DISSENTING OPINION OF JUDGE AJIBOLA

Introduction: Why the case concerning Right of Passage over Indian Territory *should be revisited.*

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INTRODUCTION

The first preliminary objection of Nigeria, filed on 17 December 1995 in this case, gives the Court another opportunity once more to examine critically its case-law on the provision in Article 36 (2) of the Statute, and more particularly Article 36 (4), which deals with the question of the Optional Clause as it relates to the jurisdiction of the Court. Unfortunately, the Court decided to follow its case-law in the *Right of Passage over Indian Territory* case of 1957, which I strongly disagree with; hence my basic reason for appending this dissenting opinion to the Judgment of the Court. But in addition to disagreeing with the Court with respect to its decision on the first preliminary objection of Nigeria, in which this

case-law — decided over 40 years ago — was reaffirmed, I also express my disagreement with the decision reached by the Court on six other preliminary objections raised by Nigeria.

I. The First Preliminary Objection

The first preliminary objection of Nigeria is the most important objection addressed to the Court, and was extensively argued by both Parties. In fact, if the objection had been accepted by the Court, it would have disposed of the entirety of the Applications of Cameroon, filed on 29 March 1994 and 6 June 1994 respectively, and in my view the Court ought to have dismissed the Applications on the basis of this objection.

It appears to me that this first preliminary objection is fundamental and that it goes to the very root of Cameroon's Application. The objection essentially concerns the interpretation of the requirements of paragraphs 2 and 4 of Article 36 of the Statute of the Court. In order to reach a decision on whether this preliminary objection should be rejected or upheld, some relevant issues raised by Nigeria and Cameroon in their respective arguments and presentations require examination.

Among these issues are:

1. Reciprocity or coincidence as expressed in Article 36 (2) in the phrase "in relation to any other State accepting the same obligation", and the use of the word "reciprocity" in the Optional Clause Declaration of Nigeria.
2. The question of good faith and the element of surprise.
3. The requirements contained in Article 36 (4) of the Statute of the Court, namely:

> "Such declarations shall be *deposited* with the Secretary-General of the United Nations, who shall *transmit* copies thereof to the parties to the Statute and to the Registrar of the Court." (Emphasis added.)

4. The Judgment in the case concerning *Right of Passage over Indian Territory* (*I.C.J. Reports 1957,* p. 125).

A. Reciprocity

The argument of Nigeria is that Cameroon, in lodging

> "its Application on 29 March, acted prematurely and so failed to satisfy the requirement of reciprocity as a condition to be met before the jurisdiction of the Court can be invoked against Nigeria" (CR 98/1, p. 29).

Cameroon lodged its Optional Clause Declaration on 3 March 1994 and filed its Application three weeks thereafter (i.e., on 29 March

1994), whereas Nigeria had accepted the Court's jurisdiction under Article 36 (2) of the Statute as far back as 14 August 1965.

The argument of Cameroon is that this objection raised by Nigeria is "untenable". Cameroon argues that:

> "According to international law pertinent in the matter as well as the firm jurisprudence of this Court, a State party to the system of the Optional Clause may bring a case against another State party to that system immediately after the deposit of its declaration of acceptance with the Secretary-General of the United Nations." (CR 98/3, p. 47, para. 54.)

It should be noted, in this preliminary objection, that there are two aspects with regard to the use and application of the word "reciprocity": the "statutory reciprocity" embodied in Article 36 (2) of the Statute of the Court (i.e., "in relation to any other State accepting the same obligation") and the word "reciprocity" as used by Nigeria in its Optional Clause Declaration, wherein Nigeria recognizes "as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is to say, on the sole condition of *reciprocity* . . ." (emphasis added). Therefore, in order for Cameroon to invoke the jurisdiction of the Court against Nigeria it must clear the two hurdles: *(a)* by satisfying the request for "reciprocity" indicated by Nigeria and also *(b)* by satisfying the "statutory reciprocity" under Article 36 (2) of the Statute.

A careful examination of Nigeria's Optional Clause Declaration has been the subject of arguments by counsel on both sides and each has given different interpretations to the use of the word "reciprocity".

However, if words are to be given their ordinary meaning, Nigeria's Optional Clause Declaration contains a clear expression of reciprocity in terms of *coincidence,* when it states, *inter alia,* "in relation to any other State accepting the same obligation", and another requirement of reciprocity when it declares "on the sole condition of reciprocity". The former requirement is worded exactly as in Article 36 (2) of the Statute of the Court. It is therefore not enough for Cameroon to have attempted to satisfy the statutory requirement of reciprocity by filing its own Optional Clause Declaration as Nigeria had done in 1965; it must also have ensured that the same was done in good faith and not surreptitiously.

What is surreptitious about Cameroon's action? It is its failure to notify Nigeria formally (perhaps by a diplomatic note) of its intention to file this case before the Court. After all, both Parties are neighbours. There are arguments on both sides that somehow Nigeria knew about the proposed action of Cameroon, that it was announced in the media and discussed in some other forums like meetings of the Organization of

African Unity. This appears to me to beg the question. Nigeria ought to have been formally notified; in my view, this is an apparent prerequisite which Cameroon cannot ignore and which will later be elaborated upon.

B. The Requirement of Article 36 (4) of the Statute of the Court

Article 36 (4) makes it mandatory for any State filing its Declaration to deposit the same with the Secretary-General of the United Nations. The Secretary-General *shall* in turn transmit copies thereof to the parties to the Statute and to the Court's Registrar. This paragraph was added to Article 36 during the deliberations stage in Committee IV/1 at the San Francisco Conference.

Shabtai Rosenne, in *The Law and Practice of the International Court, 1920-1996*, referred to the commentary of Hudson on this particular point. Hudson considered, "that the insertion of this provision into the Statute was a 'detail of housekeeping but one which, in view of uncertainties which had arisen, might prove to be useful'" (Vol. II, p. 753). Neither Party denies that such a declaration falls within the provision in Article 102 of the Charter of the United Nations, which also requires the registration of such documents with the Secretariat. The issue here is not that Cameroon failed to register the Optional Clause Declaration with the Secretary-General but that the Declaration was not transmitted to Nigeria until nearly one year later. What then is the consequence of this lapse, having regard to the fact that Nigeria demands reciprocity? Of course, Nigeria's Optional Clause Declaration had since 1965 been communicated to all Members of the United Nations, including Cameroon, and had been published since then. Reciprocity in this context requires that Nigeria should have been informed about Cameroon's Optional Clause Declaration before its Application was filed with the Court, to avoid being surprised and to be assured that Cameroon had acted in good faith.

C. The Contractual Concept

In its Judgment in the *Right of Passage* case in 1957, the Court observed that by merely depositing its declaration of acceptance with the Secretary-General of the United Nations, the accepting State automatically becomes a party to the Optional Clause system in relation to any other declarant State. The Court employed the word "contractual" and stated that: "The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established . . ." (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146.) If, therefore, such a deposit of a declaration of acceptance is considered to be an *offer* to States parties to the

Statute which have not yet deposited their declarations, the important question is when *(ratione personae* and *ratione temporis)* can it be said that such an offer has been accepted by a new declarant State? The decision of the Court in 1957 and in all other similar cases, like the *Temple of Preah Vihear* case, is that such an offer is deemed to have been accepted on the date of the deposit of the new acceptance declaration with the Secretary-General of the United Nations.

The Court stated in this case that:

> "The only formality required is the deposit of the acceptance with the Secretary-General of the United Nations under paragraph 4 of Article 36 of the Statute." (*Temple of Preah Vihear, Preliminary Objections, Judgment, I.C.J. Reports 1961*, p. 31.)

Although the subject of formation of contracts by correspondence varies from one domestic legal system to another, it is nevertheless indisputable that an offer must be communicated to the offeree before a contract can be considered binding. Judge Badawi, in his dissenting opinion in the *Right of Passage* case, confirmed this view when he observed:

> "Whatever that moment may be, the position in the present case is that, in any event, and whatever criterion or moment may be adopted with regard to the formation of a contract by correspondence, it was prior to that moment. The present case is similar to one in which there is an offer which has not yet been dispatched." (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 157.)

It is difficult to perceive of a situation whereby a contract is considered as binding on a party when that party is unaware of the content and terms of that contract. There is therefore a cardinal prerequisite condition that the other party be notified that its offer had been accepted. This is the obvious omission in this case. Nigeria was not informed about Cameroon's Declaration before it (Cameroon) filed its Application before the Court. Further, in his dissenting opinion, Judge Badawi concluded that: "The offer by Portugal, contained in its Declaration and addressed to the other States, had not been accepted by India or, indeed, communicated to India." (*Ibid.*, p. 156.)

When the Court was called upon by India in 1957 to decide on its preliminary objections, two vital issues of substance (and not of procedure) were invoked in interpreting the provision in Article 36 (4); both conditions are patently mandatory because in both cases the word used in the Article is "shall". On the first condition, the Court rightly decided that the declaration must be deposited by the declarant State with the Secretary-General of the United Nations. But the Court failed to require compliance with the second prerequisite condition, that is to "transmit copies

thereof to the parties to the Statute and to the Registrar of the Court". This also is a condition precedent which the declarant State must comply with before it can validly invoke the jurisdiction of this Court. There is no other ordinary meaning or interpretation (in accordance with Article 31 of the 1969 Vienna Convention on the Law of Treaties) that would ensure that both conditions are given the same interpretation and meaning. Such a transmission is the only valid and binding means of official notification to other States parties, and in this case to Nigeria. To enable Cameroon to file a proper application before the Court there is essentially the need for Nigeria to have been notified of Cameroon's Declaration, but which was not done until eleven-and-a-half months thereafter, by which time Cameroon had filed its Application. Regrettably the Court has consistently followed its 1957 decision for over forty years, on the basis on this case-law in *Right of Passage over Indian Territory*.

The reasoning of the Court that the requirement of transmission is purely procedural was based on the view that to state otherwise could bring about uncertainty as to the moment when jurisdiction can be invoked. But all that is required of the declarant State is to ensure from the Office of the Secretary-General of the United Nations that this condition of transmission has been met by the Secretariat before filing its application, just as it should ensure that its instrument of declaration had been properly deposited with the Secretary-General. A declarant State which knows that the condition of transmission is a prerequisite, like the deposit, would ascertain that both conditions have been fulfilled before filing its application; in my view, the issue of uncertainty can thereby be disposed of without much waste of time. If the requirement of transmission is made compulsory, the declarant State would nevertheless comply with both conditions by making the necessary enquiry with the Secretary-General of the United Nations.

One other point that could have persuaded the Court in 1957 to decide that the issue of transmission is merely procedural concerned the nature of India's Declaration of Acceptance of 28 February 1940, in which it accepted the jurisdiction of the Court for a specified period "from today's date". This is the obvious difference between the case on *Right of Passage over Indian Territory* and the present case. Nigeria's Declaration is based on reciprocity and as such it is essential that it be given due notice and effect.

D. Good Faith and the Element of Surprise

It is Nigeria's argument that Cameroon's Application to the Court came as a surprise and was perhaps filed in a clandestine manner. Nigeria further alleges the absence of good faith on the part of Cameroon. Cameroon denies all these accusations and states that Nigeria was informed

about Cameroon's intention to bring the action before the Court. Cameroon refers to an earlier meeting where it mentions arbitration as a means of resolving the dispute.

Since 1957, when the Court decided the case on *Right of Passage over Indian Territory*, the doctrine of good faith in international law has further developed considerably. There is the Friendly Relations Declaration of the General Assembly of 1970 (General Assembly resolution 2625 (XXV)), which enjoins States to fulfil in *good faith* obligations assumed by them in accordance with the Charter. Article 26 of the Vienna Convention on the Law of Treaties of 1969 also provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith". The Charter of the United Nations, in paragraph 2 of its Article 2, requires that Members shall fulfil in good faith their obligations under the Charter. The Court has also made reference to the principle of good faith in much of its case-law. In 1974, in the case concerning *Nuclear Tests (New Zealand* v. *France)*, the Court observed that:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential." (*I.C.J. Reports 1974*, p. 473, para. 49.)

One issue of good faith that is very relevant to this particular preliminary objection is the case concerning *Military and Paramilitary Activities.* In this case, the United States purported to act on 6 April 1984 in such a way as to modify its 1946 Declaration, which in fact sufficiently and immediately barred the Application filed by Nicaragua on 9 April 1984. (Nicaragua had filed its Optional Clause Declaration on 24 September 1929.)

In that case, the Court found that there was sufficient basis for its jurisdiction. In its Judgment, the Court observed as follows:

> "But the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, *which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.* Since Nicaragua has in fact not manifested any intention to withdraw its own declaration, the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that from 6 to 9 April would not amount to a 'reasonable time'." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 420; emphasis added.)

If therefore the Court has moved a step ahead since pronouncing its Judgment in 1957 in the *Right of Passage* case by accepting the requirement of good faith as a prerequisite for the termination of an Optional Clause declaration, it stands to reason that it could now move further and do the same in this case.

It is the view of the Court that the principle of good faith plays an important role in Optional Clause declarations with regard to reciprocity.

The Court observed further in the same *Nicaragua* case that:

> "In fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration. *In the establishment of this network of engagements, which constitutes the Optional Clause system, the principle of good faith plays an important role; the Court has emphasized the need in international relations for respect for good faith and confidence in particularly unambiguous terms . . .*" (*Military and Paramilitary Activities in and against Nicaragua (Nigaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 418; emphasis added.)

If, *ex hypothesi,* Nigeria, being aware of the fact that Cameroon was about to file its Application on 29 March 1994 had withdrawn its Optional Clause Declaration, say on 26 March 1994, putting Cameroon in a situation similar to that of Nicaragua, the Court would have decided that Nigeria did not act in good faith and that such withdrawal would not invalidate the Application of Cameroon. The Court is now being asked to deal with "the other side of the coin" and, in my opinion, it ought to give a "reciprocal judgment" by rejecting the Application of Cameroon as an application filed *mala fide.*

It has been strongly canvassed by Cameroon that instituting proceedings before the Court cannot be considered an unfriendly act. However, it is the practice among States that cases are addressed to the Court when negotiation and agreement have failed. It is not unusual for States to consider litigation as an unfriendly act especially in the absence of a Special Agreement. A good example is found in the steps taken by Peru and Colombia in the *Asylum* case of 1950, before the Application was eventually filed by Colombia on 15 October 1949. The "Act of Lima" agreement signed on 31 August 1949, which permits either of the parties to file its application before the Court, states in its second paragraph thus:

> "The Plenipotentiaries of Peru and Colombia having been unable to reach an agreement on the terms in which they might refer the dispute jointly to the International Court of Justice, agree that pro-

> ceedings before the recognized jurisdiction of the Court may be instituted on the application of either of the Parties without this being regarded as *an unfriendly act toward the other, or as an act likely to affect the good relations between the two countries.* The Party exercising this right *shall, with reasonable advance notice, announce in a friendly way to the other Party the date on which the application is to be made." (Asylum, Judgment, I.C.J. Reports 1950*, p. 268; emphasis added.)

It is therefore not unusual for a State to consider an application filed with the Court as "unfriendly" when the same is done without notice from the applicant or from other expected sources.

E. The Case Concerning Right of Passage over Indian Territory

Two points have to be considered under this heading:

(a) that the present case is easily distinguishable from the *Right of Passage* case;

(b) that, even if it is not distinguishable from the *Right of Passage* case, the Court ought not to follow that precedent.

(a) *The differences*

First, it can be clearly observed that the issue of good faith was not strongly canvassed by India, whereas in Nigeria's case absence of good faith on the part of Cameroon was strongly argued on the basis of the available facts and the law.

Secondly, on 28 February 1940, when India made its Optional Clause Declaration, it accepted the jurisdiction of the Court for a specified period "from today's date" (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146). There is no such provision in Nigeria's Declaration; on the contrary it demands reciprocity from any declarant State.

The issue of reciprocity was not strongly canvassed by India, unlike Nigeria, and as a result the Court did not put much emphasis on it. The situation in the present case is different from the situation in the *Right of Passage* case, which concerned certain enclaves in India, the right of passage to which Portugal claimed. In the present case Cameroon is seeking a determination of all its land and maritime boundaries with Nigeria. Again in the present case, third States' rights are involved. In the Lake Chad area the interests of Chad and Niger are involved, and within the maritime area the interests of Equatorial Guinea, Sao Tome and Principe, and Gabon are involved.

(b) *The issue of precedent*

As a prelude to his book *Precedent in the World Court*, Judge Mohamed Shahabuddeen writes:

> "Decisions of the International Court of Justice are almost as replete with references to precedent as are decisions of a common law court. *Even though previous decisions are not binding, the Court relies upon them as authoritative expressions of its views on decided points of law.*" (Emphasis added.)

The principle of *stare decisis* does not apply in this Court and, that being so, it has no rule of precedent. Article 59 of the Court's Statute expressly states that a decision of the Court is only binding between the parties and in respect of that particular case. Article 62 of the Statute permits a State which considers that it has an interest of a legal nature which may be affected by the decision of the Court in a particular case to file a request to the Court for permission to intervene.

In practice, however, the Court in most cases relies upon and follows its previous decisions.

While that practice is desirable in order to ensure some degree of certainty in the jurisprudence of the Court, there are occasions when it is necessary for the Court, for one reason or the other, not to follow its previous decisions. The present case is just such a case.

This latter practice is not unknown in the Court and had been employed in a few cases: in the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* the Court declined to follow the strict rule which it had laid down in the *Status of Eastern Carelia* case regarding the rendering of an advisory opinion. Similarly, in the *Barcelona Traction* case the Court did not follow its decision in the *Nottebohm* case on the issue of diplomatic protection.

Of recent, Shabtai Rosenne has taken a keen interest in cases connected with Optional Clause declarations under Article 36 (4) vis-à-vis the *Right of Passage* case. He observed in his recent publication, *An International Law Miscellany*:

> "In the present Court this litigation tactic has been followed in five cases of high political implication: *Nuclear Tests (Australia* v. *France)* case, the *Aegean Sea Continental Shelf* case, the *Military and Paramilitary Activities in and against Nicaragua* case, and the two cases *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie.* What is more, in all of these cases the phenomenon of the 'unwilling respondent' (in the first and third, a permanent member of the Security Council) was encountered, and in the first two of those cases, that unwilling respondent refused to have any part in the proceedings, all adding to the difficulties of jurisdiction and admissibility.

The existence of this well-established procedure coupled with the last five precedents raises serious doubts about the continued

> unchecked application of the doctrine accepted by the Court in the *Right of Passage* case. Paragraph 4 was inserted into Article 36 of the Statute at the San Francisco Conference almost as a matter of routine, and like any text it is open to more than one interpretation. Since then, important developments have taken place both as regards the general law of the depositary of multilateral instruments, formulated for the first time (as stated) in the Vienna Conventions, and in State practice as exemplified in the cases mentioned." (P. 92.)

And finally he offered some suggestions, as follows:

> "The question can be asked whether what has occurred since the *Right of Passage* case does not justify a reconsideration of the doctrine of that case should an opportunity to do so present itself. At all events, it is to be hoped that should occasion arise for a revision of the Statute, more attention will be paid to the implications of Article 36, paragraph 4, than was given in 1945, and that a method will be found to protect States which have accepted the jurisdiction under paragraph 2 from the surprise deposit of a declaration in New York and the immediate institution of proceedings accompanied by a request for the indication of interim measures of protection before the respondent can be (not 'is') aware that the declaration has been deposited; and that the provisions regarding the making of declarations, their modification and their termination and other related instruments, will be co-ordinated with what is now established law and practice regarding the exercise of the functions of the depositary of multilateral treaties and other international instruments." (Rosenne, *op. cit.*, pp. 92-93.)

From all that has been said and quoted above, it is clear that the decision in the case concerning *Right of Passage over Indian Territory* should generally be revisited and to regard such case-law as bad law, because the decision failed to take into proper consideration the second mandatory condition provided in Article 36 (4) of the Statute of the Court, namely that States parties "shall" be notified before jurisdiction can be invoked by any declarant State. Both conditions, of "deposit" and "transmission", are mandatory, as set forth in that paragraph 4 of Article 36, which provision must be complied with by any litigant State that intends to file its application.

F. Other Compelling Considerations

So many circumstances of this particular case are sufficiently compelling as to persuade the Court to accept the argument of Nigeria, even on objective grounds. Firstly, Nigeria and Cameroon are neighbours and will remain so for all time, and it is therefore not in the interests of peace and good neighbourliness in that region that one Party should be dragged

to the Court against its wish. The record before the Court is that both Parties are already involved in the settlement of some of the dispute. Delimitation and demarcation have been effected in some areas and it will be in bad faith that the matter is brought to the Court while other means of settlement of the Parties' dispute is pending.

Moreover, many cases of delimitation in land and maritime disputes have been instituted in this Court by way of Special Agreement. A very recent and successful example is the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, which was concluded and judgment delivered on 3 February 1994; by the end of May of that year Libya had complied with the Judgment of the Court. There are ten other similar cases: *Minquiers and Ecrehos (United Kingdom/France), I.C.J. Reports 1953*, p. 47; *Sovereignty over Certain Frontier Land (Belgium/Netherlands), I.C.J. Reports 1959*, p. 209; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), I.C.J. Reports 1969*, p. 3; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), I.C.J. Reports 1984*, p. 246; *Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985*, p. 13; *Frontier Dispute (Burkina Faso/Republic of Mali), I.C.J. Reports 1986*, p. 554; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), I.C.J. Reports 1992*, p. 351; and the pending territorial disputes *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* and *Kasikili/Sedudu Island (Botswana/Namibia)*.

Three further cases were instituted by unilateral application: *Temple of Preah Vihear (Cambodia* v. *Thailand), I.C.J. Reports 1962*, p. 6; *Aegean Sea Continental Shelf (Greece* v. *Turkey), I.C.J. Reports 1978*, p. 3; and *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), I.C.J. Reports 1993*, p. 38; however, these cases deal either with maritime delimitation or with frontier disputes, but not with both as in the present case.

It is a well-accepted fundamental principle of international law that the jurisdiction of the Court is based on consent of the States involved. The Court echoed this view in the recent case of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain:*

> "There is no doubt that the Court's jurisdiction can only be established on the basis of the will of the Parties, as evidenced by the relevant texts." (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 23, para. 43.)

Rosenne also comments as follows on this same established principle:

> "There exists an uncontroverted principle of general international law according to which no State is obliged to submit any dispute with another State or to give an account of itself to any international tribunal. The agreement of the parties to the dispute is the prerequisite to adjudication on the merits." (*The Law and Practice of the International Court, 1920-1996*, Vol. II, p. 563.)

With this consensual basis of jurisdiction, it can be strongly argued in this case that unless such consent is genuinely given, and not forced, the Court should exercise judicial caution in proceeding with the case on its merits. Nigeria's objection is premised on the argument that the Application was a surprise and that Nigeria was not given the prerequisite notice either by Cameroon or by the Secretary-General of the United Nations before the Application was filed by Cameroon.

In a similar vein it is also important for the Court to consider the issue of justice underpinning this preliminary objection, and ask whether a jurisdiction forced on Nigeria, as an unwilling Respondent, would promote peace and good neighbourliness between the Parties and in that region. This concept of justice is not abstract; it is to be defined and determined in accordance with the provision in Article 2, paragraph 3, of the Charter. Jurisdiction is defined by Rosenne as follows:

> "Broadly speaking the expression *jurisdiction* refers to the power of the Court to 'do justice' between the litigating States, to decide the case before it with final and binding force on those States. The expression 'do justice' has been used by the Court several times, notably in the *UNAT* advisory opinion." (*The Law and Practice of the International Court, 1920-1996*, Vol. II, p. 536.)

It is for all the reasons stated above that I felt convinced that the Court ought to uphold the first preliminary objection of Nigeria and, therefore, dismiss the Applications of Cameroon.

II. The Third Preliminary Objection

The third preliminary objection of Nigeria is that "the settlement of boundary disputes within the Lake Chad region is subject to the exclusive competence of the Lake Chad Basin Commission" (CR 98/5, p. 64). Nigeria argues that the provisions of the Statute of the Lake Chad Basin Commission, annexed to an agreement dated 22 May 1964, are binding on the four States which are signatories to that agreement, including

Cameroon. It argues further that the provisions of the Statute coupled with the agreements and other understandings between the four States parties to the Agreement are binding on them, and thus Cameroon cannot file its Application under Article 36 (2) of the Statute of the Court. The two other members of the Commission are Chad and Niger. Cameroon denies the meaning that Nigeria attaches to the function and power of the Commission. Both Parties refer to the Statute of the Commission as well as the assignments given to it by the four member States of the Commission.

A careful examination of the duties of the Commission is more than sufficient to confer on it the task of dealing with all the requests that are now being submitted by Cameroon to this Court. These assignments can be viewed in two parts: those that are contained in the Statute, i.e., under Article IX, paragraphs

> "*(c)* to maintain the liaison between the High Contracting parties with a view to the most effective utilization of the waters of the Basin;
>
> *(d)* to follow the progress of the execution of surveys and work in the Chad Basin as envisaged in the present Convention, and to keep the Member States informed at least once [a] year thereon, through systematic and periodic reports which each State shall submit to it;
>
> . . . . . .
>
> *(g)* *to examine complaints and to promote the settlement of disputes and the resolution of differences*" (emphasis added),

and those that are assigned to the Commission by the authority of the member States. As evidence of this, two sub-commissions of experts were, *inter alia*, assigned to carry out the demarcation and delimitation of borders in the Lake Chad area, having as their working documents various conventions and agreements concluded between the former colonial Powers. It is important to emphasize that the sub-commissions were assigned the duty not only to delimit boundaries but also to demarcate the same. This exercise was carried out between 1989 and 1990; by 1994 the assignment had been fully completed and awaited the signing and ratification of the pertinent document by individual Heads of State. Although the document was ratified by Cameroon last year (after this case had been filed in the Court), Nigeria did not respond accordingly, presumably because of the Application of Cameroon pending in the Court.

One important and convincing argument in favour of upholding this preliminary objection is the fact that the Commission had already carried out and completed the work that the Court is now called upon by Cameroon to carry out. The four member States are not disputing the final work of the Commission and all that is left to be done is the ratification of the resulting instrument. Apart from the fact that it is difficult, under the circumstances, to establish a case of any dispute between Nigeria and

Cameroon within the Lake Chad Basin (except for Darak and adjacent islands), it can be concluded that the Parties, having submitted their claims to the Commission, are bound by its decision. The enigma, or the confusion, that might arise in this regard is the apparent bifurcation of judicial authority within the Lake Chad Basin which could occur if all the four member States agreed to ratify the Commission's instrument in the future.

In its further argument Nigeria refers to Article 52 of the United Nations Charter, and considers the Commission's assignment as being within the framework of regional arrangements "or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action . . .". The question here is whether the Lake Chad Basin Commission can be regarded as a regional organization. In my view, the Commission can be so regarded and therefore qualifies as coming under Article 52 of the Charter. The reason for this is not far-fetched: as already mentioned, paragraph IX *(g)* of the Commission's Statute empowers the Commission to examine complaints, promote settlement of disputes and resolve differences. The maintenance of international peace and security, as stipulated in Article 52 (1) of the Charter, is in accord with the assignments conferred on the Commission by this regional group of States.

Another point raised by Nigeria during its argument in the oral proceedings concerns Article 95 of the United Nations Charter, which provides that:

> "Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future."

The crucial question here is whether the Lake Chad Basin Commission is a tribunal. To my mind it is, because it is vested with all the powers, functions and duties of a tribunal and it is competent to act as one. The word "tribunal" is a generic term that encompasses various dispute settlement jurisdictions. In *Law Terminology*, a document of the United Nations, the word "tribunal" is defined as "person or body exercising adjudicatory functions outside the regular judicial system, i.e. exercising quasi-judicial functions"; tribunals are referred to as:

> "often established by statutory authority, in which case they are sometimes called statutory tribunals. Although outside the regular judicial system they are nevertheless subject to the supervisory jurisdiction of the High Court of Justice by the process of judicial review. They may be called tribunal, board, *commission*, committee or council and are divided into three categories: administrative tribunal, domestic tribunal, tribunal of enquiry . . ." (Emphasis added.)

After all, the assignment of the Commission includes not only the delimitation and demarcation of boundaries within the Lake Chad Basin; it also includes the function of dispute settlement and it therefore qualifies as an arbitral or administrative tribunal, as the case may be. Hence Nigeria rightly invokes the provision in Article 95 of the Charter. An examination of Article 94 of the Charter, which deals with the issue of compliance "with the decision of the International Court of Justice", clearly distinguishes this Court from the establishment of such a tribunal as that envisaged in Article 95 as an alternative body that could be set up instead of an application being filed with the Court.

One point is therefore clear with regard to this preliminary objection: that the Commission had been assigned and is still seised of the duty to delimit and demarcate the boundary between both Parties in the Lake Chad Basin, and the subsequent assignment of the same work to the Court is, therefore, inadmissible. Hence my conclusion that the Court lacks jurisdiction. Furthermore, the Commission's assignment, carried out for and on behalf of the four member States, is a joint affair, apparently indivisible. Both Parties in the present case are therefore obliged to recognize and abide by the exclusive competence of the Lake Chad Basin Commission.

Finally on this preliminary objection, there is need for a note of caution: that the Court should not be called upon to carry out what has already been accomplished by the Parties through the Commission.

For all these reasons it is my view that the third preliminary objection of Nigeria should be upheld.

III. The Fourth Preliminary Objection

The Court rejects the fourth preliminary objection of Nigeria that:

> "The Court should not in these proceedings determine the boundary in Lake Chad to the extent that that boundary constitutes or is constituted by the tripoint in the Lake." (Preliminary Objections of Nigeria, Vol. I, p. 84, para. 4.12.)

However, I hold a contrary view. The reason for so doing is that, having regard to the position of the tripoint, it is difficult if not impossible to entertain the request of Cameroon.

Cameroon disagrees with this preliminary objection and argues that the case-law of the Court does not support the argument of Nigeria. Both Parties made mention of the *Frontier Dispute (Burkina Faso/Republic of Mali)*, where the Chamber of the Court conceded that it had jurisdiction to adjudicate on the case notwithstanding the fact that the endpoint of the frontier lies on the frontier of another, third State. The view of Cameroon is that the *Frontier Dispute* case, as well as the case of the *Terri-*

torial Dispute (*Libyan Arab Jamahiriya/Chad*), are case-law that cannot be distinguished from this present case as claimed by Nigeria.

As I have mentioned earlier in this opinion, a case of this nature requires the unequivocal consensus of both Parties to enable the Court to be seised of the matter. For example, both the *Frontier Dispute* and *Territorial Dispute* cases were brought before the Court by Special Agreement. Another important factor in favour of Nigeria's argument is the fact that its interests and those of Chad and Niger are interwoven within the Lake Chad Basin, in respect of which the Commission has performed its obligations of demarcation and delimitation.

But the position of Chad with regard to the tripoint is more relevant in this case when compared to the cases of *Frontier Dispute* and *Territorial Dispute*. Mention has been made of earlier clashes between Nigeria and Chad in the same area which might or might not affect the tripoint. It can therefore be said that the interests of Chad and to some extent those of Niger constitute the subject-matter of this case which, to my mind, cannot be heard on the merits without Chad intervening as a party. Of course the immediate answer on this could be the invocation of Article 59 of the Statute, in that the decision of the Court is binding only on the parties. However, this is a case which is in line with the cases of *East Timor (Portugal* v. *Australia)* and *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*. The earlier case of *Monetary Gold Removed from Rome* is also relevant here. The point has been made by Cameroon that its Applications relate only to the issue of the boundary between it and Nigeria. The issue here is not what Cameroon files or says but what, practically, is on the ground as to the position of the tripoint between Chad and the Parties. Quite definitely, the frontier between Cameroon and Nigeria will affect the frontier between Cameroon and Chad by virtue of the tripoint. A desirable situation that would certainly confer jurisdiction on the Court would be the seising of the Court by way of special agreement between Cameroon, Nigeria and Chad. For all these reasons my conclusion is that the fourth preliminary objection of Nigeria ought to be upheld.

IV. The Fifth Preliminary Objection

In my view, the Court ought to uphold the fifth preliminary objection as framed by Nigeria which regrettably it rejected, hence my disagreement with the decision of the Court. There are two important reasons which underlie my decision to take a contrary view to that of the Court: in effect the Court has failed to respond to the preliminary objection as framed and presented by Nigeria, and further the conclusions reached by the Court are contradictory in terms.

Nigeria in its fifth preliminary objection maintains that there is no dispute between it and Cameroon "concerning boundary delimitation as

such throughout the whole length of the boundary from the tripoint in Lake Chad to the sea". It maintains that there simply is no evidence of such a dispute, either in Cameroon's original Application or in its Additional Application filed on 6 June 1994. It went further to particularize the objection as follows:

> "(1) there is no dispute in respect of the boundary delimitation as such within Lake Chad, subject to the question of title to Darak and adjacent islands inhabited by Nigerians;
>
> (2) there is no dispute relating to the boundary delimitation as such from the tripoint in Lake Chad to Mount Kombon;
>
> (3) there is no dispute relating to the boundary delimitation as such between Boundary Pillar 64 on the Gamana River and Mount Kombon; and
> (4) there is no dispute relating to the boundary delimitation as such between Boundary Pillar 64 on the Gamana River and the sea" (Preliminary Objections of Nigeria, Vol. I, p. 87).

Cameroon denies the assertion of Nigeria and argues that in fact there are not only disputes within the Lake Chad Basin area and on the frontier to the sea but that there are also maritime delimitation disputes. The question put to Nigeria by the Court was not limited to the land boundary but speaks of the whole boundary. Consequently, in the conclusion reached by the Court, its finding is that there is a dispute between the Parties concerning the "boundary as a whole". It is thus clear that, strictly speaking, the fifth preliminary objection of Nigeria as put before the Court has not been specifically addressed. The Court ought to have limited itself to the preliminary objection as framed by Nigeria and therefore it cannot be said that the fifth preliminary objection of Nigeria has been properly dealt with.

As claimed by Nigeria there has been partial demarcation of the boundary. In fact, Nigeria points out that "something a little over 200 miles of the present boundary has been clearly demarcated by the erection of boundary pillars" (CR 98/2, p. 21). This is not denied by Cameroon. Nigeria goes further to state:

> "Even taking a generous view of the extent of the boundary affected by these local incidents (say, 1/4 of a mile of boundary for each 'incident') they concern, even if all of them were relevant (which they are not), perhaps some 10 or a dozen miles of its length. That cannot be taken as representing doubt or dispute as to the whole length of that 1,000-mile boundary." (CR 98/2, p. 25.)

Thus it may be concluded that, contrary to the claim of Cameroon, the area in dispute can be considered as relatively minor or even negligible.

In any case, at least it is clear from the alleged facts of the incidents and disputes presented by the Parties that there is no question of the entire length of the boundary from Lake Chad to the sea being in dispute.

Another aspect of Nigeria's fifth preliminary objection concerns the legal and geographical scope of the boundary dispute. It appears that, in the view of the Court, Nigeria has not definitively made its position clear regarding the course of the boundary, or at least does not agree with the claim of Cameroon. Equally, the Court cannot ascertain from the answer given by Nigeria (based on the question put to it as already referred to) what is its own view of the legal scope of the dispute either now or in the future. Since Nigeria has not filed its Counter-Memorial, it is not bound to disclose its line of defence at this stage of the procedure. Hence, as concluded by the Court, "the exact scope of this dispute cannot be determined at present" (Judgment, para. 93). Yet the Court still concluded that "a dispute nevertheless exists between the two Parties, at least as regards the legal bases of the boundary" *(ibid.)*. In my view, these are contradictory statements which I do not agree with. In fact, Cameroon's claim in its Application ought to have been restricted to the disputed boundary locations and area of incidents, which amount to less than 5 per cent of the entire boundary.

Again, the Court ought to have restricted its Judgment to the preliminary objection as framed by Nigeria, and amplified therein under the enumerated four points. Based on this view, the Court initially and rightly concluded that: "On the basis of these criteria, there can be no doubt about the existence of disputes with respect to Darak and adjacent islands, Tipsan, as well as the Peninsula of Bakassi." (Paragraph 87 of the Judgment.)

The Court should therefore have concerned and indeed limited itself exclusively to this clear area of boundary disputes, undenied by both Parties. This view is further confirmed by the Court when it observes:

> "All of these disputes concern the boundary between Cameroon and Nigeria. However, given the great length of that boundary, which runs over more than 1,600 km from Lake Chad to the sea, it cannot be said that these disputes in themselves concern so large a portion of the boundary that they would necessarily constitute a dispute concerning the whole of the boundary." (Para. 88.)

In effect, the Court on this preliminary objection considered the entire area from Lake Chad to the sea as being in dispute rather than the locations referred to by Nigeria.

The Court's failure to limit its decision to the preliminary objection of Nigeria as framed calls into question its Judgment in view of the *non*

ultra petita rule. The Court addressed a similar matter in submissions in the *Asylum* case (*I.C.J. Reports 1950*, p. 402). It is not for the Court to expand or enlarge the scope of the preliminary objection as framed and presented by an applicant, nor is the Court called upon to modify it *suo motu*; the objection must be considered and decided upon as put forward by the Applicant in its preliminary objection.

For example, France and the United Kingdom, in their Special Agreement in the *Minquiers and Ecrehos* case, asked the Court to decide which of the parties owns these group of islands. The Court might perhaps have decided that the islands had the status of *"res nullius"* or of *"condominium"* (*I.C.J. Reports 1953*, p. 52), but it was obliged to restrict itself to determining "which of the Parties has produced the more convincing proof of title to one or the other of these groups, or to both of them" *(ibid.)*.

Rosenne, in *The Law and Practice of the International Court, 1920-1996,* is of the opinion that,

> "in principle it is the duty of the Court, in deciding on the basis of international law the disputes that are submitted to it, to limit itself to the terms of its remit — the special agreement, the submissions, or the question put for an advisory opinion, as the case may be. This — the *non ultra petita* rule — gives the parties the last word in the ability of the Court to settle their dispute." (Vol. I, p. 173.)

In conclusion, had the Court followed this principle and restricted itself to the content of the fifth preliminary objection, as formulated and argued by Nigeria, it might have arrived at a decision different from the one reached in regard to this objection.

It is for all these reasons that I have voted against the decision of the Court.

V. The Sixth Preliminary Objection

I voted against the decision on the sixth preliminary objection because I am convinced that Nigeria is justified in its objection that the Application filed by Cameroon does not meet the required standard of adequacy as to the facts on which its Application is based, particularly in relation to the dates, circumstances and precise locations of the alleged incursions and incidents by Nigeria, in alleged breach of its international responsibility. A careful perusal of Cameroon's Applications reveals incongruities, irregularities, imprecision and mistakes.

Some of these incongruities are patent from the Applications as filed on 29 March 1994 and 6 June 1994. With reference to the requirement to be satisfied by Cameroon, its Applications must specify,

> "as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; *it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based*" (Art. 38 (2) of the Rules; emphasis added).

While it is true that Cameroon sufficiently specified the legal grounds upon which its Applications are based, it has, however, failed to specify adequately the precise nature of the claim or to provide a "succinct statement of the facts and grounds on which the claim is based".

For Cameroon to invoke Nigeria's international responsibility and consequent obligation to make reparation, it is not enough for Cameroon to make general and unsubstantiated statements about incidents. Cameroon must supply full particulars of the place, the time and the nature of the alleged incidents, and also make it clear precisely how these were serious enough to call into question Nigeria's international responsibility as recognized by international law.

It is true, as the Court stated, that "succinct" does not mean "complete", but it connotes conciseness, and that is a requirement which Cameroon failed to satisfy in its Applications. In its oral argument Nigeria contended that

> "the respondent State, and the Court, need, as a minimum, to know four things — the essential facts about *what* is alleged to have occurred, *when* it is supposed to have taken place, precisely *where* it is supposed to have taken place (especially in relation to any relevant boundary), and *why* the Respondent is thought to bear international responsibility for the incident" (CR 98/2, p. 28).

In its pleadings Cameroon stated that, in order to establish Nigeria's responsibility, its Applications were only indicative of the nature of such responsibility and that the allegations contained therein would be amplified when the matter reached the merits stage.

However "indicative" such a statement may be, it must be sufficiently clear as to the nature of Nigeria's responsibility. And since Cameroon fails in this regard, the Court ought not to reject Nigeria's sixth preliminary objection.

VI. The Seventh Preliminary Objection

The seventh preliminary objection of Nigeria contends that there is "no legal dispute concerning delimitation of the maritime boundary between the two Parties which is at the present time appropriate for resolution by the Court" (Preliminary Objections of Nigeria, Vol. I, p. 113). In support of this contention Nigeria gave two reasons:

"(1) In the first place, no determination of a maritime boundary is possible prior to the determination of title in respect of the Bakassi Peninsula.

(2) Secondly, at the juncture when there is a determination of the question of title over the Bakassi Peninsula, the issues of maritime delimitation will not be admissible in the absence of sufficient action by the Parties, on a footing of equality, to effect a delimitation 'by agreement on the basis of international law'." (Preliminary Objections of Nigeria, Vol. I, p. 113.)

On the first reason, I agree with the conclusion reached by the Court that this is simply a question of method. It is true that the Court determines its procedure and could easily arrange its own adjudicatory process so as to ensure that the land disputes are dealt with first, before embarking on the maritime dispute. As a matter of fact, this does not appear to me as an issue of preliminary objection and as such it has been rightly rejected.

However, I hold a contrary view to the conclusion reached by the Court on the second strand of Nigeria's seventh preliminary objection. Here the issue is an important one under international law, as it relates to the provisions of the United Nations Law of the Sea Convention of 1982. What Nigeria contends here is that the issue of maritime delimitation is inadmissible in the absence of negotiation and agreement by the Parties on a footing of equality to effect a delimitation. In other words, Nigeria alleges that Cameroon failed to seek first an attempt for a delimitation by agreement based on international law under the principles and provisions of the United Nations Convention on the Law of the Sea of 1982. The relevant provisions are Articles 74 and 83. Article 74, paragraphs 1 and 2, provides as follows:

"1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts *shall be effected by agreement on the basis of international law*, as referred to in Article 38 of the Statute of the International Court of Justice, *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." (Emphasis added.)

Article 83, paragraphs 1 and 2, provides as follows:

"1. The delimitation of the continental shelf between States with opposite or adjacent coasts *shall be effected by agreement on the basis of international law*, as referred to in Article 38 of the Statute of the International Court of Justice, *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." (Emphasis added.)

As quoted above, the provisions of the two Articles are similar, but while one deals with the exclusive economic zone (Art. 74), the other deals with the issue of the continental shelf (Art. 83). Furthermore, both Parties are signatories to the Convention, which they have also ratified. The question now is whether these provisions are binding on both of them; in my view, there is no doubt about that. Before instituting an application in this Court, it is a condition precedent that both Parties ought to attempt genuinely to agree on the settlement of their maritime boundary dispute, failing which such a matter could be brought before the Court. These are mandatory provisions for both Parties. Cameroon, for its part, contends that there was no compelling reason to negotiate nor reach an agreement before filing an application before the Court, and went further to state that attempts were made to reach an agreement but failed. While it may be true to say that there was an attempt to negotiate and agree on their maritime boundary delimitation up to point G, there is however no evidence to indicate that there was any attempt to reach such an agreement regarding their maritime disputes beyond that point. To institute therefore an action in the Court without compliance with the provisions set out above, under the Law of the Sea Convention, is a fatal omission which makes such an application inadmissible. In any case, the Court, pursuant to Article 38 of the Statute, must apply international law and "international conventions, whether general or particular . . ." (para. 1 *(a)*). This has always been the position under general international law and it was first affirmed by the Court in 1969 in the *North Sea Continental Shelf* cases, which emphasize the need for parties to be given the opportunity to negotiate, when it held that

> "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful . . ." (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 47).

A clear guideline was expressed in the *Gulf of Maine* Chamber case that first an agreement must be sought, following negotiations which should be conducted in good faith with a clear and honest intention of achieving a successful result. And the Chamber went on to state in its Judgment that:

> "Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence." (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 299.)

It is therefore immaterial to determine whether this is a procedural or a substantive issue. What is clear is that the process of negotiation and attempt to reach an agreement in good faith must precede any reference to a third-party adjudication. In any event, I strongly believe that without complying with the prerequisite condition of negotiation and attempt to reach an agreement, Cameroon failed to comply with a requirement of substance and not just a merely procedural one. This is not a question of jurisdiction under Article 36 (2) of the Statute, but one of admissibility. My conclusion is that the Applications of Cameroon are not admissible as regards a dispute over the maritime boundary.

VII. The Eighth Preliminary Objection

The last preliminary objection of Nigeria appears to me to be a sound one, which ought to be upheld by the Court. Unfortunately the Court also rejects it. Here, Nigeria argues "that the question of maritime delimitation necessarily involves the rights and interests of third States and is to that effect inadmissible" (Preliminary Objections of Nigeria, Vol. I, p. 133). It states that there are five States involved within the Gulf, which is "distinctly concave". These States are Equatorial Guinea, Gabon, Sao Tome and Principe, and the two Parties in the present case. Nigeria, in its argument, tries to distinguish and differentiate the situation of this particular case from other cases like those of the *Frontier Dispute,* the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* as well as the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*. Cameroon, on its part, argues to the contrary, that all these cases are relevant and that they should be followed in the present case. Besides, it invokes the provision of Article 59 to the effect that a judgment in this case would be binding on no other States than the Parties.

The subject-matter of this preliminary objection concerns maritime delimitation beyond point G, which relates to the exclusive economic zone. Agreed, that a delimitation exercise between the Parties may not affect the interests of third States as such, but, in this particular case, it is difficult to effect any maritime delimitation beyond point G without calling into question the interests of other States, particularly Equatorial Guinea and Sao Tome and Principe. In accordance with the jurisprudence of the Court, it cannot decide a dispute between two parties without the consent of those States whose interests are directly affected, unless they intervene in such a matter.

It is for all these reasons that the Court ought to refuse the Application of Cameroon based on maritime delimitation of the area beyond point G and uphold the eighth preliminary objection of Nigeria.

VIII. The Second Preliminary Objection and the First Part of the Seventh Preliminary Objection

However, I agree with the decision of the Court in rejecting the second preliminary objection of Nigeria, whereby it maintains that for a period of 24 years prior to the filing of Cameroon's Application both Parties had accepted a duty to settle all boundary disputes through "the existing boundary machinery" and that this constitutes an implied agreement and that Cameroon is thereby estopped from invoking the jurisdiction of the Court. I believe that, having regard to all the facts presented by both Parties in this case, Cameroon is not estopped from invoking the jurisdiction of the Court and that this duty cannot override the provision in Article 33 of the Charter which permits parties to seek the settlement of their disputes by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement . . . or other peaceful means of their own choice". In addition, Nigeria referred its grievance concerning the armed incident of 1981 to the Organization of African Unity. In the circumstance, it is difficult to agree with Nigeria that this is a case of *pacta sunt servanda* or estoppel.

Furthermore, I agree with the decision of the Court, as already mentioned above, that the first part of Nigeria's seventh preliminary objection deals with the matter of methodology and as such the objection, which in my opinion is unconvincing, has been rightly rejected by the Court.

Conclusion

The general conclusion I have reached with regard to the eight preliminary objections filed by Nigeria is that, whereas I agree generally with the decisions of the Court on the second and the first part of the seventh preliminary objections, I do however disagree with the decisions reached by the Court on the first, third, fourth, fifth, sixth and the second part of the seventh and the eighth preliminary objections respectively.

As already mentioned, the most important objection raised by Nigeria is the first one, which deals with Article 36 of the Statute, particularly its paragraphs 2 and 4. Needless to say that there would have been no need for the Court to consider the remaining seven preliminary objections if the first one had been upheld.

I am also of the view that the *Right of Passage over Indian Territory* case is no longer good case-law. In 1957, when the Court had the first opportunity of interpreting the provision in Article 36 (4), the decision, while positively and effectively asserting the legal position as to the *deposit* of the declaration of acceptance as a condition precedent to invoking the jurisdiction of the Court, failed to do the same with regard

to the second prerequisite condition: that copies of such instruments must be *transmitted* to all member States. That precisely is what the Court is called upon to regularize in this case, which it failed to do. This is a unique opportunity for the Court to do so, in order not to drag an unwilling Respondent to Court without its *real* consent. To do so may not be in the interests of peace within that enclave. Most cases of this nature that have come to the Court have come by way of Special Agreement and it would have been better for the Parties to be persuaded by the Court to bring the case in this manner. That would not be a unique attempt, having regard to what happened in the case concerning the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*. There are other considerations of a compelling nature to warrant an exercise of caution on the part of the Court. If one considers the fact that Cameroon is seeking the delimitation of the entire maritime and land boundary between it and Nigeria, the fact that there had been allegations and counter-allegations of border incidents and the fact that the Parties have on the ground various commissions to effect demarcation, delimitation and pacific settlement of disputes — all these facts are cogent reasons why the Parties should be enjoined to come to Court by way of Special Agreement.

Furthermore, it is essential that the Court should handle this matter with care to ensure that peace will reign within that region at the end of this litigation. In this regard there is also need for caution to ensure that the jurisdiction of the Court will not be an exercise in futility if, for example, what is required of the Court is ultimately accomplished by the Lake Chad Boundary Commission.

Finally, in dealing with cases between States, adherence to the general principles of international law as expressed in Article 2, paragraph 1, of the Charter (regarding the principle of the sovereign equality of Members) must be observed. As stated above, the jurisdiction of the Court is based on genuine consent of the parties and nothing should be done to derogate from this basic principle. As observed in the dissenting opinion of Judge Chagla in the *Right of Passage over Indian Territory* case:

> "I should like to make one general observation with regard to the question of the jurisdiction of the Court. It has been said that a good judge extends his jurisdiction. This dictum may be true of a judge in a municipal court; it is certainly not true of the International Court. The very basis of the jurisdiction of this Court is the will of the State, and that will must clearly demonstrate that it has accepted the jurisdiction of the Court with regard to any dispute or category of disputes. Therefore, whereas a municipal court may liberally construe provisions of the law which confer jurisdiction upon it, the International Court on the other hand must strictly construe the provisions

of the Statute and the Rules and the instruments executed by the States in order to determine whether the State objecting to its jurisdiction has in fact accepted it." (*I.C.J. Reports 1957*, p. 180.)

(Signed) Bola AJIBOLA.