SEPARATE OPINION OF JUDGE KOOIJMANS

Whether there is a dispute between the Parties as to the continuation of the maritime boundary beyond point G — No specific claim raised by Applicant at date of filing of Application which was positively opposed by Respondent — Seventh preliminary objection should have been partially upheld — Eighth preliminary objection consequently without object — Judicial propriety, unilateral application and rights and interests of third States in cases of delimitation of maritime boundary.

1. I have voted in favour of paragraphs 3 and 4 of the *dispositif*, which state that the Court has jurisdiction to adjudicate upon the dispute and that Cameroon's Application is admissible. That does not mean, however, that I support the Court's findings with regard to each and every preliminary objection raised by Nigeria. I voted against the Court's conclusion in subparagraph 1 *(g)* that the seventh preliminary objection must be rejected. Consequently, I had to vote also against the Court's conclusion in paragraph 2 that the eighth preliminary objection does not have, in the circumstances of the case, an exclusively preliminary character. In the following I wish to set out my viewpoints with regard to these matters.

2. In its seventh preliminary objection, Nigeria submitted that there is no legal dispute concerning delimitation of the maritime boundary between the two Parties which is at the present time appropriate for resolution by the Court. In this respect, Nigeria relied on two arguments; in the first place it contended that no determination of a maritime boundary is possible prior to the determination of title in respect of the Bakassi Peninsula. I fully share the Court's view that, since Cameroon has also requested the Court to decide on the question of the title to the Bakassi Peninsula, the issue raised by Nigeria is a question of method and that it lies within the Court's discretion how to deal with these two issues (paragraph 106 of the Judgment).

3. Nigeria's second argument is that the issue of maritime delimitation is inadmissible in the absence of sufficient prior negotiations with regard to the maritime boundary beyond point G. Nigeria does not contest that extensive negotiations have taken place with regard to the course of the boundary from the landfall on Bakassi to point G; these negotiations led to the Declaration of Maroua, the binding character of which is contested by Nigeria. Nigeria does not deny, therefore, that there is a legal dispute between the Parties concerning that part of the boundary. It contends, however, that there never have been serious negotiations on the

determination of the boundary between point G and "the limit of the maritime zones which international law places under the Parties' respective jurisdiction", whereas such negotiations are prescribed by Articles 74 and 83, paragraphs 2, of the 1982 Convention on the Law of the Sea.

4. I am of the opinion that, whatever must be held of the interpretation of these Articles of the Law of the Sea Convention with respect to the necessity of prior negotiations before a maritime delimitation issue may be unilaterally submitted to third-party settlement, such negotiations must have the possibility of leading to an agreement. In the present case, negotiations clearly could not have led to a positive result. The dispute which has developed on the legal value of the Maroua Declaration may be said to have made negotiations on the seaward continuance of the line agreed upon in that Declaration futile. And this situation has been aggravated by the subsequent dispute about the legal status of the Bakassi Peninsula. If negotiations cannot lead to results, they cannot be seen as a necessary pre-condition in the meaning of Articles 73 and 84 of the 1982 Convention, even if these Articles were to be interpreted as making such negotiations indispensable.

5. Nigeria further contends that the negotiations leading to the Maroua Declaration only dealt with the delimitation of what both Parties at the time considered to be their territorial sea and that the bilateral negotiations were never intended to cover also the delimitation of the exclusive economic zone and the continental shelf (Preliminary Objections of Nigeria, p. 119; CR 98/2, p. 41). Whatever the character, and, in particular, the intensity of such more general negotiations, Cameroon's claim that the negotiations which had taken place since 1970 had always been carried out with a view to delimiting the whole of the maritime boundary is in my view correct. This is borne out by the fact that already in the Declaration of the Nigeria-Cameroon Joint Boundary Commission of June 1971 it is stated that the delimitation of the maritime boundary should be done in due course to include the delimitation of the boundary in the continental shelf in accordance with the 1958 Geneva Convention on the Continental Shelf (Preliminary Objections of Nigeria, Ann. 21, p. 240). Moreover, even at that early moment, it was recognized that:

> "since the Continental Shelves of Nigeria, Cameroon and Equatorial Guinea would appear to have a common area, the attention of the Heads of State of Cameroon and Nigeria should be drawn to this fact so that appropriate action might be taken" (*ibid.*, Ann. 21, p. 241).

At a later stage, even after the breakdown of the negotiations as a result of the dispute over the Maroua Declaration, such appropriate action was specified as taking the form of a "tripartite meeting" to examine the issue

of the determination of the triple point as an essential condition for the delimitation of the maritime borders between the three countries (Third Session of the Nigeria-Cameroon Joint Meeting of Experts on Boundary Matters, August 1993, Preliminary Objections of Nigeria, Ann. 55, p. 465).

6. Although I share the Court's view that the alleged absence of sufficient prior negotiations is no impediment for the admissibility of Cameroon's claim, I cannot follow the Court when it says that it, consequently, rejects the seventh preliminary objection in its entirety. In this respect, it is necessary to recall Nigeria's formulation that there is no legal dispute concerning delimitation of the maritime boundary between the two Parties which is *at the present time appropriate for resolution* by the Court (emphasis added). The Statute of the Court explicitly states that its jurisdiction is concerned with the decision on disputes (Art. 38, para. 1, and Art. 36, para. 2; the latter is also applicable in the present case). For the Court to have jurisdiction it is therefore of vital importance to determine whether there is a dispute and in the affirmative case to identify such dispute. As Professor Rosenne says:

> "The function of the concept of *dispute* is to express in a legally discrete term the matter in connection with which the Court is empowered to make a judicial decision having final and binding force on the parties."[1]

And the Court itself stated in the *Nuclear Tests* cases:

> "The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55.)

7. During their history, the present Court and its predecessor have given great attention to determine what a dispute, which lends itself for judicial decision, is. Their findings have been recalled in the present Judgment (para. 87) where the Court deals with the fifth preliminary objection. The Court there refers to the *South West Africa* cases where it stated that "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). It also referred to another statement by the Court, namely "[w]hether there exists an international dispute is a matter for objective determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). Both statements were recently repeated in the Judgment in the *East Timor (Portugal* v. *Australia)* case, *I.C.J. Reports 1995*, p. 100, para. 22). After a painstaking analysis, the Court came with

[1] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, 1997, p. 519.

regard to the fifth preliminary objection to the conclusion that a dispute exists between the two Parties, at least as regards the legal bases of the whole of the existing boundary, although it is not yet possible to determine its exact scope. I fully subscribe to that conclusion.

8. In my view, the Court should have applied the same criteria with regard to the question whether a dispute exists between Cameroon and Nigeria as to the delimitation of the maritime boundary from point G to the outer limit of the various maritime zones. It is undoubtedly true that Nigeria has not raised this point as a separate argument and that, consequently, Cameroon has not seen fit to try and define the exact subject-matter of this dispute. This does, in my opinion, not relieve the Court of the task to determine *proprio motu* whether there exists a dispute which is the subject of the Application. As the Court said in the *South West Africa* cases:

> "A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence." *(South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328),

whereupon the Court, independently of the arguments of the Parties, decided that a dispute existed. It is therefore for the Court to "objectively determine whether there exists an international dispute".

9. In its Application, filed on 29 March 1994, Cameroon requested

> "the Court . . .
>
> *(f)* In order to prevent any dispute arising between the two States concerning their maritime boundary . . . to prolong the course of [this] boundary with the Federal Republic of Nigeria up to the limit of the maritime zones which international law places under their respective jurisdictions."

No further legal grounds for this request nor any other details underpinning it were provided in the Application which, therefore, hardly seems to meet the conditions of Article 38, paragraph 2, of the Rules of Court as far as this part of the claim is concerned.

In its Memorial, dated 16 June 1994, Cameroon specified its request by asking the Court to adjudge and declare:

> "*(c)* That the boundary of the maritime zones appertaining respectively to the Republic of Cameroon and to the Federal Republic of Nigeria follows the following course:
>
> . . . . . .
>
> — from point G that boundary then swings south-westward in the direction which is indicated by points G, H, I, J

> and K represented on the sketch-map on page 556 of this Memorial and meets the requirements for an equitable solution, up to the outer limit of the maritime zones which international law places under the respective jurisdictions of the two Parties."

On page 556 of the Memorial a map was reproduced entitled "La Délimitation Equitable" on which the various points mentioned in the submissions were indicated; an explanatory memorandum on the location of these points is contained in paragraphs 5.107 to 5.128 of the Memorial.

10. The critical date for the Court having jurisdiction and for the admissibility of an Application and, therefore, of the determination of the existence of a dispute is that of the Application's filing. This has been the established jurisprudence of the Court and has been recently confirmed in the Judgment of 27 February 1998 on the Preliminary Objections in the *Lockerbie* case (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), I.C.J. Reports 1998,* pp. 128-129, para. 36, and pp. 130-131, para. 43). Can it really be said that at the day the Application was filed there was with regard to the maritime boundary beyond point G a claim of Cameroon which was "positively opposed" by Nigeria, a "disagreement on a point of law or fact, a conflict of legal views or interests" between the Parties?

11. Although Nigeria did raise the matter of the non-existence of a dispute only in the context of an alleged absence of prior negotiations, it nevertheless drew the Court's attention to the fact that it had never been presented with a specific claim by Cameroon with regard to the continuation of the projected boundary line beyond point G. In its preliminary objections it stated:

> "Nigeria for its part has not yet had the opportunity to consider, in the context of diplomatic negotiations, *any* proposal for the delimitation of the respective maritime zones . . . beyond 'point G'. It learned of Cameroon's actual position as to delimitation beyond 'point G' *only when it received the Memorial.*" (Preliminary Objections of Nigeria, p. 120, para. 7.15; emphasis added.)

12. If Rosenne is correct in saying that the existence of a dispute may be established from the examination of the positions of the parties, as expressed in the diplomatic history of the matter[2], what more do we learn from that diplomatic history than that there is a clear disagreement about the location of point G, the starting point of the "prolonged" maritime boundary, and the fact that the Parties agree that for the delimitation of their maritime zones the involvement of third countries, in particular

[2] *Op. cit.*, p. 519.

Equatorial Guinea, is essential to the delineation of their maritime borders (Preliminary Objections of Nigeria, Ann. 55, p. 465), an understanding which was confirmed as late as 1993, long after the dispute about the binding character of the Maroua Declaration emerged?

How can the subject-matter of such a dispute be described in legal terms? What are the opposing legal claims which empower the Court to make a judicial decision having final and binding force on the Parties? Can it really be said that there "is a legal dispute which is at the present time appropriate for resolution by the Court"?

13. It deserves mentioning also that — in so far as there would be a dispute as to the "prolonged" boundary beyond point G — the whole issue is obfuscated by the fact that it is exactly the contested location of point G which is determinative for the settlement of that dispute. Now it may be said that this is as much a matter of method as the relationship between the disputed title to Bakassi and the initial leg of the maritime boundary up till point G and that the order in which the various issues will be dealt with lies within the discretion of the Court. Here, however, the position of points H-K are indissolubly linked with the location of point G as established in the Maroua Declaration. Any determination by the Court, which is different from Cameroon's claim, will totally unsettle its claim with regard to the seaward continuation of the maritime boundary in case the specific claim, as rephrased in its Memorial, would be accepted as an element of the dispute.

14. All this would have been different, of course, if the two Parties had concluded an agreement to submit the matter of the determination of the maritime boundary to the Court and had been able to plead their differing or opposing views, asking the Court either to define the legal principles and rules applicable to the delimitation of the maritime zones or to determine it itself. It would have been difficult for the Court to avoid or even refuse to give such a decision, even if the constituent elements of the dispute were not worded in very clear or precise terms.

It is, however, quite another matter — and hardly desirable in my view — if the Court can be unilaterally seised by a State with the request to determine a maritime boundary in more remote zones, if negotiations with another State on the delimitation of more in-shore areas have been unsuccessful, without a clear difference of views on the legal *criteria* for the delimitation in these more remote zones as well.

15. For all these reasons, I am of the opinion that the Court should not have concluded that the seventh preliminary objection must be rejected *in its entirety*, but that it should have been partially sustained; there does not exist a legal dispute between the Parties as to the continua-

tion of the maritime boundary beyond point G, as is required by Article 36, paragraph 2, of the Statute.

16. This position also has its consequences for my vote on the eighth preliminary objection. I share the Court's view that the problem of rights and interests of third States only arises for the prolongation of the maritime boundary seawards beyond point G and that the dispute as to the boundary between the landfall on the Bakassi Peninsula and point G does not concern the rights and interests of third States (para. 115 of the Judgment).

Since in my opinion the Court should have refrained from taking upon itself the task of determining the maritime boundary beyond point G by partially upholding the seventh preliminary objection, I could not vote for the Court's conclusion with regard to the eighth objection either, since this objection, in my view, should have been declared without object.

17. This may not be interpreted as implying that I disagree with the Court's finding that an objection of this character *in se* does not possess an exclusively preliminary character and can only be decided upon in connection with the merits.

I feel, however, that in the present case the Court, for reasons of judicial propriety, could or even should already *in limine litis* have sustained this objection instead of reserving that possibility for the phase of the merits.

18. Nigeria, in its eighth preliminary objection, stated "[t]hat the question of maritime delimitation necessarily involves the rights and interests of third states and is inadmissible beyond point G".

In the present Judgment the Court

> "notes that the geographical location of the territories of the other States bordering the Gulf of Guinea, and in particular Equatorial Guinea and Sao Tome and Principe, demonstrates that it is *evident* that the prolongation of the maritime boundary between the Parties seawards beyond point G will eventually run into maritime zones where the rights and interests of Cameroon and Nigeria will overlap those of third States. It thus appears that rights and interests of third States *will* become involved if the Court accedes to Cameroon's request." (Para. 116; emphasis added.)

This leads the Court to the conclusion that it

> "cannot rule out the possibility that the impact of the judgment required by Cameroon on the rights and interests of the third States could be such that the Court would be prevented from rendering it in the absence of these States . . ." *(ibid.)*.

The pivot on which everything hinges, therefore, seems to be the willingness of such third States to exercise their right to intervene under Article 62 of the Statute in the present proceedings.

19. In the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* the Court stated that it

> "has not been endowed with jurisdiction to determine what principles and rules govern delimitations with third States, or whether the claims of the Parties outside that area prevail over the claims of those third States in the region".

This was the logical conclusion of the Court's finding that its decision

> "must be confined to the area in which, *as the Court has been informed by Italy*, that State has no claims to continental shelf rights. The Court, *having been informed of Italy's claims*, . . . thus ensures Italy the protection it sought." (*I.C.J. Reports 1985*, p. 26, para. 21; emphasis added.)

20. In delimitation of maritime boundary cases, therefore, knowledge of the viewpoints of third States involved is quintessential for the Court to enable it to perform its judicial task as requested by the parties if an application has been brought by Agreement. That would be even more so with regard to the position of Equatorial Guinea, if the present case had been brought by Agreement, in view of the fact that both parties had considered the determination of the triple point an essential condition for the delimitation of the maritime borders between the three countries. If there had been an Application by Agreement, the present case would, apart from geographical factors, have reflected the *Libya/Malta* case.

21. The present case, however, has been brought by unilateral application under Article 36, paragraph 2, of the Statute. The Applicant requests the Court to determine the maritime boundary with the Respondent, whereas it has itself, together with the Respondent, admitted that such delimitation requires the involvement of, and thus negotiations with, a third State. Under such conditions it does not seem proper or reasonable to "compel" that third State to expose its views and its position by means of an intervention under Article 62 even before negotiations with the neighbouring States have begun. Of course, the third State is free not to intervene but in that case the Court could — and in the present case in all probability would — be prevented from rendering the judgment required by the Applicant. Since there is no agreed request by both Parties, considerations of judicial propriety could in the present case have led the Court to the decision to uphold the eighth preliminary objection in the preliminary phase of the proceedings.

(Signed) Pieter H. KOOIJMANS.