SEPARATE OPINION OF JUDGE YUSUF

I agree with the Court's findings — I disagree with the continued use of colonial concepts and terminology — A recurrent problem in the Court's jurisprudence regarding intra-African territorial and maritime delimitations — High time the Court set aside the use of nineteenth-century colonial law and colonial terminologies — Obsolete doctrines left over from the nineteenth-century Jus Publicum Europaeum*, in particular those relating to colonial occupation and acquisition of territory — Doctrines sometimes invoked also by African States and their counsel — No need to resort to acquisitive prescription in the Judgment — Use of such concepts tantamount to their legitimation in the twenty-first century — Reliance on the 1900 Convention would be enough — Maritime features recognized by both colonial Powers as dependencies of Corisco Island — The Court could have avoided the legal relay between colonial law and contemporary international law.*

I. Introduction

1. I agree with the findings of the Court regarding the request submitted to it by the Parties under Article 1 of their Special Agreement. I disagree, however, with the outdated terminology and colonial concepts that the Court continues to use with respect to intra-African territorial and maritime delimitations. I think it is high time that the Court set aside in its judgments on territorial disputes between African States the use of colonial law, colonial terminologies, and the legal concepts and rules attaining to it which were elaborated in the nineteenth century under the Public Law of Europe (*Jus Publicum Europaeum*), which some European scholars referred to as "international law", but was a law applied only among a self-styled club of so-called "civilized nations". I also disagree with the reasoning of the Court as regards the three maritime features in dispute between the Parties; a reasoning which, in my view, is partly based on one of the outdated and obsolete principles of the nineteenth-century *Jus Publicum Europaeum* designed for the legal justification of colonial conquest and occupation of other countries, namely "acquisitive prescription".

2. I will first address the broader issues relating to the continued use by the Court, and sometimes by the African States themselves and their counsel, of colonial-inspired or devised terminologies as well as notions and principles of colonial law, or the nineteenth-century Public Law of Europe which mainstreamed such notions and principles (Sections II and III below). I will then turn to the reasoning of the Court in the Judgment regarding the disputed maritime features of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga, which continues to perpetuate the Court's reliance on obsolete notions of acquisition of territory which were elaborated in the nineteenth century in support of the colonial enterprise (Section IV).

II. The use of colonial language and colonial law by the Court

3. A note of concern regarding the Court's use of colonial law in African disputes was first expressed by Judge *ad hoc* Abi-Saab in 1986 in *Frontier Dispute (Burkina Faso/Republic of Mali)*. This was the first territorial dispute between two African States brought before the Court. It was entrusted to a Chamber of the Court chaired by Judge Bedjaoui and composed of Judges Lachs and Ruda and Judges *ad hoc* Luchaire and Abi-Saab. While examining the applicability of the French *droit d'outre-mer* to the determination of the frontier, the Chamber clarified its intention to deny any renvoi to colonial law:

> "[I]nternational law *does not effect any renvoi to the law established by the colonizing State*, nor indeed to any legal rule unilaterally established by any State whatever; French law — especially legislation enacted by France for its colonies and *territoires d'outre-mer* — may play a role not in itself (as if there were a sort of

> *continuum juris*, a legal relay between such law and international law), but only as one *factual element* among others, or as evidence indicative of what has been called the 'colonial heritage', i.e., the 'photograph of the territory' at the critical date."[1] (Emphasis added.)

Notwithstanding the above, colonial law was extensively used in this Judgment, and conclusions were reached by endorsing colonial notions and terminologies.

4. This was well captured by Judge *ad hoc* Abi-Saab in his separate opinion whereby he observed that the Chamber was led by the apparent relevance of colonial documents (i.e. Order 2728 AP and letter 191 CM2) into "*an excessively detailed analysis of French colonial law*, a task which [was] *not*, in [his] view, a fitting one for an international court and was largely superfluous"[2]. He then added: "Along that road there can therefore be *no* question of even circuitously finding in contemporary international law *any retroactive legitimation whatever of colonialism as an institution*."[3] This warning was never fully heeded. Colonial terminology and colonial law continued to be used by the Court in subsequent cases concerning African disputes even in the twenty-first century.

1. Colonial terminology and colonial law

5. In respect of colonial terminology, one may find in the judgments of the Court expressions such as "territorial possessions" of a European power, or "German", "British" or "French" territory describing African colonial territories, or "British" or "German" sovereignty. For instance, in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, the Court stated that by Article 23 of the Treaty of Peace in 1947, "Italy renounced all *right* and *title* to *its territorial possessions in Africa*, i.e., Libya, Eritrea and Italian Somaliland. The final disposal of *these possessions* was to be determined jointly by the Governments of the Four Allied Powers"[4]. In the same Judgment, one may also find expressions such as "French Equatorial Africa" and "French West Africa" without any qualifications or explanation as to the origin or the use of such expressions, and without placing them in inverted commas to indicate that they were used by the colonial Powers. Likewise, in *Kasikili/Sedudu Island (Botswana/Namibia)*, the Court observed that in 1910, "negotiations took place between Germany and Great Britain concerning the boundary between their respective *possessions* in the area of the Caprivi Strip west of the intersection of the 18th parallel with the River Chobe"[5].

6. With regard to colonial law, the Chamber in *Frontier Dispute (Benin/Niger)*, when examining the French President's power and that of the French Governor-General before 1946 in relation to French colonies, stated that "the Chamber will first consider the various regulative or administrative acts invoked by the Parties; thus, pre-eminence is to be accorded to *legal title* over

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[1] *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 568, para. 30.

[2] *Ibid.*, separate opinion of Judge *ad hoc* Abi-Saab, p. 659, para. 3 (emphasis added).

[3] *Ibid.*, p. 659, para. 4 (emphasis added).

[4] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 19, para. 34 (emphasis added).

[5] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1076, para. 53 (emphasis added).

effective possession as a *basis of sovereignty*"[6]. But what kind of "legal title" did and can those European colonial claims create? And what kind of "basis of sovereignty" did and can the European colonial occupation provide?

7. In a dissenting opinion, the then Judge *ad hoc* Bennouna correctly pointed out that "[c]olonial law is *not* to be considered in itself as *basis of the territorial title*", but rather "is simply 'an element of fact' — confirmation of the title promulgated by the colonial Power, and hence evidence of the colonial heritage"[7]. Eight years later, in *Frontier Dispute (Burkina Faso/Niger)*, the Court decided to consider the 1927 *Arrêté*, issued by the Governor-General *ad interim* of the Colonies collectively referred to as "French West Africa", as constituting "legal title" which "such an *effectivité* could not, in any event, have overridden", and consequently intended to fix "the boundaries of the Colonies of Upper Volta and Niger"[8].

8. Again, Judge Bennouna, who in the meantime had become a Member of the Court, recalled in a declaration the warning of Judge *ad hoc* Abi-Saab in 1986 and reflected more thoroughly on the role of the Court with respect to colonial law by observing, *inter alia*, that

> "in this second decade of the twenty-first century, I cannot help but question the relevance of the task entrusted to it, namely that of drawing, or completing, the frontier between the two countries on the basis of an *Arrêté* of the Governor-General of French West Africa (FWA) dating from 1927"[9].

In this context, he questioned whether the detailed analysis of "the relationship between a decree of the President of the French Republic and an *Arrêté* of the Governor-General of ['French West Africa'], or the context of the apportionment of territories among French colonial districts" by the Court really avoided the "*continuum juris*, a legal relay" between colonial law and international law[10].

9. The answer to Judge Bennouna's question is a clear and simple no. It may indeed be observed that the persistent recourse to colonial language and to concepts of colonial law by the Court implies a legitimation and rehabilitation of colonial law, or the nineteenth-century Public Law

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[6] *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 120, para. 47 (emphasis added), referring to *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 586-587, para. 63. However, in the cited paragraph of *Frontier Dispute (Burkina Faso/Republic of Mali)*, the term "colonial *effectivités*" was used and the Chamber simply referred to "the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period". In fact, it was in a different place, namely p. 566, para. 23, and in a different context, when explaining the meaning of the principle *uti possidetis juris* as well applied in Spanish America, that the Chamber discussed:

> "The first aspect, emphasized by the Latin genitive *juris*, is found in the pre-eminence accorded to legal title over effective possession as a basis of sovereignty. Its purpose, at the time of the achievement of independence by the former Spanish colonies of America, was to scotch any designs which non-American colonizing powers might have on regions which had been assigned by the former metropolitan State to one division or another, but which were still uninhabited or unexplored. However, there is more to the principle of *uti possidetis* than this particular aspect. The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved."

[7] *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, dissenting opinion of Judge *ad hoc* Bennouna, p. 155, para. 14.

[8] *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 59, para. 19, and p. 79, para. 79.

[9] *Ibid.*, declaration of Judge Bennouna, p. 94.

[10] *Ibid.*, referring to *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 568, para. 30.

of Europe, through which attempts were sometimes made to introduce the legal concepts used to justify the European colonial enterprise in Africa into the contemporary international legal system.

2. Obsolete theories on the acquisition of territory

10. The Public Law of Europe enriched itself in the nineteenth century with all kinds of theories to justify imperial conquest and colonial occupation of territories in Africa. However, these were theories and concepts that were applicable amongst them and that were later partly codified at the Berlin Conference. Some of these theories and concepts are occasionally argued before the Court, particularly regarding decolonization or territorial delimitation among African States. One such theory that was presented to the Court in the 1970s in the *Western Sahara* case was that on the occupation of *terra nullius* that was extensively used by European colonial Powers with respect to the conquest of African territories. However, the Court strongly rejected this fundamental tenet of the *Jus Publicum Europaeum* as being applicable to the *Western Sahara* case in so far as "territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*". For such territories, the Court stated, "the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers [as derivative roots of title]"[11]. However, the Court left open "the nature and legal value of agreements between a State and local chiefs" and hence the "legal character or the legality of the titles which led to Spain becoming the administering Power of Western Sahara"[12].

11. The latter issue was revisited by the Court in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*. In that case, one of the key issues was whether the treaties concluded in 1884 by Great Britain with the Kings and Chiefs of Opobo and the Kings and Chiefs of Old Calabar constituted a "Treaty of Protection" that, as argued by Nigeria, allowed Britain only to protect them from external aggression, or whether Britain was also entitled to cede the territory to any third State[13]. Instead of properly interpreting and applying the agreements between the African rulers and Britain, the Court chose to have recourse to one of the arbitral awards which applied colonial law and to the principles on acquisition of territory of the nineteenth-century *Jus Publicum Europaeum*, namely the *Island of Palmas* Award of 1928 and, quoting from it, found the contested agreements with local rulers "not an agreement between equals" but rather "a form of internal organisation of a colonial territory, on the basis of autonomy of the natives"[14]. This was pure and unadulterated colonial law received and applied by the Court on the basis of "intertemporal law". According to the Court, "[e]ven if this mode of acquisition does not reflect current international law, the principle of intertemporal law requires that the legal consequences of the treaties concluded at that time in the Niger delta be given effect today, in the present dispute"[15].

12. It is, however, difficult to understand how the Court could give effect, in 2002, to a treaty which it described as "not an agreement between equals" and which was based on a law that, as described by Max Huber in the *Island of Palmas* Award, did not recognize the African or Asian rulers as "members of the community of nations" amongst whom alone the law of nations he was describing

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[11] *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 39, para. 80.

[12] *Ibid.*, pp. 39-40, para. 82.

[13] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 402, para. 201, and p. 404, para. 204.

[14] *Ibid.*, p. 405, para. 205, referring to the *Island of Palmas case (Netherlands/United States of America), Award of 4 April 1928* (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. II, pp. 858-859).

[15] *Ibid.*

applied at the time[16]. In other words, the Court was applying, on the basis of the "principle of intertemporal law", to the African Chiefs and Kings who concluded those agreements with Britain, a law which did not apply to them, but was reserved for application only among a self-styled club of so-called "civilized nations", mostly in Europe.

13. In his separate opinion, Judge Al-Khasawneh questioned the Court's approach:

> "[I]f the Judgment is to constitute a legally and morally defensible scheme, it cannot merely content itself with a *formalistic appraisal of the issues* involved. Such issues include the *true scope of intertemporal law* and the extent to which it should be judged by *contemporary values* that the Court ought to foster; an ascertainment of State practice at the relevant time and the role of the Berlin Conference on West Africa of 1885; the question, whether that practice — assuming it permitted the acquisition of title in the so-called colonial protectorates — could be invoked in an African case when no African State had participated in the formation of such alleged practice; the relevance of the fundamental rule *pacta sunt servanda* on the passing of title and the normative value to be attached to the consistent practice of the colonial Power in question (Great Britain) of distinguishing between colonies on the one hand and protectorates on the other. Only when a serious attempt has been made to analyse this host of relevant and interrelated considerations can it be said that the question repeatedly and forcefully posed by Sir Arthur Watts as counsel for Nigeria — Who gave Great Britain the right to give away Bakassi? And when? And how? — would be answered."[17] (Emphasis added.)

In the same vein, Judge *ad hoc* Ajibola echoed that the Court failed to address or answer the constant questions asked by the counsel for Nigeria throughout the oral proceedings: "who gave Great Britain the right to give away Bakassi? And when? And how?"[18]

14. A second problematic concept accepted by the Court, including in the present Judgment, is that of acts accomplished *à titre de souverain* to display authority over a certain period of time in an occupied territory (known in European legal doctrine as acquisitive prescription), which was often employed under the *Jus Publicum Europaeum* and colonial law to legitimize the acquisition of territory that could not manifestly be considered as *terra nullius*, through mere colonial occupation[19]. In *Kasikili/Sedudu Island (Botswana/Namibia)*, although the Parties agreed "between themselves that acquisitive prescription is recognized in international law and they further agree[d] on the conditions under which title to territory may be *acquired by prescription*", the Court found that

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[16] According to the Award by Max Huber, "[a]s regards *contracts between a State* or a Company such as the Dutch East India Company and *native princes or chiefs of peoples* not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties". *Island of Palmas case (Netherlands/United States of America), Award of 4 April 1928, RIAA*, Vol. II, p. 858 (emphasis in the original).

[17] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, separate opinion of Judge Al-Khasawneh, pp. 493-494, para. 3.

[18] *Ibid.*, dissenting opinion of Judge *ad hoc* Ajibola, p. 579, para. 127.

[19] See R.Y. Jennings, *The Acquisition of Territory in International law* (2017), p. 35:

> "Prescription as a whole may therefore be defined in the careful terms we find in Lauterpacht's *Oppenheim*: 'the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order" (referring to H. Lauterpacht, *Oppenheim, International Law* (1955), Vol. 1, p. 576).

> "even if links of allegiance may have existed between the Masubia and the Caprivi authorities, it has not been established that the members of this tribe occupied the Island *à titre de souverain*, i.e., that they were *exercising functions of State authority there on behalf of those authorities*"[20] (emphasis added).

15. Again, this was a legitimation and acceptance of legal notions and principles (such as the above statement that African "tribes" were incapable of exercising functions of State authority!) employed in the *Island of Palmas* Award, which thoroughly reflect nineteenth-century European colonial law and the principles and rules used by the Berlin Conference to codify the colonization of the African continent. Indeed, the *Island of Palmas* Award may be characterized as an authoritative proclamation of colonial law, or those aspects of the *Jus Publicum Europaeum* which dealt with the conquest, occupation and colonization of non-European lands. It describes the so-called prescription as an example of a mode of acquisition of territory in the partition of the African continent by European Powers, undertaken on an "open and public" manner in 1885[21]. The continuous display of authority *à titre de souverain* over a certain period of time as a mode of acquisition of territory occupied by a colonial Power was laid down in Article 35 of the Final Act of the Berlin Conference which provided that

> "[t]he Signatory Powers of the present Act recognize the obligation to ensure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under the conditions agreed upon"[22].

16. The third problematic notion that should not find application in territorial disputes between African States is the principle of *uti possidetis juris*. African States have never ratified the Final Act of the Berlin Conference, nor have they collectively accepted to apply colonial law in relations amongst themselves. This principle may have been accepted by Latin American States in order to settle disputes amongst themselves and to use Spanish administrative law, which delimited the boundaries between them prior to their independence. However, this is not the case in Africa. Neither the Organization of African Unity (OAU) nor the African Union (AU) endorsed such a principle. I have discussed in detail in my separate opinion in *Frontier Dispute (Burkina Faso/Niger)* that the OAU/AU principle of respect for borders existing on achievement of independence[23] is *neither* identical *nor* equivalent to the principle of *uti possidetis juris* applied by the Spanish-American Republics following their own decolonization a century earlier[24].

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[20] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1105, paras. 96 and 98.

[21] *Island of Palmas case (Netherlands/United States of America), Award of 4 April 1928, RIAA*, Vol. II, p. 868.

[22] Article 34 of the Final Act of the Berlin Conference also stated that:

> "Any Power which henceforth takes possession of a tract of land on the coasts of the African continent outside its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own."

[23] Article III, paragraph 3, of the 1963 Charter of the Organization of African Unity indicates that the Member States shall declare their adherence to the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence". The OAU Charter was later replaced by the African Union Constitutive Act on 26 May 2001, Article 3, paragraph *(b)*, of which reads: "The objectives of the Union shall be to: . . . defend the sovereignty, territorial integrity and independence of its Member States". The resolution AGH/Res. 16 (I), "Border Disputes among African States", adopted in Cairo in 1964 (Cairo Resolution) at the First Session of the Conference of African Heads of State and Government also emphasizes that "all Member States pledge themselves to respect the borders existing on their achievement of national independence".

[24] *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, separate opinion of Judge Yusuf, pp. 136-145, paras. 10-36.

III. Colonial law invoked by African States

17. The Court is not, however, alone in perpetuating the application to contemporary African territorial disputes of the outdated notions of colonial law and the obsolete principles of the *Jus Publicum Europaeum*. These notions and principles are sometimes invoked by the African States appearing before the Court through special agreements or written arguments usually drawn up by counsel from Western countries or counsel educated in the Western legal systems using the language inherited from colonial law.

18. For instance, in *Frontier Dispute (Burkina Faso/Republic of Mali)*, the parties themselves, in their written and oral arguments, reaffirmed their commitment to the principle of *uti possidetis juris*[25]. In *Kasikili/Sedudu Island (Botswana/Namibia)*, in addition to the reference to the principle of *uti possidetis juris* made by Namibia[26], the parties themselves requested to apply prescription as a valid mode of acquisition of territory, and colonial law was heavily relied on as legal basis for their respective claims. The Court took note that

> "Namibia alleges that in the present case *Germany was in peaceful possession of the Island* from before the beginning of the century and *exercised sovereignty over it* . . . It states that this peaceful and public possession of the Island, *à titre de souverain*, was continued without interruption by Germany's successor until accession of the territory to independence."[27] (Emphasis added.)

Botswana did not object to this approach:

> "Although it considers the doctrine of prescription inapplicable in this case for the reasons referred to earlier, Botswana *accepts the criteria for acquiring prescriptive title* as set out by Namibia; it argues, however, that those criteria have not been satisfied by Namibia and its predecessors. Botswana asserts, in substance, that 'there is no credible evidence that either Namibia or its predecessors exercised State authority in respect of Kasikili/Sedudu' and that even if peaceful, public and continuous possession of the Island by the people of Caprivi had been proved, it could not have been *à titre de souverain*."[28] (Emphasis added.)

19. In *Frontier Dispute (Benin/Niger)*, the parties stated in Article 6 of the Special Agreement of 15 June 2001 that the applicable law includes "the principle of State succession to the boundaries inherited from colonization, that is to say, the intangibility of those boundaries". In particular:

> "The Parties both acknowledge that, in accordance with the principle of *uti possidetis juris*, the course of the frontier and the attribution of islands in the River Niger to either one of them must be determined in the light of French colonial law, known as '*droit d'outre-mer*'. They also agree on the identification of the relevant rules of that law, but do not share the same interpretation thereof."[29]

Likewise, in *Frontier Dispute (Burkina Faso/Niger)*, the parties agreed in Article 6 of the Special Agreement that "rules and principles of international law applicable to the dispute" include "the

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[25] CR 1986/3, p. 51 (Burkina Faso, Salembere): "*Le Mali réaffirme dans ses écritures un attachement au principe de l'uti possidetis. Nous nous en félicitons et lui en donnons acte*."

[26] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1092, para. 71.

[27] *Ibid.*, p. 1103, para. 94.

[28] *Ibid.*, p. 1104, para. 95.

[29] *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, p. 96, para. 2, and p. 110, para. 28.

principle of the intangibility of boundaries inherited from colonization and the Agreement of 28 March 1987". According to them, the latter source, namely the 1987 Agreement, "specifies the acts and documents of the French colonial administration which must be used to determine the delimitation line that existed when the two countries gained independence"[30]. Had this been presented as a relevant fact that had to be taken into account, it would not be objectionable, but to submit that the "documents of the French colonial administration . . . must be used to determine the delimitation line" was quite remarkable.

20. In the instant case, the situation is even worse. Not only have colonial occupation and colonial law been extensively employed by both Parties, but the counsel for Equatorial Guinea relied heavily on, among others, Spanish "public and notorious assertion of sovereignty without protest" as well as the agreements allegedly signed with local people in respect of the legal title over Mbanié/Mbañe, Cocotiers/Cocoteros and Conga[31]. For the former, the counsel for Equatorial Guinea referred to a series of instruments indicating mere colonial claims of title such as the 1778 "Treaty of El Pardo" between Spain and Portugal, the 1843 "Declaration of Corisco" entitled "Original Documents on the Annexation to Spain of Corisco, Elobey and their Dependencies", the 1846 "Record of Annexation", the 1846 "Charter of Spanish Citizenship given to the inhabitants of Corisco, Elobey and their dependencies", and the 1858 "Letter reaffirming Spanish possession of the island of Corisco"[32]. For the latter, the facts presented to the Court show that, on 17 March 1843, the Spanish Commander Juan José de Lerena, who was sent to reassert Spain's colonial control over Corisco Island after an English warship destroyed a Spanish installation there[33], appointed a local person called Boncoro — whose identity and role in the local community was unknown — as the "Pilot of the Bay of Corisco and Chief of the Southern point of the island" due to "his demonstrated loyalty to Spain". The appointment reads as follows:

> "*The faithful negro Boncoro* is hereby named Pilot of the Bay of Corisco and Chief of the Southern point of the island of the same name, and wishes to be called hereinafter Baldomero Boncoro, which is *granted to him due to his demonstrated loyalty to Spain* and the Head of its Government, whose name he takes. Given on board the aforementioned ship in said bay at 56 minutes North latitude on March 17, 1843. — Juan José de Lerena."[34] (Emphasis added.)

Three years later, on 18 February 1846, Boncoro's alleged successor, identified as "King of the Island of Corisco, Elobey, and dependencies", signed the document called "Record of Annexation" with the Inspector General of the so-called "Spanish Possessions in the Gulf of Guinea" declaring that "the Island of Corisco, Elobey and its current dependencies are Spanish"[35]. The 1846 "Charter of Spanish Citizenship given to the inhabitants of Corisco, Elobey and their dependencies" simply followed this narrative[36].

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[30] *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 51, para. 2, and p. 75, para. 65.

[31] CR 2024/33, pp. 47-48, paras. 31-36 (Reichler).

[32] CR 2024/29, pp. 61-62, paras. 12-17 (Reichler).

[33] Kingdom of Spain, Royal Commissioner for the Islands Fernado Póo, Annobón and Corisco on the Coast of Africa, Declaration of Corisco (16 March 1843), Memorial of Equatorial Guinea (hereinafter "MEG"), Vol. V, Annex 110.

[34] Kingdom of Spain, Original Documents on the Annexation to Spain of Corisco, Elobey and their dependencies (17 March 1843), MEG, Vol. V, Annex 111.

[35] Kingdom of Spain, Ministry of State, Record of Annexation (18 February 1846), MEG, Vol. V, Annex 112.

[36] Kingdom of Spain, Ministry of State, Charter of Spanish Citizenship given to the inhabitants of Corisco, Elobey and their dependencies (18 February 1846), MEG, Vol. IV, Annex 47.

IV. The present Judgment and the continued use of obsolete colonial concepts

21. In the instant case, the Parties defined and delimited the scope of the dispute they decided to submit to the Court in Article 1 of the Special Agreement, which reads as follows:

> "1. The Court is requested to determine whether the legal titles, treaties and international conventions invoked by the Parties have the force of law in the relations between the Gabonese Republic and the Republic of Equatorial Guinea in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga.
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> To this end:
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> 2. The Gabonese Republic recognizes as applicable to the dispute the special Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, signed in Paris on 27 June 1900, and the Convention demarcating the land and maritime frontiers of Equatorial Guinea and Gabon, signed in Bata on 12 September 1974.
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> 3. The Republic of Equatorial Guinea recognizes as applicable to the dispute the special Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, signed in Paris on 27 June 1900.
>
> 4. Each Party reserves the right to invoke other legal titles."

22. At the heart of the dispute between the Parties is the title to the three maritime features — Mbanié/Mbañe, Cocotiers/Cocoteros and Conga — in the Corisco Bay. In *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, the Court stated that what truly matters is that a title should be "always and exclusively the effect of a legal operation" rather than the result of any "purely physical fact"[37]. Therefore, it is my view that two sets of legal operations or analysis should be undertaken by the Court: first, whether any legal titles are conferred on the Parties with respect to the disputed maritime features by conventions, treaties or other agreements concluded between them after their independence; and secondly, whether legal titles relating to the disputed maritime features result for either of them, as a matter of fact, from conventions, treaties or agreements concluded between the colonial Powers or other acts accomplished by them prior to the independence of the Parties.

23. However, this Judgment, instead of trying to find titles in the treaties and international conventions concluded between the Parties or by the colonial Powers, looks for such titles in obsolete concepts and principles of colonial law or of the *Jus Publicum Europaeum*. Notably, it is stated in paragraph 185 of the Judgment that, "[i]n the absence of a treaty establishing title to territory, international courts and tribunals have examined whether there has been an intentional display of authority over the territory through the exercise of State functions". This is a clear reference to "acquisitive prescription" as defined in R.Y. Jennings citing Lauterpacht's *Oppenheim* (see footnote 20 above) as well as in Max Huber's Award on the *Island of Palmas case*; and there was no need to disguise this mode of colonial "acquisition of territory" by avoiding calling it by its name. In the *Island of Palmas* Award, Max Huber described it as follows:

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[37] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 296, para. 103.

> "As to the conditions of acquisition of sovereignty by way of continuous and peaceful display of State authority (so-called prescription), some of which have been discussed in the United States Counter Memorandum, the following must be said:
>
> The display has been open and public, that is to say that it was in conformity with usages as to exercise of sovereignty over colonial States."[38]

The usages referred to here are European eighteenth- and nineteenth-century usages regarding the colonization of Asian and African countries.

24. Furthermore, this Judgment does not only avoid calling this colonial practice by its real name, but it also does not explain how Spain's display of authority enabled it to acquire "a title" to the island and its "dependencies". First of all, prescription requires the existence of a former displaced sovereign or at least a lack of objection or acquiescence by the former sovereign. Which State or political entity was the former sovereign here? The Judgment is silent on this issue. If there was no former sovereign, as seems implied in the Judgment, was this considered by the European Powers as *terra nullius*? Here also the Judgment is silent.

25. Secondly, the Judgment confuses claims to title and acquisition of territory through the so-called acquisitive prescription. It is observed in paragraph 187 of the Judgment that

> "Spain purported to act *à titre de souverain* in relation to Corisco Island and its dependencies before 1900, as evidenced by the 1843 Declaration of Corisco (Kingdom of Spain, Royal Commission for the Islands Fernando Póo, Annobón and Corisco on the Coast of Africa, Declaration of Corisco, 16 March 1843), the 1846 Record of Annexation (Kingdom of Spain, Ministry of State, Record of Annexation, 18 February 1846) and the 1846 Charter of Spanish Citizenship (Kingdom of Spain, Ministry of State, Charter of Spanish Citizenship Given to the Inhabitants of Corisco, Elobey and their Dependencies, 18 February 1846)."

26. These declarations and charters may show a claim to colonial occupation, but they do not show the acquisition of territory by prescription. Indeed, they say nothing about display of authority or about actual exercise of such authority in a continuous manner; neither does the Judgment show such exercise of authority over a long period of time before 1900. As argued by the counsel for Equatorial Guinea, the Record of Annexation was based on an act of cession signed by a person referred to as "King Boncoro II" with the Spanish Inspector General and it was based on this so-called Record of Annexation that the "Charter of Spanish Citizenship Given to the Inhabitants of Corisco, Elobey and Their Dependencies" of 1846 was issued by the Spanish Inspector General[39].

27. Thirdly, even the *Island of Palmas* Award did not claim that a continuous display of authority amounts to title. It stated that "it is as good as a title"[40]. However, the Parties to the Special Agreement requested the Court to determine title but not acts that could be "as good as a title". Thus, the Judgment's insistence on display of authority *à titre de souverain* does not fit the framework of Article 1 of the Special Agreement, nor does it respond to the request of the Parties. In sum, there was no need for the Court to take from the shelf and dust down an obsolete concept conceived for the colonial occupation of African and Asian territories by European Powers without even showing its relevance or its suitability for the purpose of addressing the questions put to the Court by the

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[38] *Island of Palmas case (Netherlands/United States of America), Award of 4 April 1928, RIAA*, Vol. II, p. 868.

[39] See CR 2024/29, pp. 61-62, paras. 15-16 (Reichler).

[40] *Island of Palmas case (Netherlands/United States of America), Award of 4 April 1928, RIAA*, Vol. II, p. 839.

Parties through the Special Agreement. As was aptly observed by Judge Moreno Quintana in the case concerning *Right of Passage over Indian Territory (Portugal* v. *India)*:

> "To support the Portuguese claim in this case, which implies survival of the colonial system, without categorical and conclusive proof is to fly in the face of the United Nations Charter.
>
> As judge of its own law — the United Nations Charter — and judge of its own age — the age of national independence — the International Court of Justice cannot turn its back upon the world as it is."[41]

28. Instead of having recourse to such obsolete colonial law principles, the Judgment could have substantiated the title over the three maritime features solely through an analysis and interpretation of the 1900 Convention itself, which is recognized by both Parties. In particular, the Judgment notes in paragraph 189 that "the Parties agree that Mbanié/Mbañe, Cocotiers/Cocoteros and Conga constitute a single unit and that France shared this view". Indeed, Gabon underscored that references to Mbanié/Mbañe encompass all three maritime features in dispute and that they "*sont non seulement un tout géographique, mais . . . ont été regardées comme tel par les Parties*"[42]. The Judgment also notes in paragraph 191 that, in 1886 and 1887, France recognized "Baynia [Mbanié/Mbañe]" as a "geographical dependenc[y]" and "natural dependenc[y]" of Corisco Island[43]. Further, it appears that, as noted in paragraph 189 of the Judgment, the French Commissioner General did not object when the Spanish Governor-General of Fernando Póo/Fernando Pó referred to "Embagna [Mbanié/Mbañe]" as a dependency attached to Corisco Island in 1895[44].

29. In light of the above observations, the Judgment could have concluded that the three maritime features together constitute part of the Corisco group of islands, the title to which was confirmed in the 1900 Convention by the two colonial Powers as belonging to the colonial territory administered by Spain. In this manner, the "*continuum juris*, a legal relay" between colonial law and international law could have been avoided in the Judgment. However, by choosing not to do so and by engaging extensively again with colonial law and the legal concepts and doctrines used in the 1885 Final Act of Berlin, the Judgment confirms the harsh critique made by Dr Dirdeiry M. Ahmed that this Court "cares very little, if at all, as to how and when the African states acquired title to territory. Yet it uses the term 'title' ceaselessly in references that are mostly unnecessary, confusing, and contradictory"[45].

(Signed) Abdulqawi Ahmed YUSUF.

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[41] *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, dissenting opinion of Judge Moreno Quintana, p. 95

[42] CR 2024/32, p. 39, para. 80 (Miron).

[43] French-Spanish Commission, Conference on the Delimitation in West Africa, Archives of the French Ministry of Foreign Affairs, Annex to Protocol No. 17 (24 December 1886) (excerpt), MEG, Vol III, Annex 11; Protocol No. 30, Session between the Kingdom of Spain and the French Republic (16 September 1887) (excerpt), MEG, Vol III, Annex 3.

[44] Letter No. 368 from the Spanish Governor-General of Fernando Póo to the Commissioner General of the French Congo (22 November 1895), MEG, Vol. IV, Annex 50.

[45] Dirdeiry M. Ahmed, "Between Intangibility and Uti Possidetis: The Debate on Title to Territory in Africa", *African Yearbook of International Law*, Vol. 24 (2019), pp. 191-192.