

## DECLARATION OF JUDGE WOLFRUM

Although I voted in favour of the judgment I consider it necessary to add some comments to supplement, to interpret or to emphasize parts of its reasoning. I shall do so in respect of the methodology used in delimiting the continental shelf and the exclusive economic zone of the Parties and the treatment of islands in the delimitation process. Before that, however, I will discuss the relevance the Judgment attributes to the existing case law of international courts and tribunals in the delimitation of maritime areas.

In respect of the relevance of case law the Tribunal notes in paragraph 184 “[d]ecisions of international courts and tribunals, referred to in Article 38 of the Statute of the ICJ, are also of particular importance in determining the content of the law applicable to maritime delimitation under articles 74 and 83 of the Convention.” In the same paragraph the Tribunal concurs with a statement in the Arbitral Award of 11 April 2006: “In a matter that has so significantly evolved over the last 60 years, customary law also has a particular role that, together with judicial and arbitral decisions, helps to shape the considerations that apply to any process of delimitation.”

These statements, the statement of the Tribunal and the one of the Arbitral Tribunal, are neither identical nor very clear in their meaning. Taken literally, they attribute a different role to case law. Whereas according to the Tribunal case law seems to be a means of identifying the applicable law, the Arbitral Tribunal seems to consider case law to be an independent source of international law.

According to Article 38 of the Statute of the ICJ, decisions of international courts are means for identifying the applicable sources of international law. It is doubtful whether this adequately describes the role that international case law plays and is meant to play in the delimitation of the continental shelf and the exclusive economic zone.

Case law of international courts and tribunals is more than a means to identify the customary or treaty law relevant for the delimitation of continental shelves and exclusive economic zones, as stated by the Tribunal. In my view

international courts and tribunals in respect of maritime delimitation exercise a “law-making function”, a function which is anticipated and legitimized by articles 74 and 83 of the Convention. In this context it is appropriate to mention that article 287 of the Convention entrusts three institutions with the task and responsibility of interpreting the Convention and, within its framework, to progressively develop it. This requires them to harmonize their jurisprudence with the view to avoiding any fragmentation, in particular in respect of delimitation of maritime areas.

Unlike for the delimitation of the territorial sea, the Third United Nations Conference on the Law of the Sea could not agree on a particular method of delimitation of the continental shelf and the exclusive economic zone. The Conference therefore left the task of the delimitation to the coastal States concerned and – if they could not agree – to judicial dispute settlement. That means it is the task, and even the responsibility, of international courts and tribunals (when requested to settle disputes) to develop the methodology that is suitable for this purpose. In doing so they are guided by a paramount objective, namely, that the method chosen can lead to an equitable result and that, at the end of the process, an equitable result is achieved. This is stated in the Judgment (paragraph 235). Further objectives to be taken into consideration by international courts and tribunals are to provide for transparency and predictability of the whole process. The ensuing international case law constitutes an *acquis judiciaire*, a source of international law to be read into articles 74 and 83 of the Convention. It is the feature of this law not to be static but to be open to progressive development by the international courts and tribunals concerned. It is the responsibility of these international courts and tribunals not only to decide delimitation cases while remaining within the framework of such *acquis judiciaire* but also to provide for the progressive development of the latter. They are called upon in further developing this *acquis judiciaire* to take into account new scientific findings.

As far as the progressive development of the *acquis judiciaire* on maritime delimitation is concerned, I am of the view that the Tribunal could and should have been more forthcoming.

The Tribunal was faced with, amongst others, the problem of islands in the delimitation process. It stated that the effect to be given “depends on the geographic realities and the circumstances of the specific case” and that there was

no general rule in this respect. Each case was unique and called for specific treatment, the ultimate goal being to reach a solution which was equitable (paragraph 317). Such a statement does not provide any meaningful guidance. That the geographical features have to be taken into account is self-evident and equally that the result achieved has to be equitable. But what is equitable in a situation like that of St. Martin's Island? The Tribunal should have spelled out which considerations it took into account and which it did not. If it had done so, it would have provided for the development of the general rule, which is missing.

The Tribunal concludes that – where the territorial waters of St. Martin's Island do not overlap with the territorial waters of the mainland coast of Myanmar – St. Martin's Island should have a right to a territorial sea of 12 nm. I fully concur in this finding, in particular in the reasoning that to decide otherwise would have been to give more weight to the sovereign rights of Myanmar in its exclusive economic zone and continental shelf than to the sovereignty of Bangladesh over its territorial sea (paragraph 169). It is evident that this statement of principle only refers to the case before the Tribunal. It is to be regretted that the Tribunal does not formulate the principle as a general one, indicating whether there might exist exceptions.

In respect of the delimitation of the continental shelf and the exclusive economic zone St. Martin's Island was not given any relevance. The Tribunal even ruled out that a base point on St. Martin's Island should be established for the delimitation of the exclusive economic zone or the continental shelf. Although I share this decision it would have required a more detailed and in-depth reasoning. In particular, since such decision is not easy to understand after St. Martin's Island was given its full effect in the delimitation of the territorial sea.

Regarding the exclusive economic zone and the continental shelf, the Tribunal mostly justified its decision by relying on the ICJ judgment in the *Black Sea* case (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 61, at paragraph 149). In this regard the Tribunal states that giving effect to St. Martin's Island would result in a line blocking the seaward projection from Myanmar's coast that would cause an unwarranted distortion of the delimitation line (paragraph 265). This argument, as formulated, seems to be a subjective one. No objective grounds are provided why the so-called distortion is unwarranted. This does not meet the standards referred to above, namely transparency and predictability. In my view the Tribunal should have further discussed: whether in a situation such as this one the feature governing delimitation was the mainland or the island; whether the ratio of the size of the island to the size of the maritime area in question was of relevance; and whether and

to what extent the freedom of access to the sea should also be a determining factor.

Equally, there is no substantial reasoning as to why no base points were identified on St. Martin's Island. Here again, the Tribunal followed the reasoning of the ICJ in the *Black Sea* case (at p. 110) in respect of Serpents' Island, which I find equally unconvincing. Moreover I note that the Tribunal's decision on St. Martin's Island has not prevented it from selecting an additional base point on the southern tip of Myanmar's Myay Ngu Kyun Island (paragraph 266), without answering the question why such base point could justifiably govern the direction of the delimitation line, more than 180 nm off the coast of Myanmar.

To sum up, I think the Tribunal missed the opportunity to progressively develop the rules on islands in the delimitation process and thus to contribute to the *acquis judiciaire* on the rules concerning maritime delimitation. In my view, such contribution would have been particularly called for since international jurisprudence, so far, seems to lack the necessary coherence on this issue.

As far as the delimitation of the exclusive economic zone and the continental shelf is concerned, the Tribunal follows the three-step approach as developed by the ICJ in the *Black Sea* case. It may be questioned whether the subsection on the disproportionality test is really enlightening. It would have been equally appropriate just to employ a two-step procedure. Consideration of proportionality should then have been integrated into the considerations leading to the adjustment of the provisional equidistance line. Considerations in respect of proportionality should cover a broader spectrum than they do now and their separation from the reasoning leading to the adjustment of the equidistance line seems to be artificial. Both steps, the second and third, may result in an adjustment of the equidistance line and thus should be combined.

The Tribunal has constructed its provisional equidistance line *lege artis*. Equally, the statement that "the objective is a line that allows the relevant coasts of the Parties 'to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way'" is to be endorsed. However, there is very little reasoning explaining why the adjusted line must be deflected at point B<sub>1</sub> and none at all why the line should follow an azimuth of 215°. It is to be noted that the azimuth of 215° was the line constructed by Bangladesh on the basis of its angle-bisector method, a method rejected by the Tribunal (paragraphs 234-237).

I have no reason to doubt that this line constitutes an equitable result, as required by articles 74 and 83 of the Convention, but other lines may equally have done so. However, the way in which the Tribunal reaches this conclusion again lacks transparency. The Tribunal tries to justify its reluctance to consider alternatives to this line by repeating a statement of the Arbitral Tribunal in the *Barbados / Trinidad and Tobago* case (paragraph 373) that there is no “magic formula” for the adjustment (paragraph 327). Although there may be no formula covering all geographical circumstances, there would definitely have been some merit in looking into alternatives. A discussion of alternatives already tested in the jurisprudence of international courts and tribunals, such as changing the position of the line but not its direction or changing both, was called for. Some of these alternatives would have had the advantage of producing an adjusted line that would not have started northwest of St. Martin’s Island and thus would not have enclosed it so much. But even if the Tribunal had come to the same conclusion, in-depth consideration of the starting point of the adjusted delimitation line, and its direction, would have clearly reinforced the findings in the Judgment and at the same time made the required contribution to the *acquis judiciaire* on the delimitation of the continental shelf and the exclusive economic zone.

Finally, it is to be emphasized that the Tribunal breaks new ground on the delimitation of the continental shelf beyond 200 nm, an issue that mostly has been avoided by international courts and tribunals thus far. I consider that this part of the Judgment positively contributes to the international case law on maritime delimitation, although some additional reasoning might have enhanced its being fully accepted by other international courts and tribunals.

(signed) Rüdiger Wolfrum