SEPARATE OPINION OF JUDGE TLADI

Court's jurisdiction limited by Special Agreement — Principle of consent of States to jurisdiction — Court exceeded its jurisdiction by determining whether land boundary had been modified — Special Agreement limits the Court's jurisdiction to determining which legal titles have the force of law in the relations between Parties.

I. Introduction

1. I have voted in favour of all the relevant parts of the *dispositif*. Yet, the reasoning in some parts of the Judgment and the conclusions drawn therefrom, which to my mind have as potent a legal effect as the *dispositif*, far exceed the scope of the Court's jurisdiction in this case. Worse still, the Court's conclusions risk entrenching the positions of the Parties and thus making any future negotiations difficult if not impossible. The reasoning I am referring to can be found at paragraphs 134 to 157, and the offending conclusions are to be found at paragraphs 144, 155 and 156 of the Judgment.

2. Before addressing the substance of my views in this opinion, I wish to refer to the context of these proceedings which have served to, once again, highlight an uncomfortable reality and tension concerning international law, Africa and colonialism. On the one hand, colonialism is a blemish on the history of humanity and indeed, on the reputation of international law — one of the most egregious violations against humanity, whose consequences continue to be felt long after its formal end, and will likely continue to be felt for decades or even centuries to come. Yet, on the other hand, international law continues to respect, normatively, many of the legacies of colonialism, mainly as a consequence of the so-called principle of intertemporal law. It is this principle of intertemporal law that, for example, is said to prevent the application of reparation obligations to former colonial Powers for the unconscionable atrocities committed by them in history.

3. In the context of the current case, and of colonial borders in general, another legacy of colonialism is seen in the entrenchment of legal principles such as *uti possidetis juris*, which is a consequence of intertemporal law — and which is reflected in the African context in the African Union's principle concerning the respect for colonial borders[1]. What is perhaps worse, at least in the context of the *uti posseditis juris* principle, is that the continent is caught between the proverbial rock and a hard place. The principle of the respect of colonial borders is not just a legal principle that has been accepted as such by States, including those most affected by it, but it is also a principle of necessity adopted by African States in order to prevent the continent from plunging into conflict. Thus, it is not possible, as far as I can see, to imagine a world without the *uti possidetis juris* principle, which would not thrust formerly colonized territories into untold chaos.

4. This principle — that former colonies must respect colonial borders — is a bitter pill that had to be swallowed by former colonies for the sake of peace and stability[2]. In this particular case, it was especially difficult to observe two African States locked in dispute about their boundaries based

[1] See Constitutive Act of the African Union (2000), Article 4 *(b)* ("respect of borders existing on achievement of independence"). See also the principle of respect of borders existing on achievement of independence adopted by the Organization of African Unity (OAU) in its Resolution AHG/Res. 16 (I) in 1964.

[2] See, for example, Statement by Permanent Representative of Kenya during the United Nations Security Council's urgent meeting on the situation in Ukraine, 21 February 2022, para. 14: "We chose to follow the rules of the OAU and the United Nations Charter not because our borders satisfied us but because we wanted something greater forged in peace", available at https://www.un.int/kenya/sites/www.un.int/files/Kenya/kenya_statement_during_urgent_meeting_on_on_ukraine_21_february_2022_at_2100.pdf.

not on what they themselves believed, but rather on what the colonial masters believed prior to independence.

5. Be that as it may, we are here now, and the Court is called upon to exercise its judicial function and assist the Parties with the matter that they have brought before it.

6. In the following section, I will discuss the inherent limitation upon the Court's jurisdiction on account of the Parties' Special Agreement. Section III will then address my main concern regarding the majority's approach to the case, which has resulted in the Court exceeding its mandate as provided in the Special Agreement.

II. The Court's limited jurisdiction

7. I begin by noting that the actual dispute between the Parties is one concerning the delimitation of their land and maritime boundaries and the determination of sovereignty over the islands of Mbanié/Mbañe, Cocotiers/Cocoteros and Conga. However, the case submitted to the Court is narrower in scope. As the Court is seised of this case on the basis of a Special Agreement under Article 36, paragraph 1, of the Statute, the scope of its jurisdiction is to be determined by reference to that provision and the terms of the Special Agreement.

8. A special agreement inherently limits and defines the Court's jurisdictional powers. In such cases, the Court, in determining its jurisdiction, is expected to limit its deliberation to the scope dictated by the special agreement[3]. After all, it is a "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent"[4], and that "it has jurisdiction in respect of States only to the extent that they have consented thereto"[5]. In the present context, the Special Agreement is the embodiment of that consent, as well as the extent of that consent.

9. In the present dispute, the Special Agreement concluded by the Parties states as follows:

> "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."[6]

10. The Parties, both in their written and oral submissions, have made plain their understanding that this provision does not authorize the Court to delimit the boundaries or otherwise determine sovereignty over any of the disputed areas. Rather, the Parties intended the Court's mandate to be

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[3] *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, pp. 68-69, para. 42.

[4] *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32.

[5] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan* v. *United Arab Emirates), Provisional Measures, Order of 5 May 2025*, para. 28.

[6] Special Agreement between the Gabonese Republic and the Republic of Equatorial Guinea, signed in Marrakesh on 15 November 2016 (hereinafter the "Special Agreement"), Article 1 (1).

limited to identifying the legal titles having the force of law between them[7]. This understanding of the Special Agreement is fully consistent with the ordinary meaning of the terms of the Special Agreement, both in their context and in light of the object and purpose of the Special Agreement[8]. Article 1 of the Special Agreement asks the Court to determine *whether* the various titles invoked by the Parties have the force of law between them. This determination would require the Court to consider each title and determine *whether* the invoked title concerns the delimitation of the relevant land and maritime boundaries and has the force of law between the Parties. Under these terms, the Court is precluded from making any determination on the content or scope of the titles invoked. As such, an interpretation of the titles, resulting in a determination of how they delimit the boundary, or how they determine sovereignty, goes beyond the scope of the Court's jurisdiction.

11. What is more, the interpretation of Article 1 (1) of the Special Agreement, which is shared by both Parties, appears to also be shared by the Court as well. At paragraph 30 of the Judgment, the Court admits that it

> "has not been asked [under Article 1 of the Special Agreement] to delimit the land and maritime boundary or determine sovereignty over the three islands, but only to determine whether the legal titles, treaties and international conventions invoked by the Parties have the force of law in their relations in so far as they concern the dispute between them".

12. It is the case that both Parties, in their submissions, addressed issues concerning the proper course of the land boundary and sovereignty over the relevant maritime features. However, this does not result in the expansion of the scope or limit of the Court's jurisdiction. Rather, the Court should rule on a disputed issue *only if it remains within the limits defined by the provisions of the Special Agreement*[9].

13. The implication of the above is that the Parties did not want the Court to "resolve" the main dispute for them. Rather, the Parties wished, in accordance with their sovereign right, to resolve the dispute by themselves on the basis of negotiations which were to take place following the Court's Judgment determining which legal titles concerning their common maritime and land boundaries had the force of law between them. Hence, the Parties brought the matter to the Court to resolve certain legal issues which would aid them in their negotiations.

III. The Court has exceeded its mandate

14. Despite a clear understanding to the contrary, the Court has decided to go beyond the four corners of its mandate and essentially resolve the broader dispute. By so doing, the Court has undermined the sovereign right of the Parties to decide the limits of their acceptance of the Court's jurisdiction. The Court attempts to remedy this by a rather feeble caveat in the Judgment, wherein it states that the conclusions it has reached — concerning the interpretation of the titles, which was beyond its mandate — was "predicated on the specific mandate given by the Parties under the Special Agreement" and that this "conclusion does not prevent the Parties from agreeing to adjust their land boundary in light of the existing situation on the ground and the interests of the local populations"[10].

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[7] Memorial of Equatorial Guinea, para. 1.4; Counter-Memorial of Gabon, paras. 5.2, 5.92; CR 2024/29, p. 26, para. 3 (d'Argent); CR 2024/31, p. 24, para. 38 (Rossatanga-Rignault).

[8] Article 31 (1) of the 1969 Vienna Convention on the Law of Treaties.

[9] *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, pp. 68-69, para. 42.

[10] Judgment, para. 157.

Indeed, the choice of the word "adjust" reflects the fact that the Court has determined the boundary requiring adjusting if the Parties were to agree on a different course.

15. The fact that Equatorial Guinea, in its final submissions, put forward the 1900 Convention between France and Spain, "including those titles to territory held on the basis of the modifications made, in the application of that Convention" can have no effect on the limits of the Court's jurisdiction because, as recalled above, "any request made by a party in its final submissions can fall within the jurisdiction of the Court only if it remains within the limits defined by the provisions of the special agreement"[11].

16. When seen in the context of the limited scope of the Court's jurisdiction, the Parties put forward only two possible titles in respect of the territorial boundary. For Equatorial Guinea, the relevant title was the 1900 Convention, while Gabon put forward the "Bata Convention" and, to the extent not modified by the "Bata Convention", the 1900 Convention. In light of this, once the Court reached the conclusion that the "'Bata Convention' is not a treaty having the force of law between" the Parties and therefore that it "does not constitute a legal title within the meaning of Article 1, paragraph 1, of the Special Agreement", it should simply have concluded that, in respect of the land boundary, the 1900 Convention constitutes a legal title having the force of law between the Parties. That should have been the end of the matter. Instead, the Court proceeds to conduct an analysis of whether the boundary set forth in Article IV of the 1900 Convention was modified and, in the process, determines the course of the boundary.

17. The Court, in paragraphs 134-155, assesses various acts (*effectivités*) to determine whether these may have had the effect of modifying the boundary in the Utamboni River area (Judgment, paras. 134-144) and the Kie River area (Judgment, paras. 145-155). This assessment, and the conclusions based on them, would be perfectly acceptable if one or both of the Parties had made submissions that *effectivités*, in and of themselves, constituted title concerning the common land boundary between them. But this is not the case here. The acts invoked by Equatorial Guinea are claimed as part and parcel of the title invoked, namely the 1900 Convention. Gabon on the other hand expressly denied that *effectivités* can constitute a legal title.

18. Moreover, in the present instance, the treaty itself explicitly provides for the modification of the boundary established under Article IV of the 1900 Convention. Article VIII in turn provides for the boundary to be recorded on the relevant maps "with the reservations made in [A]ppendix No. 1" to the Convention. For its part, Appendix No. 1 of the 1900 Convention states that, although the lines agreed to in Article IV "are generally assumed to be accurate, these lines cannot be considered an absolutely correct representation until confirmed by new maps". It also states that the delimitation "on the ground" has to "*use as a basis*" the line of demarcation in Article IV. The Appendix, however, also provides that the modifications may be made "to delimit [the boundary] more accurately and to rectify the position of the dividing lines of roads, rivers, cities, or villages". As such, the Court was considering these *effectivités* not as an independent title. Rather, in the words of the majority itself, these *effectivités* were considered to determine "whether the boundary described in Article IV of the 1900 Convention was modified pursuant to the procedures set out in the Convention, with respect to the Utamboni River area and the Kie River area, respectively"[12].

19. To my mind, by undertaking the assessment of whether there has been modification of the boundary under the 1900 Convention, the Court goes beyond merely determining the applicable legal

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[11] *Frontier Dispute (Burkina Faso/Niger)*, *Judgment, I.C.J. Reports 2013,* pp. 68-69, para. 42.

[12] Judgment, para. 133.

titles, treaties and conventions, as per its jurisdiction under the Special Agreement. The Judgment goes into interpreting the identified titles and therefore determining the land boundary between the Parties. It should be recalled that what is at issue in this case is not the modification of the 1900 Convention itself but rather the modification of the boundary *in accordance with the Convention.* Thus, even if any of the modifications had been effective, the legal title would not be affected. The legal title, in my view, remains the 1900 Convention and any changes in the course of the boundary would simply be by operation of the 1900 Convention.

20. On the basis of the above, in respect of the land boundary, the Court ought to simply have stated that the 1900 Convention constitutes legal title. At the most, it would have been acceptable, even in the *dispositif*, for the Court to refer to the possibility of modification of the boundary in accordance with the 1900 Convention and to explain that the limits of its jurisdiction prevent it from determining whether any modification had in fact taken place. Regrettably, the majority chose to exceed the scope of the Court's jurisdiction and, in doing so, it has trodden on the sovereign right of States to determine the extent of their consent to the jurisdiction of the Court.

(Signed) Dire TLADI.

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