DISSENTING OPINION OF JUDGE *AD HOC* PINTO

[Translation]

1. I regret that I am unable to concur with the majority view on certain key aspects of the Judgment. In particular, I voted against the Court's decisions regarding the "Bata Convention"[1] and sovereignty over the islands.

2. The dispute between the Parties goes far beyond the one brought before the Court. Under the terms of Article 1, paragraph 1, of the Special Agreement:

> "[t]he 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 [them] 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"[2].

3. The formulation indicates that this case is but one step in the process of resolving the dispute between the Parties. It is not for the Court to delimit the maritime and land boundaries or to determine who has sovereignty over the three islands. The judgment of the Court must assist the Parties in achieving that resolution, without prejudging it.

4. The Gordian knot of the case lies in the Court's determination of the legal significance of the "Bata Convention", since if it is considered to be a legal title that has the force of law in the relations between the Parties in so far as it concerns the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié, Cocotiers and Conga, it prevails over the other titles invoked by Equatorial Guinea.

5. In paragraphs 73 to 97 of its Judgment, the Court carries out an analysis based on a set of indications drawn from its own jurisprudence and that of other international courts and tribunals concerning the determination of the existence of a treaty. It begins by ascertaining whether it can be inferred from the language of the "Bata Convention" that the Parties envisaged being bound by a treaty (Judgment, para. 77), even if the *nota bene* clause, which was handwritten in the Spanish version, suggests that the Parties agreed to

[1] I am using the same presentation as the Court, i.e. the "Bata Convention", without this implying, as demonstrated further on, any denial or rejection of the instrument's legal force.

[2] Special Agreement between the Gabonese Republic and the Republic of Equatorial Guinea, 15 November 2016, https://www.icj-cij.org/sites/default/files/case-related/179/179-20210305-SPE-01-00-EN.pdf.

certain future activities relating to the boundary (*ibid.*, para. 78). The Court concludes that "[o]n the whole, the circumstances in which the 'Bata Convention' was drawn up do not assist [it] in ascertaining the intention of the Parties. A clear intention to be legally bound cannot be discerned from these circumstances." (*Ibid.*, para. 82.)

6. The Court then examines the subsequent conduct of the Parties in order to determine whether it provides indications that they intended to be legally bound by the "Bata Convention" (Judgment, para. 83); in the Court's opinion, their conduct furnishes compelling indications that this was not the case (*ibid.*, paras. 84 and 97).

7. I am not convinced by the Court's reasoning and conclusion on this point. Gabon presented evidence that a meeting between the Presidents took place and that a document which it calls the "Bata Convention" was signed; Equatorial Guinea did not repudiate these claims, and even acknowledged that

> "the evidence before [the Court] suggest[ed] that it [wa]s possible that the Parties m[ight] have reached an understanding on elements of a possible future agreement. But the evidence ma[de] it crystal clear that no such agreement with the force of law, in the sense of the Special Agreement in this case, [had been] concluded on 12 September 1974"[3].

8. Moreover, Equatorial Guinea did not allege that the document concerned was a forgery. However, it disputed that an agreement had been concluded and that its content was as presented by Gabon.

9. As indicated above, I do not share the view of the Court or its conclusion in point 1 of the operative clause (Judgment, para. 213). The reasoning of the majority relies more on subjective sentiment than on evidence, since the elements on which the Court bases its finding could very well lead to the opposite conclusion. This is especially true given that Equatorial Guinea did not challenge the letter by which the copy of the Convention was sent to France in 1974[4]. Furthermore, I stand by the authenticity of the explanations of the political context at the time, which Equatorial Guinea did not dispute, especially since its current President was part of the country's delegation to Bata in 1974, although I agree that these explanations do not in themselves provide sufficient legal arguments to support Gabon's case.

10. To my mind, if each of the criteria for determining the existence of a treaty is found to be met, the consideration of those criteria as a whole leads to the same result. The conclusion reached by the Court in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)* is applicable in this instance, in so far as Equatorial

[3] CR 2024/33, p. 27, para. 34 (Sands).
[4] Counter-Memorial of Gabon, Vol. V, Ann. 155, pp. 281-285.

Guinea's arguments, taken individually or as a whole, cannot change that outcome:

> "The Court notes that Bolivia's argument of a cumulative effect of successive acts by Chile is predicated on the assumption that an obligation may arise through the cumulative effect of a series of acts even if it does not rest on a specific legal basis. However, given that the preceding analysis shows that no obligation to negotiate Bolivia's sovereign access to the Pacific Ocean has arisen for Chile from any of the invoked legal bases taken individually, *a cumulative consideration of the various bases cannot add to the overall result*."[5]

11. In my opinion, the "Bata Convention" is the legal title that has the force of law in the relations between the Parties with regard to land and maritime delimitation, as well as sovereignty over the islands of Mbanié, Cocotiers and Conga. The Court, in my view, should have given greater attention to the statements that President Macías made to the diplomatic corps, since they clearly show that a treaty was concluded and that he "relinquished to Gabon *de jure* sovereignty over M'Banie, Cocotier and Conga"[6]. I think these admissions should have been taken into account by the Court. Looking separately at the question of sovereignty over the islands, the documents in question indicate that the two Heads of State agreed that the three islands would belong to Gabon, and that President Macías himself declared as much to the diplomatic corps.

12. Nonetheless, given that the Court rejected the "Bata Convention" as a legal title within the meaning of Article 1, paragraph 1, of the Special Agreement, it then had to analyse the other instruments invoked by the Parties. Consequently, since the "Bata Convention" cannot have the force of law between the Parties, I shall review and analyse the Court's reasoning as regards the rest of the Judgment. In this respect, I would say that I support the Court's findings in point 2 of the operative clause on the land boundary; in point 4 on the maritime boundary; and in point 5, concerning the United Nations Convention on the Law of the Sea (UNCLOS); but not the finding in point 3, relating to the islands.

13. This brings me to my second point, namely sovereignty over the islands. As noted by the Court, the Parties are in agreement on the fundamental point that the Court is not called upon to carry out any delimitation or demarcation or to assign sovereignty over the islands, but only to identify the legal titles invoked by the Parties that have the force of law in their relations in so far as they concern the delimitation of their common maritime

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[5] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018 (II)*, p. 563, para. 174 (emphasis added).

[6] Counter-Memorial of Gabon, Vol. V, Ann. 152, pp. 251 and 255; see also *ibid.*, Ann. 153, p. 267.

and land boundaries and sovereignty over the islands of Mbanié, Cocotiers and Conga (Judgment, para. 30).

14. I am not convinced that Spain succeeded in establishing sovereignty over Mbanié, Cocotiers and Conga — neither before nor after the conclusion of the 1900 Convention. Moreover, I agree with the Court's finding that the 1900 Convention is of no relevance as regards the islands.

15. In paragraph 191 of the Judgment, the Court bases itself on the work of the Mixed Commission, which was in operation between 1886 and 1891, in order to demonstrate that France had accepted Spain's claim over Mbanié. I do not consider that the work carried out by the Mixed Commission can serve as evidence: the Court has been very clear in its jurisprudence that it "cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement"[7]. Hence, neither the question of "dependencies" nor any recognition on the part of France can be taken into account. No definitive conclusions can be drawn. I would add that since the Parties to this dispute agree that the three islands must be treated as a whole, the question of the "dependencies" ought not to be addressed[8].

16. It is true that the Court has previously noted that in the context of small uninhabited islands, there is no need to demonstrate numerous *effectivités*[9]. However, I consider that Equatorial Guinea failed to present sufficiently clear and precise information regarding the stationing of troops on Mbanié. I do not think that the evidence available to the Court unequivocally indicates that Spain exercised *continuous* authority over the three islands.

17. Further, the Court attaches considerable importance to the incident involving the construction of a beacon on Cocotiers, in respect of which Equatorial Guinea relies on a legal opinion drafted in 1955 by the Legal Service of the French Ministry of Foreign Affairs. According to that opinion,

> "the 'Cocotier' islet must be considered as following the fate of Baynia Island, of which it is a geographical dependency . . .
>
> Over the past fifty years, Baynia Island was occupied by the Spanish on several occasions, without protest or alternate occupation by us.

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[7] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 51, cited, *inter alia*, in *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 270, para. 54, and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 126, para. 40.

[8] CR 2024/34, p. 38, para. 3 (Miron).

[9] *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, pp. 45-46.

> Baynia Island is located within the six nautical mile-limit forming the boundary of Spanish territorial waters.
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> . . . . . .
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> Furthermore, the situation of the islet within Corisco's territorial waters places us in a disadvantageous basic legal position."[10]

18. This opinion is nothing more than an internal note that was not sent to the other Party, which is therefore not liable to be aware of its content. Its probative value is thus very limited. It is true that the same Legal Service reaffirmed its opinion in 1972[11], but the Ministry of Foreign Affairs did not take it into account. The Ministry in fact took a diametrically opposite position. France asserted that the islands belonged to it before Gabon's independence[12].

19. I would further add that, in the context of the Cocotiers beacon incident, France did not seek Spain's authorization because it considered that the island belonged to Spain. On the contrary, the annexes show that

> "it is not that the Spanish authorities are actually claiming possession of the island of Cocotier. They are simply expressing their surprise at not being consulted beforehand. . .
>
> Indeed, it is true that in accordance with Article 5 of the Convention of 27 June 1900, the provisions concerning lighting and beaconing in the waters are subject to arrangements between the two Governments."[13]

The incident therefore has to do with the interpretation and application of the Paris Convention — which has no bearing on the question of the islands in the manner indicated by the Court (Judgment, para. 193) — and not with any recognition of Spanish sovereignty by France through its request for authorization.

20. The foregoing does not dispel my doubts as to the existence of a legal title that was held by Spain and subsequently transmitted to Equatorial Guinea.

21. With regard to UNCLOS, my dissent does not turn on the legal significance that the Court has attached to this instrument — it is a treaty that has the force of law in the relations between the Parties — but rather the decision to include it in the operative clause. In my opinion, UNCLOS can be used to guide negotiations between the Parties regarding delimitation, in the same way as other non-mandatory instruments of their choosing.

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[10] Memorial of Equatorial Guinea, Vol. IV, Ann. 94, pp. 529-530.
[11] Reply of Equatorial Guinea, Vol. IV, Ann. 31, pp. 155-157.
[12] Counter-Memorial of Gabon, Vol. V, Ann. 128, pp. 101-103.
[13] Rejoinder of Gabon, Vol. II, Ann. 5, pp. 39-40.

22. As indicated at the beginning of this opinion, the dispute between the Parties is broader than the one submitted to the Court. The Judgment determines the titles within the limits laid down by the Special Agreement, but also underlines that the Parties are free to "adjust their land boundary in light of the existing situation on the ground and the interests of the local populations" (Judgment, para. 157). In so doing, the Court offers valuable tools to the Parties, which are already aware of the issues at hand, enabling them to come to the negotiating table in a constructive spirit of good neighbourliness and co-operation.

(Signed) Mónica PINTO.