SEPARATE OPINION OF JUDGE MBAYE

[Translation]

General considerations deemed helpful for a better understanding of the dispute — Applicability of the Thomson-Marchand Declaration — Delimitation/demarcation — Effectivités *and legal title — Purpose and value of colonial treaties — Nature of treaties of protection — Legal value of Maroua Declaration — Court's jurisprudence on maritime delimitation, application — Reparation adjudged sufficient for injury suffered and rendering it unnecessary to determine responsibility therefor.*

INTRODUCTION

1. I share the findings reached by the Court; it is absolutely correct:

(a) in concluding, in respect of the Lake Chad region, having determined the endpoint of the lake boundary at the "mouth of the Ebeji", that

— "as regards the settlements situated to the east of the frontier confirmed in the Henderson-Fleuriau Exchange of Notes of 1931, sovereignty has continued to lie with Cameroon"; and

(b) in confirming, as regards Bakassi, that "sovereignty over the peninsula lies with Cameroon".

In so doing, the Court has made the law prevail over the fait accompli.

2. The proceedings have thus drawn to a close after passing through numerous phases which, although costing a great deal of time, did at least have the merit of clarifying the substantive issue before the Court. This has enabled the Court to achieve a comprehensive and definitive settlement of a border dispute which for some 19 years has divided two brother countries of Africa: Cameroon and Nigeria. This dispute, in the form that it was referred to the Court, concerned the entire course of the boundary, both terrestrial and maritime, separating the areas over which each State has jurisdiction.

3. Like the Parties, the Court divided the boundary into a number of sectors:

— the Lake Chad region,
— the land boundary between Lake Chad and Bakassi,
— Bakassi,
— the maritime boundary.

4. Apart from the preliminary objection that the Court joined to the

merits by its Judgment of 11 June 1998, three further issues were added to the matters arising from the points mentioned above. Those issues were:

— the intervention of Equatorial Guinea,
— Cameroon's responsibility claim,
— Nigeria's counter-claim.

5. Although I voted in favour of the entire *dispositif* of the Judgment, I felt that it would be appropriate to draft a separate opinion setting out a number of considerations emphasizing certain points that I regard as being of particular significance, or addressing issues on which my responses may be somewhat different to those given by the Court. In the present opinion I will confine myself to brief comments on the *Lake Chad region* and *Bakassi*, after saying a few words about the principle of the intangibility of colonial frontiers, before going on to make a number of observations on *maritime delimitation* and on the *issue of responsibility*.

6. But first, it seems to me that a few preliminary remarks of a general nature would be helpful.

SECTION 1. GENERAL CONSIDERATIONS

7. I propose to make a number of observations linked to the context of the dispute which may help to make it more readily understandable.

1. The States in Question

8. The dispute submitted to the Court involved two States of sub-Saharan Africa, on the one hand Cameroon and on the other Nigeria, a country regarded on that continent as, relatively speaking, a great Power. The Agent of Nigeria said as much in guarded terms on 28 February 2002 in opening the first round of his country's oral argument. He gave an impressive list of the substantial roles which Nigeria has played and continues to play in Africa.

It is a fact that, in Africa, Nigeria is perceived as a *Power* not only in demographic terms (120 million inhabitants), but also in economic, social and military terms. Within the sub-region where it is situated, that State is both respected and feared, and those feelings extend over a good part of western and central Africa. It is not impossible that Nigeria seeks, to some extent and indeed quite legitimately, to derive advantage from that fear which it inspires. The circumstances and events of the present dispute would certainly not contradict such an observation.

2. The Means Chosen by the Parties to Defend Their Positions

9. Each of the Parties to the present dispute chose the ground on which it wished to position itself in order to argue its case.

Thus in this case, from the filing of the Application right up to the end of the oral pleadings, one had the impression that there was one Party which clung for all it was worth to the letter of the law, and one which relied more on facts, albeit dressed up in a legal guise.

10. On the one side we had Cameroon, which had placed the matter before the OAU, then the United Nations, and then the Court, and on the other there was Nigeria, which had criticized Cameroon for each of these initiatives concerning an issue which, according to Nigeria's representatives, could have been settled by dialogue and negotiation.

11. Cameroon relied on the principle of *uti possidetis juris* and generally on legal titles founded essentially on treaties, agreements, declarations, and decisions of the League of Nations and of the United Nations.

12. Nigeria, for its part, sought out weaknesses capable of undermining the validity of the legal titles relied upon by Cameroon, and based the essence of its position before the Court on *effectivités*.

13. This situation cannot have escaped the Court's notice and neither the written pleadings nor the argument of the Parties' counsel have been able to efface the impression produced by it.

Where Cameroon invoked a legal title, Nigeria spoke of history, of geography, of ethnology and of the "historical consolidation of title". Of course, this is not a criticism, simply an observation. Each party to proceedings is free to choose the terrain on which it wishes to place the judicial debate.

3. *The Raison d'Être for Respect for Colonial Boundaries*

14. Many countries of sub-Saharan Africa, and more particularly those of western and central Africa, have been troubled since independence by an instability which precludes a serious and continuous search for true solutions to underdevelopment. Such instability fosters poverty.

15. The founding fathers of the African nations, who sought to disprove the forecast that Africa had "got off to a bad start", had decided, as the Chamber pointed out in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, "at their first summit conference after the creation of the Organization of African Unity", in resolution AGH/Res.16 (1), to adopt the principle of *uti possidetis juris* (*I.C.J. Reports 1986*, p. 565, para. 22). At all costs they wanted to avoid having the boundaries bequeathed by the colonial Powers (however absurd, illogical or badly drawn, and even where they divided ethnic groups or tribes), called into question. This is clear from the fact that, at the conference of African peoples held in Accra in December 1958 (thus less than six years before the Cairo conference), African leaders stated in a resolution on frontiers that: "the artificial barriers and boundaries drawn by imperialists to divide the African peoples to the detriment of Africans must be abolished or adjusted . . ." (cited by Zidane Mériboute in *La codification de la suc-*

cession d'Etats aux traités — Décolonisation, sécession, unification, p. 119).

The African nations thus had to choose between two routes. They were well aware of the evils which could follow from a rejection of the colonial frontiers in terms of the stability of the new States. They chose to opt for the intangibility of those frontiers.

16. That is why both Parties in the present case have paid particular attention to the issue of respect for colonial boundaries. That is a further reason why I feel I should return to that issue.

17. One of Nigeria's counsel stated at the hearing of 6 March 2002 that this is an important case and that the Court's decision "will have serious consequences". He was absolutely right.

Indeed the whole of Africa has been awaiting the Court's Judgment, fearing any impugnment of the principle of the "intangibility of colonial frontiers".

18. That is also why I regret that the Court, while not rejecting that principle (far from it) and applying it in practice, did not find it necessary to discuss the issue further, merely stating, in relation to Bakassi in particular, that it "has not found it necessary to pronounce upon the arguments of *uti possidetis*".

19. Respect for colonial boundaries is a principle of exceptional significance in Africa. The strict application of such respect is a prerequisite for peace and security on that continent. The dispute between Cameroon and Nigeria has raised new questions as to the principle's specific scope. It was the Court's duty forcibly to reaffirm the obligation of unconditional respect incumbent upon every African State.

The reason for this was set out by the Court in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case:

> "In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples." (*I.C.J. Reports 1986*, p. 567, para. 25.)

4. Nationality and Ethnicity in Africa

20. In relation to the Lake Chad region, the Court encountered the issue of nationality/ethnicity conflicts that are so frequent in Africa.

We should never lose sight of the fact that, in Africa, the majority of countries were attributed their nationality only some 50 years ago.

By contrast, ethnic groups have existed, and have often straddled the

international boundaries between the new States, since time immemorial.

As a result certain authors have written that in Africa, "contrary to what occurred in Europe, the State preceded the Nation", although this may not always be the case.

21. Whatever the truth of the matter, a nationality which has been superimposed on ethnic groupings is, without the intervention of the public authorities, felt much less strongly than ethnicity. It may very well be that two Kanuris (an ethnic group in the Lake Chad region) of different nationalities feel much closer to one another than a Kanuri and a Hausa (another ethnic group in that region) of the same nationality. Certain serious problems of the African continent are explicable on this basis. One can thus be easily led astray in good faith, attributing to nationality what is solely a matter of ethnicity. Such a proposition might be applied in the present case to the Lake Chad region and to the arguments of Nigeria in this respect as regards the *Nigerian villages*.

It was this situation in Africa that impelled Pélissier to write in *Les Paysans du Sénégal*, on page 23: "National consciousness has not erased the rich diversity of a long past . . . Deeply Senegalese for a few decades only, our regions have been since time immemorial . . . Wolof, Serer, Toucouleur, Manding, Diola, Balant, etc. . . ."

22. Throughout the length of the boundary between Cameroon and Nigeria, it would seem that, for a very long time and notwithstanding the various political statuses enjoyed by these regions in the course of their history (German, British or French possessions, independence), the indigenous populations have settled according to their ethnic affinities and their economic needs in total disregard of territorial boundaries and nationality, and that Governments have subsequently sought to take advantage of the particular situations thus created. This context did not escape the attention of the Court in the present case (see para. 67 of the Judgment). That is why Africa's salvation lies in respect for colonial boundaries, expressed unequivocally and without recourse to subtle distinctions. Later on we will consider the two exceptions to this proposition.

SECTION 2. DETERMINATION OF THE COURSE OF THE LAKE AND LAND BOUNDARY BETWEEN THE TWO STATES

23. The Court, as always in disputes like the present case, has determined the boundary between the two countries with precision, without assuming the role of a demarcation authority (para. 84 of the Judgment).

24. I deliberately use the word "determination" and am employing it in a general sense which encompasses the terms "delimitation", "demarcation" and "indication". I find it particularly appropriate in the present case, with "determine" meaning here: to indicate with precision. The Court uses an equivalent term, in particular in paragraph 85 of its Judg-

ment when it states the purpose of its task as being "*to specify definitively* the course of the . . . boundary . . ." (emphasis added by the Court). It nevertheless defines and distinguishes between the two terms *delimitation* and *demarcation*, as we shall see later.

1. The Boundary in the Lake Chad Region

A. The instruments applicable

25. When we address the question of whether or not there exists a boundary between Cameroon and Nigeria in Lake Chad, we find ourselves dealing mainly with the *1919 Milner-Simon Declaration*. That Declaration was clarified in 1930 by the *Thomson-Marchand Declaration*, which was confirmed and *incorporated* in the Henderson-Fleuriau Exchange of Notes between France and Great Britain on 9 January 1931.

Those instruments had never been challenged until quite recently. They describe the boundary in some detail from the "junction of the three old British, French and German boundaries at a point in Lake Chad 13° 05″ latitude north and approximately 14° 05″ longitude east of Greenwich" to the Atlantic Ocean (Preamble to the Thomson-Marchand Declaration).

26. The Thomson-Marchand Declaration contains 138 paragraphs. Signed on behalf of Great Britain by the Governor of the Colony and the Protectorates of Nigeria and on behalf of France by the Governor of the French Cameroons, it is, in my view, together with the Notes and the accompanying Moisel map, a legally valid agreement which binds the two Parties in the present case.

27. Nigeria and Cameroon agree on this point. The Court clearly stated that:

> "the Thomson-Marchand Declaration, as approved and incorporated in the Henderson-Fleuriau Exchange of Notes, has the status of an international agreement. The Court acknowledges that the Declaration does have some technical imperfections and that certain details remained to be specified. However, it finds that the Declaration provided for a delimitation that was sufficient in general for demarcation." (Para. 50 of the Judgment.)

28. However, as Nigeria had levied a certain number of criticisms at the Declaration, it would not be unhelpful to address that one of those criticisms which seems to me to carry the most weight for the Respondent, notwithstanding the clear demonstration by the Court in reaching the conclusion cited above.

B. Legal force and significance of the Thomson-Marchand Declaration

29. For Nigeria, the Exchange of Notes which might give the Thomson-Marchand Declaration the appearance of an agreement in reality did

not fix the boundary between its territory and that of Cameroon. Nigeria based its argument on the following provision of the Notes exchanged by the French and British authorities, in which we read in almost identical terms that:

> "The Declaration is not the product of a boundary commission constituted for the purpose of carrying out the provisions of Article 1 of the Mandate, but only the result of a preliminary survey conducted in order to determine more exactly than was done in the Milner-Simon Declaration of 1919 the line ultimately to be followed by the boundary Commission."

30. I would first of all observe that in the "Notes" from the representatives of France and Great Britain, the above-cited passage is followed by this passage:

> "nonetheless the Declaration does in substance define the frontier; and . . . it is therefore desirable that the agreement embodied therein shall be confirmed by the two Governments in order that the actual delimitation of the boundary may then be entrusted to a boundary commission, appointed for the purpose in accordance with the provisions of Article 1 of the Mandate".

This passage is particularly helpful in shedding light on the intention of the signatory parties.

31. Nigeria argued that the Thomson-Marchand Declaration represented only an announcement of the procedure to be followed and of a programme to be implemented.

32. Cameroon, on the other hand, accorded it the binding force of a valid legal instrument.

33. It is readily apparent simply from reading paragraph 3 of the two Notes that there was a will on the part of both parties, Great Britain on the one hand, France on the other, to resolve the problem of the boundary of their "possessions", as they were called at that period. Thus in paragraph 3 the word "confirm" appears twice as does the word "agreement". It seems to me not unhelpful to quote paragraph 3, which reads as follows:

> "His Majesty's Government note that the French Government by their note under reference confirm, for their part, the agreement embodied in the Declaration; and I have the honour in reply to inform Your Excellency hereby that His Majesty's Government similarly confirm this agreement."

There was certainly an agreement, as the Court found.

34. In the course of oral argument, Nigeria eventually recognized that the Declaration was an instrument which both Parties accepted. However, it noted that the Declaration contained defects which required more than a simple process of demarcation. Nigeria enumerated 22 such defects, which the Court examined in detail in paragraphs 86 to 192 of its Judgment. I will not dwell on that.

35. One of Nigeria's counsel claimed that the texts delimiting the frontier were so badly drafted in a number of places that they could not be regarded as instruments of delimitation, and that such delimitation remained to be effected. Nigeria's counsel stated that "the colonial boundary agreements of the period 1906 to 1931 did not produce a conclusive delimitation in the Lake Chad region". Counsel then listed 33 villages in the Lake Chad region which he claimed were Nigerian, with the apparent exception of one, said to be inhabited by Malian nationals.

The Court did not accept his claim.

C. Delimitation — demarcation

(i) *General considerations*

36. The Parties stressed the distinction between delimitation and demarcation (para. 84 of the Judgment). This debate, looked at from a viewpoint contemporary with the instruments applicable in the present case, was rightly approached by the Court with caution. It gave a clear definition (in the paragraph cited) of delimitation on the one hand and demarcation on the other. But the important thing was to determine the boundary between the two States. The Court did so without overstepping its judicial role, confining itself to interpreting and applying the legal instruments which delimit that boundary.

37. Thus it was for the Court in this case to interpret the Fleuriau-Henderson Exchange of Notes and the Thomson-Marchand Declaration. It performed that task successfully.

38. In my view, when the two authorities representing Great Britain and France speak in their respective Notes of: "the actual delimitation *[délimitations proprement dites]*", what they mean is what in this case the Parties finally agreed to call "demarcation".

I believe that, on studying the abundance of detail contained in the Thomson-Marchand Declaration, one is bound to reach that conclusion, subject to the defects or "defective delimitations" cited by Nigeria.

39. Nigeria enumerated a number of such defective delimitations, as I have already pointed out. The Court examined each of them and, through reasoning based on law or on findings of fact, reached conclusions that I will not venture to discuss here, even though some of them do not precisely correspond to those which I myself had reached. Once applied on the ground, the consequence of choosing one solution rather than another will, in any event, be relatively minimal.

(ii) *The LCBC*

40. As regards demarcation, according to Cameroon the Lake Chad Basin Commission (LCBC) was charged with the task of undertaking the demarcation of the boundary, although the Commission itself spoke of delimitation (see Lagos Declaration of 21 June 1971).

41. According to Nigeria, the LCBC also undertook a true delimitation, which of course, in logical terms, justified the Respondent's position that there had been no prior delimitation. And Nigeria stressed the fact that the demarcation works did not bind it, since it had never accepted their conclusions.

42. In its 1998 Judgment on the Preliminary Objections, the Court described the LCBC's task. In this regard, it speaks of *demarcation*.

43. Created in 1964, the LCBC became involved with the delimitation of the boundary following incidents between Cameroon and Nigeria in 1983 in the Lake Chad region. The States concerned agreed to adopt as working documents dealing with the "delimitation" of the boundaries in Lake Chad "various bilateral treaties and agreements concluded between Germany and Great Britain between 1906 and 1913". The experts proposed that the boundary as thus delimited "be demarcated".

Thus the LCBC's task was one of demarcation as the Court found (*I.C.J. Reports 1998*, pp. 305, 307 and 308, paras 65 and 70) in its Judgment on Nigeria's preliminary objections. This is reiterated by the Court in paragraph 55 of the present Judgment, where it indicates: "The Court observes that the LCBC had engaged for seven years in a technical exercise of demarcation, on the basis of instruments that were agreed to be the instruments delimiting the frontier in Lake Chad."

D. Cartography

44. In the present case, there has been an outright battle of maps.

The old maps, in particular those used in the preparation of the Thomson-Marchand Declaration (especially the Moisel map), were heavily criticized by Nigeria. One of its counsel charged that they contained approximations and even errors, as well as gaps and contradictions.

45. Naturally, maps dating from 1919, 1930 or 1931 will inevitably reflect the weaknesses of the contemporary techniques employed in their preparation. But that is not a sufficient reason to reject en bloc the information which they provide. Moreover, we should not forget what the Court has said on maps in general:

> "maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part.

> Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts." (*Frontier Dispute (Burkina Faso/Republic of Mali) I.C.J. Reports 1986*, p. 582, para. 54; see also *Kasikili/Sedudu Island (Botswana/Namibia), I.C.J. Reports 1999 (II)*, p. 1098, para. 84.)

However, in the present case, the Anglo-German Agreement of 1913 does accord a certain importance to the maps (see final provisions of that Agreement).

E. Effectivités *and legal title*

46. The debate in the present case largely focused on the opposition between legal title and *effectivités*.

(i) *General considerations*

47. In order to make good the alleged absence of delimitation, Nigeria invoked *effectivités* — *effectivités* which confirmed its historic title. To illustrate its argument, it cited the occupation of Darak and the surrounding villages by *Nigerians*, together with a whole series of other facts which, according to Nigeria, clearly demonstrated the exercise of its sovereignty in the part of the Lake Chad area which it claimed. Nigeria even contended that there had been acquiescence on the part of Cameroon.

48. The Court addresses this issue at length in paragraphs 64 *et seq.* of its Judgment, stating clearly that: "any Nigerian *effectivités* are indeed to be evaluated for their legal consequences as acts *contra legem*" (para. 64 of the Judgment).

The Court moreover rejected Nigeria's argument as to alleged acquiescence on the part of Cameroon.

49. I can only approve such conclusions; in particular, the absence of any acquiescence by Cameroon in the present case is quite clear. Acquiescence to an extension of sovereignty over a portion of the national territory of a State requires a long period and a clear and unequivocal voluntary acceptance, which is not the situation in the present case. The circumstances in the *Temple of Preah Vihear* and *El Salvador/Honduras* cases were different from those in the *Cameroon v. Nigeria* case.

50. Neither during the colonial period, nor during the periods of Mandate and Trusteeship, nor since independence, has there occurred any consent by Cameroon which would enable those areas to be considered as forming part of Nigeria.

51. Evidence of the absence of acquiescence is indeed provided by the

very existence of the LCBC, of its work and of the way in which the two Parties continuously collaborated in the exercise of the functions conferred upon it by the countries involved. In this regard, it makes no difference that Nigeria subsequently refused to associate itself with the LCBC's conclusions.

52. In any event, the Court rightly affirmed that where there is a legal title (and in this case there is a legal title), that title must prevail over *effectivités*. The Chamber in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case forcibly restated this in regard to *uti possidetis juris*.

53. In this connection, note should be taken of the very interesting passages of the Court's Judgment (paras. 65 *et seq.*) in which it addresses the highly controversial theory of the "historical consolidation of title", observing that:

> "nothing in the *Fisheries* Judgment suggests that the 'historical consolidation' referred to, in connection with the external boundaries of the territorial sea, allows land occupation to prevail over an established treaty title".

54. I consider it unnecessary to add to the length of this opinion by enlarging on what the Chamber said in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case. I agree with the Court that the *effectivités* in the present case cannot prevail over legal title. In this regard, the Chamber took up a position which permits of no ambiguity:

> "Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title." (*I.C.J. Reports 1986*, pp. 586 and 587, para. 63.)

55. The Court has adopted the same position in the present case.

In my view, as regards frontier disputes, *the actual continuous and peaceful display of State functions* (which is not the case here) can serve as the *sound and natural criterion of territorial sovereignty*.

That principle only holds good, however, on condition that "no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt" (*Reports of International Arbitral Awards (RIAA)*, Vol. II, p. 840; *Revue générale de droit international public*, pp. 165-166, cited in *I.C.J. Reports 1999 (II)*, separate opinion of Judge Kooijmans, p. 1146, para. 14).

(ii) *The Nigerian villages in Lake Chad*

56. I now come to the question of the so-called "Nigerian" villages in the Lake Chad region. I will not go back over what counsel for Cameroon have already said about these villages, in particular their relatively recent character, moreover emphasized by the Court in the present Judgment (para. 65), and their establishment following the retreat of the shores of Lake Chad.

57. I would simply mention an issue, already referred to in passing in my *general considerations,* on which the Parties did not enlarge, namely that of the nationality of villagers settled beside, or straddling, an African boundary. This is a phenomenon that we find all over the continent. In settling under such circumstances, the villagers in question have no sense at all of doing so in pursuance of a national identity, with which efforts have only been made to imbue them for just over 40 years, but because it is a custom in Africa to ignore linear boundaries, which are a foreign importation, especially when men and women of the same ethnic origin live on the other side. Moreover, as counsel for Nigeria pointed out in oral argument, "the villages move with the water".

This is in all likelihood what has occurred in the case of the Nigerian villages along the shore of Lake Chad, whose surface has varied considerably over the years in the form of a *marked recession of the waters* (para. 58 of the Judgment).

58. By the same token, we find in Gambia villages of Wolofs from Senegal and vice versa. Often what counts is ethnicity and not nationality, which is a recent notion in Africa. One of Nigeria's counsel recognized that among the Lake Chad villages there is one said to be Malian — a point which speaks for itself.

59. In the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, the Court had to deal with the problem of the Masubia, who had settled on the island in dispute, and of whom the Court said "the activities of the Masubia on the Island were an independent issue from that of title to the Island" (*I.C.J. Reports 1999 (II)*, p. 1106, para. 98). The existence of a colony of *Nigerians* in Lake Chad, to the east of the border, has no bearing on the sovereignty of the territories where they have been living. That is also *a separate issue to that of the title* to the territory where those *Nigerians* are living.

F. Determination of the mouth of the Ebeji

60. The course of the boundary in Lake Chad raised a problem which Nigeria opportunely highlighted. This problem represented an example of the work of interpretation which Nigeria invited the Court to carry out and which Cameroon accepted that it should do.

61. According to the Thomson-Marchand Declaration, the lake boundary starts from a tripoint with co-ordinates 13° 05″ latitude north and approximately 14° 05″ longitude east.

It is also stated that the boundary runs in a straight line.

62. The problem arises in regard to the endpoint of that straight line. The Declaration places this at the "mouth of the Ebeji" without indicating the exact co-ordinates. Unfortunately, this river now flows into Lake Chad down two channels and not from a single mouth. Each Party endeavoured to show that the mouth contemplated by the applicable instrument now takes or should take the form of the channel that supported its respective arguments. Cameroon opted for the western channel and Nigeria for the eastern one. The LCBC had found a *compromise solution* which Nigeria did not accept.

63. The Court had to settle the problem thus posed and it did so.

The Court had to ascertain the intentions of the parties to the Declaration and at the same time seek to place itself at the time when that Declaration was signed. Such a solution was not totally adapted to the present case. Eventually, based on the relevant factors, the Court found itself with three choices:

— to choose one of the two channels,
— to adopt the proposal of the LCBC, or
— to interpret the Declaration itself.

The Court favoured the latter solution. For my part, I would certainly agree with that.

64. Addressing the concerns of Nigeria, which had spoken of the fate and conduct of the "Nigerian" inhabitants if the territories which it claimed were to be recognized as belonging to Cameroon, the Court acknowledged the undertaking by the Agent of Cameroon on behalf of his country that the Nigerians remaining in Cameroon would continue to live there under the same conditions as other persons of other nationalities, just as occurs in other parts of Africa and indeed elsewhere. By doing so the Court gave legal weight to this unilateral undertaking invoked in the judicial debate. It was entitled to do so. It thus recorded that undertaking as follows in the *dispositif* of the Judgment:

> "*Takes note* of the commitment undertaken by the Republic of Cameroon at the hearings that, 'faithful to its traditional policy of hospitality and tolerance', it 'will continue to afford protection to Nigerians living in the [Bakassi] Peninsula and in the Lake Chad area'" (para. V (C)).

On this point we can observe that what is true for Lake Chad is equally so for Bakassi.

2. *Bakassi*

65. Nigeria's essential argument on the issue of Bakassi was that Great Britain could not cede to Germany what did not belong to it. And Nigeria then enlarged upon the theory of the existence in this region of

Kings and Chiefs whose territory could not be disposed of without their consent. Nigeria recognized that these Kings and Chiefs inhabited the territory of an "acephalous federation" rather than any form of regional political subdivision. It nonetheless accorded them international personality and relied for this purpose on a colonial treaty of 1884 (see C below) and on a number of other arguments, including the *nemo dat quod non habet* principle, which the Court examined in detail and to which I will not return.

66. Nigeria's argument against the 1913 Franco-German Agreement further relied on its alleged non-opposability; but any such non-opposability would since have been made good by the conduct of the parties, following that of the colonial Powers. But I shall return later to the matter of the Kings and Chiefs of Old Calabar (see D below).

Moreover, on the subject of whether Bakassi belonged to one Party or the other, a number of key questions were raised that cannot be addressed, in my view, without first considering the validity of colonial *treaties*.

A. Colonial treaties

(i) *The validity of colonial treaties in general*

67. Various treaties were signed in Africa between the colonial Powers and the "kinglets" of the time, as they were called in the history books of school children of my generation, not without a certain contempt which numbers of Africans have remarked upon and deplored. In the Bakassi Peninsula alone, the Agent of Nigeria counted 17 such treaties, on one of which he focused as being a treaty under international law. This was the Treaty of 1884 between Great Britain and the Kings and Chiefs of Old Calabar. Such treaties were concluded by the dozen in the course of the colonization from which Africa has so greatly suffered. This historical reality is emphasized by the Court in paragraph 203 of its Judgment. Their purpose was simply to serve the "dismemberment" decreed against Africa at the Berlin Conference or earlier.

68. In sub-Saharan Africa, the sole purpose of the *protectorates* which resulted from the colonial treaties was to create a system of indirect administration. They could be distinguished from treaties of protection which were *international* in character. The kings and chiefs in the administrative divisions formed by the villages, districts and provinces took over the duties of the colonizers. Such situations were not unusual and could hardly be said to attribute any real personal power to these local authorities. Thus in Senegal such kings and chiefs collected taxes, administered justice, took censuses, etc. They still exist in certain countries with or without power. In Senegal a statute gave them their quietus.

69. Such "colonial treaties" protected the inhabitants and the territory where they lived against other colonial Powers, basically, and quite simply for the benefit of the European signatory. In the present case the

treaties involved were indeed *colonial protectorate* treaties or treaties of protection.

70. The Court described them as having been "entered into not with States, but rather with important indigenous rulers exercising local rule over identifiable areas of territory" (para. 205 of the Judgment).

This is a disguised way of saying that they were "colonial treaties".

71. What view should be taken of colonial treaties?

Thus the agreements or treaties signed in sub-Saharan Africa before or after the Berlin Conference by the colonizing States with the numerous *"kinglets"* (as they were called) were simply intended to warn the other colonial Powers that specific parts of the black continent were now a *possession* falling within the zone of influence of a given European State. Thus, the General Act of the Berlin Conference (Chap. VI, Art. 34) provides: "The Power which henceforth shall take possession of a territory upon the coast of the African continent situated outside of its present possessions . . . shall accompany the respective act with a notification addressed to the other . . . Powers . . ."

That is true not only of Nigeria and Cameroon but of everywhere else in Africa. Such treaties of protection of the kind cited by counsel for Nigeria were signed by the dozen. The Court itself has pointed this out in its Judgment. They had no validity in international law. To accord them such validity now would be to open a Pandora's box. The chiefs themselves had no precise idea of the territorial boundaries of the areas which they *governed.*

72. The problem here is not to make a value judgment today concerning those rules and practices but rather, in the context of intertemporal law, to take note of them. The Court does not have the authority to revise international law. It is not entitled to assess the practices of past times, still less to rely on such assessment in support of a decision. The Court should simply, where necessary, note the characteristics and rules of the various phases in the development of international law in order to interpret it and apply it to the facts of the period in question.

73. It should be recalled that the notion of a linear frontier is not an African one. It was imported into the continent by the colonial Powers. That does not mean to say that human groupings in pre-colonial Africa placed no reliance on boundaries. But these were natural: rivers, mountains, forests, etc. The black African concept was one of tribes and ethnic groups with their chiefs, "wherever they [were] to be found", as Nigeria's Agent put it. The power of the chief was exercised over subjects and to some extent over villages or townships. When historians speak of African kingdoms or empires what is very often actually meant is groupings of settlements whose inhabitants acknowledged the suzerainty of a particular king or chief.

74. Moreover, the colonial treaties in question were rarely signed by the duly authorized representatives of the colonial State. Often, those who signed them were explorers, merchants, navigators, sometimes junior military officers. But these treaties which they signed enabled the

colonial State whose nationals they were to dispose of the areas conquered, explored or simply visited pending their *annexation* pure and simple. This word "annexation", with its ambiguous meaning given the distance from the countries in question, was a convenient way of reflecting the colonizers' right to dispose of the territory concerned, the territory in their "possession" (to employ the term found in the General Act of the Berlin Conference). It is on this basis that Professor Pierre-François Gonidec states in the *Encyclopédie juridique de l'Afrique* on page 24 of Volume II: "the annexed territories became an integral part of the territory of the colonial State. In consequence, the latter had a free right of disposal over them and could cede them to foreign States according to its political needs". And Gonidec continues by giving an example: "thus we have the 1911 Agreement involving a swap between Germany and France in Equatorial Africa and Morocco".

This statement by one of the greatest experts in African law applies very well to our case. Gonidec adds, moreover: "there was only one Government left, that of the metropole, subject to some form of delegation to local representatives of the central Power or to the use of traditional chiefs as auxiliaries of the colonial Power".

It was this situation that Nigeria invoked in support of its position. The system of indirect rule, for which there were many reasons, was employed everywhere in Africa.

75. Finally, I cannot resist the temptation to cite one more passage from Gonidec:

> "In international terms, the annexed countries lost all personality. In truth, they were considered never to have been legal persons (since they were not recognized as having the status of States). However, those carrying out colonial conquest agreed to enter into agreements called 'treaties' with African authorities . . . and this implied that African countries did have international personality. Subsequently, however, some legal experts maintained that in reality these were not genuine treaties but mere agreements under internal law, basing this argument on the fact that they had not been concluded between independent States. This enabled those *pseudo-protectorates* to be easily annexed (generally by mere decree)." (Emphasis added.)

Colonial delimitation treaties were subsequently rehabilitated.

(ii) *Specific value of colonial delimitation treaties*

76. I wish to return once more to the question of the respect for colonial boundaries.

77. As has already been said, the countries of Africa, meeting in Cairo in 1964, adopted resolution AGH/Res.16 (1), under which: "all Member States [of the Organization of African Unity] pledge themselves to respect the frontiers existing on their achievement of national independence".

78. The Parties agreed that this principle, which they called *uti possidetis juris*, was applicable to the present case. The Court did not see fit to have recourse to it. I regret that.

This principle clearly means that Nigeria could not challenge today a boundary which existed for 47 years before its independence and which Nigeria itself unequivocally accepted as the boundary between its territory and that of Cameroon from 1960 to 1977.

If one were not to accept this, what would be the purpose of the principle of respect for colonial boundaries? If we refer to paragraphs 19 to 26 of the Court's Judgment in the *Frontier Dispute* case, we can clearly see the importance attached by Africa, and by the Court too, to the principle.

The Chamber stated:

> "Although there is no need, for the purposes of the present case, to show that this is a firmly established principle of international law where decolonization is concerned, the Chamber nonetheless wishes to emphasize its general scope, in view of its exceptional importance for the African continent and for the two Parties" (*I.C.J. Reports 1986*, p. 565, para. 20);

and continued:

> "It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power." *(Ibid.)*

79. When African States speak of *uti possidetis juris*, they employ the phrase *"intangibility of colonial frontiers"*. These words best reflect their common view. Of course it would be unreasonable to conclude from this that frontiers are immutable. They can certainly be modified, not by invoking their technical defects but only in accordance with the rules of international law — in other words, by mutual agreement or by judicial decisions. In the latter case, the forum seised of the matter must confine itself to interpreting the instruments determining the boundary and must not rewrite them. In other words, it may remedy material defects but not alleged legal errors. Two cases illustrate this point. The case of the mouth of the Ebeji (a material defect) and the case of the "Nigerian" villages of Lake Chad (an alleged legal error). This second case would involve a legal rectification. The same applies to the historical consolidation invoked by Nigeria in respect of Bakassi. The Court does not have a power of rectification. A court cannot change a clear provision. That would exceed its power.

80. My general conclusion on the dispute is the same as that of the

Court: there is indeed a boundary between Nigeria and Cameroon. That boundary derives from the following instruments:

— the Thomson-Marchand Declaration,
— the 1913 Agreements,
— the Order in Council of 1946.

Any other decision would have represented an attempt by the Court to change the law so as to make it coincide with what it regarded as being normal and fair and consistent with the reality on the ground. That approach is possible in intellectual and political terms. But the Court states the law. It has a jurisprudence, which it is bound to respect and which it is not entitled to change save in case of absolute necessity and on the basis of sound legal reasoning. That is not the case here.

81. In this respect, it will be recalled that, in relation to an alleged "clash" of new declarations of acceptance of the compulsory jurisdiction of the Court with declarations already existing, Nigeria was perfectly well aware of the Court's established jurisprudence on this question; but what Nigeria wanted was in essence that the Court should change what actually existed. The Court did not agree to follow that route. It remained firm to its jurisprudence. The Court's mission is to contribute to the establishment of peace by applying the law. That law must be applied in all cases.

82. Returning to my general conclusion in the present dispute, it should be noted that in the *Encyclopédie juridique de l'Afrique*, in Volume II dealing with "international law and international relations", there is a chapter devoted to "national territory". That chapter was written by Professor Chemillier-Gendreau and Mr. Dominique Rosenberg. In paragraph (2), entitled "the case-by-case situation between African States", there is a subheading "C" entitled "the boundaries between Cameroon and Nigeria".

I should like to quote what the Encyclopaedia has to say:

> "On 12 July 1884, the territories of Cameroon became a German Protectorate and that was notified to the other Powers on 15 October 1884. On 5 June 1885 a British Protectorate, initially called the Oil Rivers Protectorate and then the Niger Coast Protectorate, was established to the west of that of Cameroon . . . [These two possessions] were definitively delimited by the Agreements of 11 March and 12 April 1913." (*Encyclopédie juridique de l'Afrique*, p. 76.)

Later in the same text we read the following:

> "Thus the boundary runs from Lake Chad up to the River Gamana on the basis of the above-mentioned agreements of 1931, with the subsequent transverse section of the boundary from the River Gamana to Mount Kombon being a British colonial boundary which became the international boundary after the plebiscites of 1961." (*Ibid*, p. 77.)

The authors then summarized the situation as follows: "Thus from the River Gamana to the Cross River, then to the sea, the boundary is that laid down by the Anglo-German Agreements of 11 March 1913." (*Encyclopédie juridique de l'Afrique*, p. 76.)

83. This is the lake and land boundary as derived from the law rather than from faits accomplis. The conclusion reached by the Court confirms this. As it says, "Bakassi is Cameroonian". And this is indeed what was said by one of Africa's greatest jurists — who also happens to be Nigerian. The letter produced to the Court in which he states that Bakassi belongs to Cameroon is a fact which the Court had in its possession, even though it refrained from relying on it.

Having discussed the colonial treaties, I will turn now to two issues related to such treaties: the 1884 Treaty and the question of the Kings and Chiefs of Old Calabar.

B. Legal force of the 1884 Treaty

84. The Treaty of Protection of 1884 between Great Britain and the Kings and Chiefs of Old Calabar resembles a great many other agreements establishing a *colonial protectorate* of the kind described below by Sibert. Its legal force is the same, as can be seen from a reading of the extract provided by counsel for Nigeria.

85. Great Britain was not bound, in terms of the contemporary practice, by the adage *nemo dat quod non habet*, for the good reason that the territory whose boundaries it had agreed to determine jointly with another colonial Power had been "annexed" by it. How could it have been required to be bound by this adage, given that Germany itself was under no obligation to comply with the terms of a "treaty" of whose very existence it may well have been entirely unaware. In any event, Germany was protected by the well-known rule regarding the relative effect of treaties *(res inter alios acta)*.

86. The Parties did not place any emphasis on the treatment of this question in the Arbitral Award concerning the *Island of Palmas* (non-opposability to the Dutch Government of the Spanish-American Peace Treaty of 10 December 1898 ceding to the United States the Philippines and its dependencies, including the Island of Palmas, occupied since 1677 by the Netherlands (*RIAA*, Vol. V, pp. 471-473)), despite the fact that the Award was quoted *in extenso* by counsel for Nigeria.

87. The Court could not simply place a parenthesis around that part of the 1913 Agreement which relates to Bakassi, on the sole ground that the "City States belonging to the Kings and Chiefs of Old Calabar" were covered by it.

It followed that Nigeria's argument based on "historical consolidation of title" was bound to fail here, as it did in the Lake Chad region.

Thus it was to the instruments of 1913 that the Court had to look in order to determine the course of the boundary in the present case, interpreting or clarifying them as required.

88. Moreover, as I have already indicated, I believe we should avoid involving ourselves too much in the semantic controversy as between "delimitation" and "demarcation". The essential lies in what the Parties asked of the Court in pursuance of its task of adjudication: to determine the boundary between the two States concerned, in accordance with its Statute.

C. The question of the Kings and Chiefs of Old Calabar

89. There were a certain number of us, in particular before the accession of African States to independence, who fought against the doctrinal notions of *"terra nullius"* or "absence of sovereignty" which had served as a pretext for colonization. Our struggle was a political one. African historians came to the rescue of the politicians in order to restore the dignity of the African kings and chiefs and to re-establish the truth about the past.

90. African kings and chiefs were indeed the lawful representatives of their subjects. However "they governed not the land but the people" (*Encyclopédie juridique de l'Afrique*, Vol. 2, pp. 68-69). Counsel for Nigeria stated as much.

91. Before the acts of independence of the 1960s (and still today) it was and is necessary to correct the mistakes of a *betrayal of history*. African leaders were very well aware of this when their countries acceded to independence; they urged it. But in 1964 they preferred to align themselves not with historical truth but with the law, in decreeing that colonial boundaries should not be touched. They thus closed the road to any secessionist notions. That is why, when Biafra defied the principle in 1967, they united behind Nigeria in order to fight the secessionists.

92. What of the colonial protectorates?

According to Max Huber (*Island of Palmas* case):

> "it is not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy for the natives. . . And thus suzerainty over the native State becomes the basis of territorial sovereignty as towards other members of the community of nations" (*RIAA*, Vol. II, p. 858; *Revue générale de droit international public*, Vol. XLII, 1935, p. 187).

Once again, it is not a matter of casting a value judgment on rules that prevailed in the late nineteenth and early twentieth century, but of noting with due objectivity what they meant at the time. Colonial protectorates do not generally meet the criteria of statehood (see Bengt Brons in *International Law — Achievements and Prospects*, Vol. 1, p. 54).

Colonial protectorates are described by Marcel Sibert as follows: "a Power sought to extend its exclusive right of action over 'non-civilized' countries . . . which it did not wish to annex immediately as colonies" (*Traité de droit international public*, Vol. I, p. 157, para. 111).

One is entitled to disagree with such a practice — as I do personally — and above all with the terms used.

93. The fact remains that this was legally true of entire territories and even more so of townships under the influence of kings or chiefs, as well as of other rules of which we disapprove today. This form of protection had a purely personal value. The individual protected was the chief, even if, through the misuse of language, the word "territory" was to be found in the agreements. He was protected against his local rivals, against slavery and against other disasters and above all his territory was protected, and carefully delimited (sometimes on the basis of gunshot range as in Gambia), against other colonizers. When the General Act of the Berlin Conference speaks of the "possessions" of the "signatory Powers", it makes no distinction between those Powers which had acquired possessions and those which had taken on protectorates.

The foregoing remarks apply to the Kings and Chiefs of Old Calabar.

The questions posed by Judge Kooijmans in regard to these Kings and Chiefs produced replies which were ambiguous, not to say embarrassed, and which confirm the above remarks, which have had a decisive effect on the identification of the point where the boundary reaches the sea.

D. Terminal point of the boundary on the coast

94. The land boundary terminates at the sea.

It is surprising that Nigeria should have located this terminal point on the Rio del Rey.

95. Cameroon pointed out that Nigeria sought to rely on prior negotiations in order to make the Akwayafe disappear from the definition of the boundary (despite more recent negotiations) and to replace it with the Rio del Rey. But Nigeria could not do otherwise as long as it sought to shelter behind the fragile screen of the Kings and Chiefs of Old Calabar in order to protect its position in regard to Bakassi. It fortified this screen with the notion of "historical consolidation", which could have no effect on the legal title of Cameroon.

96. The boundary is clearly defined by the 1913 Agreements (the last instruments accepted by the Parties and concluded by their colonial predecessors). Both Parties agreed on this, if we leave out of account the matter of the Kings and Chiefs of Old Calabar. Following the thalweg of the River Akwayafe, it terminates at the midpoint of a line joining Bakassi Point to King Point and it is from here that the maritime delimitation must start.

97. This is a reply to Nigeria's eighth preliminary objection, which moreover lost much of its force once it was accepted that the boundary had been clearly delimited and that its endpoint on the coast was indeed that indicated by the 1913 Agreement. This objection was also weakened as regards its second limb by the fact that Equatorial Guinea intervened in the case, even if it did so, as was made clear by the Court, "without being a party", as it was perfectly entitled to do.

98. It is true that Nigeria contended that the Yaoundé II and Maroua Agreements did not indicate the starting point of the dividing line between the two States' maritime areas as being situated at the "mouth" of the Akwayafe.

99. But this argument is contradicted by the negotiations between the two countries, which referred to the 1913 Agreement, and by British Admiralty Chart No. 3433, which served as the basis for those Agreements, and on which the Heads of State of Cameroon and Nigeria marked a line and appended their signatures.

SECTION 3. THE MARITIME BOUNDARY

100. As regards the maritime boundary, the Court had to address the request by Cameroon "for the tracing of a precise line of maritime delimitation". In support of that request, Cameroon had produced an *equitable line*.

101. The most important issue in regard to the determination of the maritime boundary concerned the Maroua Declaration, whose validity was challenged by Nigeria, its importance being emphasized by the Court in the following terms:

> "If the Maroua Declaration represents an international agreement binding on both parties, it necessarily follows that the line contained in the Yaoundé II Declaration, including the co-ordinates as agreed at the June 1971 meeting of the Joint Boundary Commission, is also binding on them." (Para. 262 of the Judgment.)

1. The Maroua Declaration

A. Identification of the problem

102. As regards the question of whether or not negotiations had taken place, and as the Court had already pointed out when examining [Nigeria's] seventh preliminary objection,

> "it ha[d] not been seised on the basis of Article 36, paragraph 1, of the Statute, and, in pursuance of it, in accordance with Part XV of the United Nations Convention on the Law of the Sea relating to the settlement of disputes arising between the parties to the Convention with respect to its interpretation or application" (*I.C.J. Reports 1998*, pp. 321-322, para. 109).

The Court explained that

> "[i]t ha[d] been seised on the basis of declarations made under Article 36, paragraph 2, of the Statute, which declarations do not contain any condition relating to prior negotiations to be conducted within a reasonable time period" (*ibid.*, p. 322, para. 109).

The Court did nonetheless state that: "Cameroon and Nigeria entered into negotiations with a view to determining the whole of the maritime boundary" (*I.C.J. Reports 1998*, p. 322, para. 110) and that "[i]t was during these negotiations that the Maroua Declaration relating to the course of the maritime boundary up to point G was drawn up" *(ibid.)*.

We may conclude from these passages that there were indeed negotiations between the two Parties with an undetermined geographical objective and that these negotiations resulted, up to point G, in an agreement known as the "Maroua Declaration".

That Declaration was regarded by Cameroon as legally binding on the two Parties, whereas Nigeria took the contrary view.

103. It should be recalled that Nigeria had raised an eighth preliminary objection. The Court joined that objection to the merits. Before dealing with the maritime delimitation, it was necessary to settle the incidental point raised by this eighth Nigerian objection. I have already stated the Court's finding above in respect of the first limb of that objection.

104. Nigeria also argued that the question of the maritime delimitation between its territory and that of Cameroon necessarily affected the rights and interests of third States and that Cameroon's claim in this regard was accordingly inadmissible.

105. The Court had stated in its 1998 Judgment that this eighth objection "d[id] not have, in the circumstances of the case an exclusively preliminary character" (*I.C.J. Reports 1998*, p. 326, operative para. 118 (2)) and took the view that it was thus required to decide how far beyond point G it could extend the line separating the two Parties' respective maritime areas.

In very clear terms, the Court stated (para. 292 of the Judgment) and repeated that "it [could] take no decision that might affect rights of Equatorial Guinea, which [was] not a party to the proceedings" (para. 307 of the Judgment). On this point I will make (*infra*, para. 136) an observation that I consider to be logical and fair.

106. The Court thus had to determine whether or not there was an existing delimitation as far as point G. I think it is unnecessary for me to emphasize the need to effect this delimitation without disassociating it from the land delimitation, that is to say, to determine the starting point on the coast for the maritime delimitation (see Nigeria's eighth preliminary objection). The answer is obvious.

107. Nigeria insisted that this delimitation must take place after the determination of its starting point on the coast. It subsequently moved this point to the east to the Rio del Rey. But for over five years Nigeria negotiated on the basis of a different point, situated further to the west, on the River Akwayafe.

108. In any event, the incidental issue was settled. The Court held that the starting point for the maritime delimitation was the terminal point of

the 1913 boundary on the line joining Bakassi Point and King Point. This conclusion follows from what the Court decided as to the validity of the 1913 Agreement.

109. From that starting point as far as point 12, the agreement between the Heads of States which gave rise to the so-called "compromise line" (Yaoundé II Agreement) had to be treated as having been definitively accepted by the Parties. The compromise line was extended by a line as far as point G. The Court regarded the line starting from the coast and ending at point G as a legally established maritime delimitation.

From point 12 to point G, the delimitation is governed by a decision known as the "Maroua Declaration". That decision, as I have already said, was regarded by Cameroon as an agreement binding on both Parties, whereas Nigeria took the contrary view.

110. The Court settled the issue as to whether the Maroua Declaration of 1 June 1975 was binding on both Cameroon and Nigeria. In its view:

> "the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties (see Art. 2, para. 1), to which Nigeria has been a party since 1969 and Cameroon since 1991, and which in any case reflects customary international law in this respect" (para. 263 of the Judgment).

111. This conclusion, as pointed out earlier, applies *ipso jure* to the Yaoundé II Declaration.

112. Nigeria considered that the Maroua Declaration was tainted by two defects and that it was not bound by it. It seems to me to be helpful to return to this point.

113. First, Nigeria contended that President Gowon, who signed the Agreement, could not bind his country without the consent of the "Supreme Military Council".

114. Secondly, Nigeria contended that the alleged agreement had been neither ratified nor published.

I should like to address first the issue of ratification.

B. The question of the ratification of the Maroua Declaration

115. Nigeria took the view that the internal legal requirements in regard to the ratification of the Declaration were not satisfied.

116. From a purely formal point of view, one is entitled to discuss, as Nigeria did, the issue of whether or not the Maroua Declaration is a treaty in the strict sense of the term. The Court settled that point.

117. But is it necessary for a declaration of the type in question to be a treaty in the formal sense of the term in order to produce effects in the circumstances of the present case? The Court has always answered such a

question in the negative. If the Maroua Declaration were to be disregarded, that would be a serious precedent, which would certainly undermine the legal security which should govern relations between States, in particular where those relations are established at the highest levels of State authority. Under Article 7, paragraph 2 *(a)*, of the Vienna Convention on the Law of Treaties, Heads of State are included among those State authorities who are entitled to represent their countries "without having to produce full powers".

118. That is why I wholeheartedly agree with the Court's decision that "the Maroua Declaration, as well as the Yaoundé II Declaration, have to be considered as binding and as establishing a legal obligation on Nigeria" (para. 268 of the Judgment) as a result of the circumstances in which it was adopted.

119. Many writers consider generally, without even relying on a category of "agreements in simplified form", as one of Cameroon's counsel did, that the ratification of treaties is not always necessary. In the present case the Court, considering that "[b]oth customary international law and the Vienna Convention on the Law of Treaties leave it completely up to States which procedure they want to follow", observed that here the two Heads of State had come to an agreement and further concluded that the "Declaration entered into force immediately upon its signature" (para. 264 of the Judgment). A prime concern of writers, and with reason, is the question of legal security in international relations. In this regard Marcel Sibert writes in his *Traité de droit international public* that:

> "in the interest of morality and sincerity in international relations, in the interest also of the effectiveness that one is entitled to expect of States' treaty-making activities, it is desirable that the Law of Nations should continue to evolve in regard to ratification and finally to abandon its extreme positions and to adopt the doctrine of the *'juste milieu'* that we have felt entitled to advocate" (Vol. II, p. 230, para. 904).

120. And what Sibert specifically recommends is to apply Nicolas Politis's proposition (quoted by Sibert) that: "under the new international order . . . a tendency seems to be developing no longer to regard as absolute and unconditional the right to refuse to ratify" (*op. cit.*, p. 230).

C. The question of the powers of the Nigerian signatory of the Maroua Declaration

121. The second defect alleged by Nigeria against the Maroua Declaration is that President Gowon had no power to sign it, which amounts to saying that the Agreement was void.

122. In the event of conflict between international law and domestic law, it is the former which must prevail. And this is what the Vienna

Convention on the Law of Treaties does (see Sir Robert Jennings, in *International Law — Achievements and Prospects*, pp. 65 and 166).

123. According to Article 27 of the Convention, "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

This provision continues as follows: "this rule is without prejudice to Article 46".

Counsel for Cameroon accordingly drew attention to the pertinence of Article 46 of the Convention in the present case.

He recalled that:

> "1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

Counsel drew attention to the fact that any violation capable of invalidating the competence of President Gowon at the time must be "manifest", as Article 46, paragraph 2, cited above provides.

Counsel, after discussing the point at length, reached the conclusion that President Gowon did indeed have the power to bind his country.

He added that, in any event, the alleged violation of the provision of Nigeria's internal law by President Gowon (if there was one) was far from being "manifest", given all the constitutional legislative or administrative changes that had taken place in regard to the powers of the Head of the Nigerian State, particularly between 1966 and 1978. He emphasized that the complexity of the legislation in question was such that it was unreasonable to expect President Ahidjo, co-signatory of the Agreement, to be aware that his interlocutor, in signing the Maroua Declaration and the final communiqué which accompanied it, was manifestly violating a provision of internal Nigerian law.

124. As the Court noted: "there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States" (para. 266 of the Judgment).

125. It follows from this that, without even addressing the issue of ratification, the Court was entitled to hold that the Maroua Declaration represented an obligation undertaken by both Parties and was accordingly opposable to both of them. It duly did so, adding that:

> "while in international practice a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into force of a treaty, there are also cases where a treaty enters into force immediately upon signature. Both customary international law and the Vienna Convention on the Law of Treaties leave it completely up to States which procedure they want to follow" (para. 264 of the Judgment).

126. In the Court's view, as we have already seen, what applies in regard to the Maroua Declaration applies equally *mutatis mutandis* to the Yaoundé II Declaration.

2. The Maritime Delimitation beyond Point G

A. The Court's jurisprudence

127. As regards the maritime delimitation beyond point G, each of the Parties expressed itself at length, as did Equatorial Guinea as intervener. Cameroon even proposed a line separating the maritime areas of the two Parties.

128. Nigeria and Equatorial Guinea criticized that line for various reasons.

129. The Court applied the well-established principle that it has developed over the years.

130. As regards maritime delimitation for States with adjacent or opposing coasts, "the legal rule is now clear". This statement comes from the speech given by the President of this Court on 31 October 2001 to the Sixth Committee of the United Nations General Assembly. The rule, which has emerged after a long period of maturation, applies both to the territorial sea and to the continental shelf and the exclusive economic zone.

131. The Parties in the present case wanted the boundaries of their respective sovereignty or sovereign rights to be determined by a single line.

Of course, as the President pointed out, "each case nonetheless remains an individual one, in which the different circumstances invoked by the parties must be weighed with care" (see the above-mentioned speech of 31 October 2001). The legal rule to which the President refers is the following:

> "The Court must first determine provisionally the equidistance line. It must then ask itself whether there are special or relevant circumstances requiring this line to be adjusted with a view to achieving equitable results." *(Ibid.)*

B. Special circumstances

132. As regards special circumstances, the Court considered whether there were any such circumstances "that might make it necessary to

adjust [the] equidistance line" that it had drawn "in order to achieve an equitable result" (para. 293 of the Judgment). What first comes to mind in the present case is the concavity of the Gulf of Guinea and of Cameroon's coastline. Bioko Island is also a factor here. As the Court stated in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case:

> "the equidistance method is not the only method applicable to the present dispute, and it does not even have the benefit of a presumption in its favour. Thus, under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question." (*I.C.J. Reports 1985*, p. 47, para. 63.)

The Court referred to "the concavity of the Gulf of Guinea in general, and of Cameroon's coastline in particular" (para. 296 of the Judgment). Cameroon, in the words of the Court:

> "contends that the concavity of the Gulf of Guinea in general, and of Cameroon's coastline in particular, creates a virtual enclavement of Cameroon, which constitutes a special circumstance to be taken into account in the delimitation process.
>
> Nigeria argues that it is not for the Court to compensate Cameroon for any disadvantages suffered by it as a direct consequence of the geography of the area. It stresses that it is not the purpose of international law to refashion geography."

As regards the presence of Bioko Island (para. 298 of the Judgment), the Court stated:

> "Cameroon further contends that the presence of Bioko Island constitutes a relevant circumstance which should be taken into account by the Court for purposes of the delimitation. It argues that Bioko Island substantially reduces the seaward projection of Cameroon's coastline.
>
> Here again Nigeria takes the view that it is not for the Court to compensate Cameroon for any disadvantages suffered by it as a direct consequence of the geography of the area."

However, the Court refrained from affording any effect to these two circumstances.

133. For my part, I regret this. It is desirable in maritime delimitation (the result of which has to be equitable) that any circumstance capable of contributing to that goal should be regarded as relevant.

134. The Court stresses that: "delimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity" (para. 294 of the Judgment).

This principle cannot be disputed, even though it differs slightly from what the Court stated with a certain subtlety in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 22, para. 18).

135. For my own part, subject to the above-mentioned observation, I

believe that the Court has applied its jurisprudence. Up to a certain point, the Court has confined itself, as it had already done in the *Tunisia/Libya* case, to indicating a direction rather than drawing a finished line. This was required in view of the rights of third States.

136. In this respect, it should however be noted that, in promulgating a decree determining the limits of its sovereign rights, Equatorial Guinea gave an indication of its legal interests. In so doing, it was well aware that the maritime area in this part of the Gulf of Guinea belonged to three States, Nigeria, Cameroon and itself, since it had already recognized that between these three countries' respective areas there was a tripoint (even if the location of that point had not yet been determined). That decree could have been amended by Equatorial Guinea by the same unilateral means. It preferred to have recourse to a treaty with Nigeria. The legal result is the same. That treaty thus amended the decree. Some protection is admittedly afforded by the relative effect of treaties. Nonetheless, the treaty does have the effect of modifying the claims of Equatorial Guinea in the same way as an internal act of that State would have done. In consequence, Equatorial Guinea was not entitled to argue before the Court that in relation to another State its claims remained those which had been indicated by decree. Such a position is illogical in my view.

It follows from this that, as regards the course of the line, the Court was not circumscribed by the limit laid down by Equatorial Guinea's decree but rather by the treaty signed by Equatorial Guinea with Nigeria in the year 2000.

137. As regards the relevant circumstances, it is quite clear that Cameroon has not been blessed by nature and that it is not for the Court to rectify that. But that should not prevent the Court from pursuing the aim of achieving an equitable result in the delimitation to be effected by it. Achieving an equitable result is not the same as delimiting in equity. That is not at issue. But the notion of an equitable result is only a legal one inasmuch as it is used in international law. The result of its application is no different for a delimited area rather than "a previously undelimited area" (*I.C.J. Reports 1969*, p. 22, para. 18). This means that after it has carried out the delimitation, the Court is required to ask itself: "is the result we have reached equitable"? The rest is simply a matter of subtle reasoning.

And in response to that question, I do not believe, in view of the circumstances that for my part I regard as relevant but that the Court preferred to ignore, that the answer must inevitably be "yes".

Section 4. Responsibility

138. The issue of responsibility was considered by the Court under the twin heads of Cameroon's reparation claim and Nigeria's counter-claim.

139. In its submissions at the close of its oral argument, Cameroon

requested the Court to find that Nigeria had violated the fundamental principle of *uti possidetis*, as well as its legal obligations regarding the non-use of force against Cameroon and compliance with the Court's Order of 15 March 1996 indicating provisional measures. It asked the Court to find that Nigeria's responsibility was engaged by these wrongful acts and that reparation was due to it on this account.

140. On the basis of those allegations, Cameroon requested *inter alia* a declaration that Nigeria must put an end to its presence, both civil and military, on Cameroonian territory, and in particular that it must forthwith and unconditionally evacuate its troops from the occupied area of Lake Chad and the Bakassi Peninsula and that it must refrain from such actions in the future.

Cameroon further pleaded the absence of any circumstances capable of precluding the wrongfulness of the acts imputed by it to Nigeria.

141. Nigeria did not accept Cameroon's position on responsibility. In its final submissions, Nigeria argued that Cameroon's State responsibility claims, even if admissible, were in any event unfounded and must be dismissed.

Nigeria did not confine itself to rebutting Cameroon's charges against it. It considered that Cameroon bore responsibility for the acts set out in its Counter-Memorial and Rejoinder, and claimed reparations on that account.

142. The Parties' formal submissions give a more precise indication of their claims and defences in terms of responsibility and reparations.

I will simply confine myself here to a few observations.

143. It is for the Court to verify the merits of claims for reparation. Availing itself of this power, the Court considered that its order for the withdrawal of the administration and of military or police forces sufficiently addressed the injury caused by the Nigerian occupation and that in consequence it would "not therefore seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon ha[d] been engaged as a result of that occupation" (para. 319 of the Judgment). By this decision, the Court did not state that Nigeria was not responsible. It moreover indicated (para. 64 of the Judgment previously cited): "any Nigerian *effectivités* are indeed to be evaluated for their legal consequences as acts *contra legem*".

144. Moreover, in accordance with a well-established rule of procedure, it is of course for each party to prove the facts which it alleges. The Court therefore had to ensure that this requirement had been properly met. The Court did so with regard to the *incidents* for which the Parties held each other responsible. It was entitled to do so. Nigeria contended that, in any event, its actions were covered by self-defence or by other circumstances precluding any wrongfulness (para. 321 of the Judgment).

145. Cameroon considered that its territory had been invaded and occupied and that such occupation had occurred by force without its consent, which constituted a violation of Nigeria's international obligations.

146. Nigeria contended that it was present in good faith in areas which it regarded as forming part of its territory and that, on the contrary, it was Cameroon which had made incursions and created incidents, thus rendering itself responsible for a certain number of acts which had injured Nigeria and on account of which it claimed reparation.

147. It is appropriate to recall the view of Eduardo Jiménez de Aréchaga and Attila Tanzi (in *International Law — Achievements and Prospects*, Vol. I, p. 369) that, once there has been a breach of an international obligation and consequent injury to a State, the State having suffered the injury is entitled to claim reparation from the State responsible.

148. The Court preferred to dismiss any claim for reparation, considering that "Nigeria is under an obligation in the present case expeditiously and without condition to withdraw its administration and its military and police forces from that area of Lake Chad which falls within Cameroon's sovereignty and from the Bakassi Peninsula" (para. 314 of the Judgment). It adds:

> "In the circumstances of the case, the Court considers moreover that, by the very fact of the present Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed. The Court will not therefore seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon has been engaged as a result of that occupation." (Para. 319 of the Judgment.)

149. With regard to the other facts invoked by the Parties, it concludes:

> "The Court finds that, here again, neither of the Parties sufficiently proves the facts which it alleges, or their imputability to the other Party. The Court is therefore unable to uphold either Cameroon's submissions or Nigeria's counter-claims based on the incidents cited." (Para. 324 of the Judgment.)

While this solution is certainly correct in law for the reasons that I have set out above, yet, when the facts of the case are examined, one can only conclude that Nigeria did indeed commit unlawful acts. For this reason I find it somewhat regrettable that Cameroon's claims for reparation have not been satisfied, precisely because it has been granted exclusive sovereignty over certain areas of the Lake Chad region and of Bakassi that Nigeria has been occupying, notwithstanding the protests of the egitimate sovereign and in full awareness of the law governing its borders with Cameroon, since it disputed the titles on which that law is founded by invoking *effectivités* bearing the hallmark of faits accomplis.

150. All that remains to be said, in my humble opinion, is that the Court has rendered a Judgment based on sound reasoning which I am sure will alleviate the concerns aroused in Africa by this dispute between

Cameroon and Nigeria, familiar even to the man in the street as the *Bakassi* case. The Judgment will contribute to the establishment of peace between two brother countries of Africa and throughout the region.

(Signed) Kéba MBAYE.