customary equidistance" line has been accepted by Côte d'Ivoire as the boundary between the two States, Ghana has clearly not been able to prove that an agreement on this line exists between Ghana and Côte d'Ivoire.

3. International jurisprudence has consistently maintained that the threshold for the proof of an agreement on a maritime boundary is very high. As the International Court of Justice (ICJ) stated in *The Territorial and Maritime Dispute in the Caribbean Sea (Nicaragua v. Honduras)*, the evidence for the existence of a tacit agreement on a maritime boundary must be "compelling". This is because "the establishment of a permanent maritime boundary [between States] is a matter of grave importance", and such an agreement "is not easily to be presumed".

4. Thus, even though Ghana has shown why it believes that Côte d'Ivoire has accepted the "customary equidistance line" as the maritime boundary between Ghana and Côte d'Ivoire, it has not met the very high standard of proof that is required to prove that such an agreement exists between the two countries. Ghana has been unable to show that there is anything in the oil practice of the Parties, in the bilateral exchanges or negotiations of the Parties, or in their submissions to the CLCS, which constitutes "compelling proof" that there is in fact a tacit agreement between Ghana and Cote d'Ivoire on their maritime boundary.

5. It is no doubt true that the Parties seem to have attached a certain significance to the equidistance line which Ghana refers to as “the customary equidistance boundary”. The oil concession blocks of the Parties have been aligned with this line, and the oil activities of each of the Parties, such as the granting of oil concessions, their seismic surveys and drilling operations, have all been confined to the area that falls on the right side of the line for that Party. But such a line is not necessarily the “maritime boundary”. It may be nothing more than an agreed line of convenience for a particular purpose. As the ICJ pertinently observed in the *Nicaragua v. Honduras* case, “a *de facto* line may not (have been intended as) an “agreed legal boundary, but ... only as a ... line for a specific, limited purpose, such as sharing a scarce resource”. Hence such a line may not be “an international boundary”.

6. It is also the case that the oil practice of a State cannot by itself establish a tacit agreement for an all-purpose boundary. To be a valid proof of the existence of an agreement on a maritime boundary, the concession line must be shown to be based on an agreement (express or tacit), on a maritime boundary and such an agreement should be capable of being proved independently of the oil practice. Ghana has not provided such a proof. As the Special Chamber rightly observes, Côte d'Ivoire has made it clear that the limits of its oil concession blocks are distinct from the limits of its maritime jurisdiction.

7. I agree, however, that the delimitation should be done by the normal method. Côte d'Ivoire has not provided any convincing reason why the Special Chamber should, in the present case, deviate from the standard methodology that is normally adopted by international courts and tribunals for the delimitation of maritime areas between States. Côte d'Ivoire has not given any convincing reason why the Special Chamber should not use the equidistance/relevant circumstances methodology in this case. I agree that there are no circumstances in the present case that would justify the use of any methodology other than the equidistance/relevant circumstances methodology.

8. I agree fully with the delimitation of the maritime areas between Ghana and Côte d'Ivoire, based on the provisional equidistance line described in paragraph 401 of the Judgment, and I agree that there are no relevant circumstances which would require any adjustment to be made to this line. I fully share the reasons given by the Special Chamber for this conclusion. In particular, I share the view that neither history nor geography (and certainly not the case law) provide a legal basis for considering the geography of Jomoro as constituting a

circumstance that warrants or requires an adjustment of the provisional equidistance line. I agree that Jomoro is part of the territory of Ghana and that it cannot be isolated from the land territory of Ghana as a whole. Hence, having base points on Jomoro cannot be a relevant circumstance that would require an adjustment of the provisional equidistance line.

9. I also consider that the argument of Ghana that the oil practice of the Parties constitutes a relevant circumstance that would require an adjustment of the provisional equidistance line to conform to the “customary equidistance boundary” is an attempt to revive the claim that there is a tacit agreement on a maritime boundary between Ghana and Cote d'Ivoire, which has already been rejected by the Special Chamber.

10. Finally, I agree with the conclusion of the Special Chamber that Ghana has not violated either international law, or the Convention, or the Order of the Special Chamber of 25 April 2015, in undertaking activities in the disputed area.

11. With respect to the submission of Côte d'Ivoire that Ghana has violated the Order of the Special Chamber of 25 April 2015, I note that the Order prohibited “new drilling”. In issuing this Order, the Special Chamber made it abundantly clear that the prohibition of “new drilling either by Ghana or under its control” does not entail the “suspension of exploration and exploitation activities in respect of which drilling has already taken place”.

12. The Special Chamber has concluded (correctly, in my opinion) that the drilling that has been carried out in the disputed area, either by Ghana or under Ghana's control, has been merely “to ensure the proper production and maintenance of the oil deposits”. This drilling has been part of “ongoing activities in respect of which drilling has already taken place”, and not “new drilling” which is prohibited by the Order.

13. I also agree with the finding of the Special Chamber that Ghana has done nothing that is contrary to its obligation “to negotiate in good faith” or which can rightly be characterised as “jeopardising or hampering” the conclusion of a provisional arrangement of a practical nature.

14. In this regard, it is pertinent to observe that the oil activities that have been carried out by Ghana in the disputed area have all been in maritime areas that have been attributed to Ghana by the present judgment. It is, thus, not correct to say that Ghana has undertaken “unilateral activities in Ivorian maritime area”, as the final submissions of Côte d’Ivoire state. It is also not correct to say that Ghana has done anything that has “jeopardised or hampered” the conclusion of the final agreement on delimitation.

(*signed*)                      Thomas A. Mensah