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Cour internationale de Justice

LA HAYE

International Court of Justice

THE HAGUE

ANNÉE 2002

Audience publique

tenue le lundi 11 mars 2002, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

en l'affaire de la Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant))

COMPTE RENDU

YEAR 2002

Public sitting

held on Monday 11 March 2002, at 3 p.m., at the Peace Palace,

President Guillaume presiding,

in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)

VERBATIM RECORD

Présents : M. Guillaume, président
M. Shi, vice-président
MM. Ranjeva
Herczegh
Fleischhauer
Koroma
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby, juges
MM. Mbaye
Ajibola, juges *ad hoc*

M. Couvreur, greffier

Present:	President	Guillaume
	Vice-President	Shi
	Judges	Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
	Judges *ad hoc*	Mbaye
		Ajibola
	Registrar	Couvreur

Le Gouvernement de la République du Cameroun est représenté par :

S. Exc. M. Amadou Ali, ministre d'Etat chargé de la justice, garde des sceaux,

comme agent;

M. Maurice Kamto, doyen de la faculté des sciences juridiques et politiques de l'Université de Yaoundé II, membre de la Commission du droit international, avocat au barreau de Paris,

M. Peter Y. Ntamark, professeur à la faculté des sciences juridiques et politiques de l'Université de Yaoundé II, *Barrister-at-Law*, membre de l'Inner Temple, ancien doyen,

comme coagents, conseils et avocats;

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre, membre et ancien président de la Commission du droit international,

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M. Michel Aurillac, ancien ministre, conseiller d'Etat honoraire, avocat en retraite,

M. Jean-Pierre Cot, professeur à l'Université de Paris 1 (Panthéon-Sorbonne), ancien ministre,

M. Maurice Mendelson, Q. C., professeur émérite de l'Université de Londres, *Barrister-at-Law*,

M. Malcolm N. Shaw, professeur à la faculté de droit de l'Université de Leicester, titulaire de la chaire sir Robert Jennings, *Barrister-at-Law,*

M. Bruno Simma, professeur à l'Université de Munich, membre de la Commission du droit international,

M. Christian Tomuschat, professeur à l'Université Humbold de Berlin, ancien membre et ancien président de la Commission du droit international,

M. Olivier Corten, professeur à la Faculté de droit de l'Université libre de Bruxelles,

M. Daniel Khan, chargé de cours à l'Institut de droit international de l'Université de Munich,

M. Jean-Marc Thouvenin, professeur à l'Université de Paris X-Nanterre, avocat au barreau de Paris, société d'avocats Lysias,

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The Government of the Republic of Cameroon is represented by:

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as Agent;

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S. Exc. M. Biloa Tang, ambassadeur du Cameroun en France,

S. Exc. M. Martin Belinga Eboutou, ambassadeur, représentant permanent du Cameroun auprès de l'Organisation des Nations Unies à New York,

M. Etienne Ateba, ministre-conseiller, chargé d'affaires a.i. à l'ambassade du Cameroun, à La Haye,

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M. Anicet Abanda Atangana, attaché au secrétariat général de la présidence de la République, chargé de cours à l'Université de Yaoundé II,

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M. Ousmane Mey, ancien gouverneur de province,

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M[e] Marc Sassen, avocat et conseil juridique, société Petten, Tideman & Sassen (La Haye),

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H.E. Mr. Biloa Tang, Ambassador of Cameroon to France,

H.E. Mr. Martin Belinga Eboutou, Ambassador, Permanent Representative of Cameroon to the United Nations in New York,

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Mr. Robert Akamba, Principal Civil Administrator, Chargé de mission, General Secretariat of the Presidency of the Republic,

Mr. Anicet Abanda Atangana, Attaché to the General Secretariat of the Presidency of the Republic, Lecturer, University of Yaoundé II,

Mr. Ernest Bodo Abanda, Director of the Cadastral Survey, member, National Boundary Commission,

Mr. Ousmane Mey, former Provincial Governor,

Chief Samuel Moka Liffafa Endeley, Honorary Magistrate, Barrister-at-Law, member of the Middle Temple (London), former President of the Administrative Chamber of the Supreme Court,

Maître Marc Sassen, Advocate and Legal Adviser, Petten, Tideman & Sassen (The Hague),

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Mr. Jean Mbenoun, Director, Central Administration, General Secretariat of the Presidency of the Republic,

M. Edouard Etoundi, directeur de l'administration centrale au secrétariat général de la présidence de la République,

M. Robert Tanda, diplomate, ministère des relations extérieures

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M. Jean-Pierre Meloupou, capitaine de frégate, chef de la division Afrique au ministère de la défense,

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Mr. Nfan Bile,

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comme responsables de la communication;

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Mme Lawrence Polirsztok,

Mme Mireille Jung,

M. Nigel McCollum,

Mme Tete Béatrice Epeti-Kame,

comme secrétaires de la délégation.

Le Gouvernement de la République fédérale du Nigéria est représenté par :

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comme agent;

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Sir Arthur Watts, K.C.M.G., Q.C., membre du barreau d'Angleterre, membre de l'Institut de droit international,

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Mr. Olinga Nyozo'o,

as Media Officers;

Ms René Bakker,

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Ms Mireille Jung,

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Ms Tete Béatrice Epeti-Kame,

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The Government of the Federal Republic of Nigeria is represented by:

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Alhaji Abdullahi Ibrahim SAN, CON, Commissioner, International Boundaries, National Boundary Commission of Nigeria, Former Attorney-General of the Federation,

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Mrs. Nella Andem-Ewa, Attorney-General and Commissioner for Justice, Cross River State,

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M. Maxwell Gidado, assistant spécial principal du président pour les affaires juridiques et constitutionnelles, ancien *Attorney-General* et commissaire à la Justice, Etat d'Adamaoua,

M. A. O. Cukwurah, conseil adjoint, ancien conseiller en matière de frontières (ASOP) auprès du Royaume du Lesotho, ancien commissaire pour les frontières inter-Etats, commission nationale des frontières,

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M. Gbola Akinola, membre de l'équipe juridique du Nigéra,

M. K. M. Tumsah, assistant spécial du directeur général de la commission nationale des frontières et secrétaire de l'équipe juridique,

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S. Exc. l'honorable Dubem Onyia, ministre d'Etat, ministre des affaires étrangères,

M. Alhaji Dahiru Bobbo, directeur général, commission nationale des frontières,

M. F. A. Kassim, directeur général du service cartographique de la Fédération,

M. Alhaji S. M. Diggi, directeur des frontières internationales, commission nationale des frontières,

M. A. B. Maitama, colonel, ministère de la défense,

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M. Chris Carleton, C.B.E., bureau hydrographique du Royaume-Uni,

M. Dick Gent, bureau hydrographique du Royaume-Uni,

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Mme Victoria J. Taylor, *International Mapping Associates*,

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Mme Claire Ainsworth, *NPA Group,*

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M. Mau Onowu,

M. Austeen Elewodalu,

M. Usman Magawata,

comme responsables de la communication.

Le Gouvernement de la République de Guinée équatoriale, qui est autorisée à intervenir dans l'instance, est représenté par :

S. Exc. M. Ricardo Mangue Obama N'Fube, ministre d'Etat, ministre du travail et de la sécurité sociale,

comme agent et conseil;

S. Exc. M. Rubén Maye Nsue Mangue, ministre de la justice et des cultes, vice–président de la commission nationale des frontières,

S. Exc. M. Cristóbal Mañana Ela Nchama, ministre des mines et de l'énergie, vice–président de la commission nationale des frontières,

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The Government of the Republic of Equatorial Guinea, which has been permitted to intervene in the case, is represented by:

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as Agent and Counsel;

H.E. Mr. Rubén Maye Nsue Mangue, Minister of Justice and Religion, Vice-President of the National Boundary Commission,

H.E. Mr. Cristóbal Mañana Ela Nchama, Minister of Mines and Energy, Vice-President of the National Boundary Commission,

Mr. Domingo Mba Esono, National Director of the Equatorial Guinea National Petroleum Company, Member of the National Boundary Commission,

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Sir Derek Bowett,

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Sir Derek Bowett,

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Mr. Coalter G. Lathrop, Sovereign Geographic Inc., Chapel Hill, North Carolina,

Mr. Alexander M. Tait, Equator Graphics, Silver Spring, Maryland,

as Technical Experts.

Le PRÉSIDENT : Veuillez vous asseoir. La séance est ouverte et je donne la parole, au nom de la République du Cameroun, au professeur Malcolm Shaw.

Mr. SHAW: Je vous remercie, Monsieur le président.

IV. BAKASSI

The situation before 1961

1. Mr. President and Members of the Court, the distinguished Agent for Nigeria affirmed in his address that Bakassi is "the main focus of this case" (CR 2002/8, p. 18). Indeed it is. In this pleading, the question of title to Bakassi up to and including the process by which British Cameroons became independent by joining respectively Nigeria and Cameroon on 1 October 1961 will be addressed. Issues after this date will be discussed by Professor Mendelson.

2. In so far as the long pre-independence period is concerned, Nigeria's case hangs on one simple and single thread, and that is the sovereign status of the Kings and Chiefs of Old Calabar. Not just sovereign status, but sovereign territorial rights on the international plane *erga omnes*. Anything less than this will not do to maintain Nigeria's thesis. As counsel for Nigeria starkly declared: "Cameroon invites you to agree that a State can, without express authority from the owner, give away some other State's territory" (CR 2002/8, p. 55). Note the wording, Mr. President, "some other State's territory".

3. Nigeria argues that "Bakassi was part of the territory of the Kings and Chiefs of Old Calabar" who had in 1884 "international treaty-making capacity" so that "Great Britain acquired only the limited rights conferred by the terms of the Treaty of Protection, and those rights did not include either sovereignty over the territory of Old Calabar or the right or power to give away its territory". Accordingly, Great Britain "had no legal title to Bakassi and no legal authority to transfer Bakassi to Germany by the Treaty of March 1913", so that Germany was able to acquire no good title nor were any of its successors including Cameroon. Further, "at all times up to 1960 title to Bakassi consequently remained with the Kings and Chiefs of Old Calabar and, thereafter, with Nigeria" and "while the Treaty of Protection remained in force Great Britain lacked all authority unilaterally to vary its boundaries" (CR 2002/8, p. 65, and see CR 2002/9, p. 19).

4. Nigeria's thesis is a simple one, simply wrong. Nigeria asks the Court to accept that the Treaty of Protection of 1884 was between two international persons under international law at the time and it had the effect of recognizing the international territorial rights over Bakassi until independence and beyond: this both in respect to sovereign title and territorial extent *erga omnes*. All instruments, agreements, activities and processes contrary to this perception are of necessity wrong and ineffective in law.

5. We are asked to consider a long line of legal error. Great Britain's effort to establish a boundary with Germany regarding the Bakassi by the Treaty of March 1913 — was wrong. Germany in accepting this boundary — was wrong. The establishment of the mandate and later the trust over the British Cameroons as including Bakassi — was wrong. British practice throughout the mandate and trust periods showing, by legislative activity and official behaviour on the ground, that Bakassi was part of the Southern Cameroons — was wrong. The supervisory activity of the League of Nations and the United Nations organs with regard to the territory which, as shown consistently in, for example, official maps presented to them by Britain, includes Bakassi — was wrong. The plebiscite process as supervised by the United Nations and which included Bakassi with Southern Cameroons voting districts — was wrong. The General Assembly resolution officially and legally terminating the trusteeship on the basis of the plebiscite process — was wrong. Not least, Nigerian practice at that time and for a couple of decades thereafter, recognizing Bakassi as part of Cameroon, was also wrong. One might be tempted to conclude that never have so many made the same mistake so often and over such a long period of time.

6. But, of course, Mr. President, Members of the Court, there was no such mistake. On the contrary, what we have is a consistent practice by the colonial and then administering power, other interested States, international supervisory organs, the United Nations and, up to relatively recently, Nigeria itself, all affirming that Bakassi was part of what is now Cameroon. I turn now to deal in more detail with Nigeria's single and now rapidly unravelling thread.

The international legal status and territorial extent of the Kings and Chiefs of Old Calabar

7. No one denies that the inhabitants of the Calabar River region, including its various towns, settlements and outposts, included at the time under consideration many enterprising traders and

merchants, who engaged in a variety of commercial activities and travelled far and wide. The question at issue, however, is not that, but whether in 1884 and thereafter, there existed an international legal person with full sovereign and territorial rights under international law and thus capable of maintaining an internationally valid territorial title *erga omnes* until the date of Nigeria's independence. For it is only on this basis that Nigeria's thread may remain suspended and support its assertions.

8. While it is not disputed that various peoples operated in the area in question at the time in question, Nigeria has provided no evidence that any State in the international community recognized or dealt with the Kings and Chiefs of Old Calabar as a sovereign entity in international law. That is a key question. What we have is a treaty, the Treaty of Protection of 1884, the point at which for Nigeria history ends. We need, however, to take a look at this Treaty and the context both local and international.

9. Nigeria offers us a choice. Either the treaty was with a "myth", as Nigeria so caricatures Cameroon's argument (CR 2002/8, p. 43), so that the territory in question was in effect *terra nullius* or the Treaty was one with a sovereign State as that term was understood under international law at the time. This is a false choice. It is an issue dealt with in both the *Island of Palmas* case (2 *RIAA*, p. 829) and by the Court in the *Western Sahara* case (*I.C.J. Reports 1975*, p. 12). What we are saying is not new, but it is correct.

10. Judge Huber in the *Island of Palmas* case noted that agreements (what he termed contracts) between States and "native princes or chiefs of peoples not recognized as members of the community of nations" were "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". They were not devoid of effect, however, since: "if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account" (at p. 858). In the *Western Sahara* case, this Court built upon Judge Huber's approach and emphasized that State practice accepted that "territories inhabited by tribes or peoples having a social or political organization were not regarded as *terrae nullius*", rather sovereignty was acquired by colonial powers "through agreements with local rulers" (at p. 39). At no stage, did the Court suggest that

such local rulers were sovereign States recognized as such by the international community, nor that such agreements constituted treaties in the sense of agreements between sovereign States.

11. It is fully accepted that the range of protectorate agreements signed by Britain with local rulers in the area in question precluded the acquisition of title by occupation of *terrae nullius* and indeed established a position relative to third States that was accepted by them in the colonial scramble. But this is far from saying that such agreements were made necessarily with sovereign States generally, and particularly so with regard to the Kings and Chiefs of Old Calabar. But there is another problem with regard to this entity. Trying to ascertain its nature is rather like trying to grasp jelly.

12. In its Counter-Memorial, Nigeria termed the Kings and Chiefs of Old Calabar "an acephalous federation" (Counter-Memorial of Nigeria, p. 67), rather a headless concept in international law. It later referred to Old Calabar as "apparently a compendious name for the various kings and chiefs in the area of the Calabar River" (*ibid.*, p. 93). Counsel for Nigeria accepted that: "we are not talking of a single unitary entity, but rather of a grouping of political units, effectively separate City States", who, it is argued, "over time came to act together as the Kings and Chiefs of Old Calabar" (CR 2002/8, p. 43). A good effort at trying to work up a conclusion of international legal status, but one which is hardly convincing. As the noted Nigerian writer J. C. Anene points out, Major Macdonald, appointed Commissioner to the Niger Districts in 1889, explored the area and "made his way to Old Calabar where he found a congeries of independent 'kingdoms' and 'dukedoms'" (*Southern Nigeria in Transition 1885-1906: Theory and Practice in a Colonial Protectorate*, 1966, p. 124).

13. Another rather unconvincing effort is that devoted to establishing the territorial domain of Old Calabar. First, the precise relationship between Bakassi and the Kings and Chiefs of Old Calabar is rather difficult to discern. Nigeria argues both that Old Calabar had original title to Bakassi and that Bakassi was a dependency (Counter-Memorial of Nigeria, pp. 74-75). The two are not identical terms. Further, nowhere in the 1884 Treaty is Bakassi actually mentioned.

14. Secondly, the question of the territorial extent of Old Calabar is posed. What does Nigeria assert? [Project Nigerian map NCM, No. 28] You see one of Nigeria's sketch-maps on the screen, Mr. President, Members of the Court, and is to be found at judges' folder, tab 125. Counsel

for Nigeria declared that, basing himself upon Consul Johnston's 1890 report to the Foreign Office: while the territory to the west of the River Ndian "belonged 'undoubtedly' to Old Calabar, Bakassi and the Rio del Rey, are demonstrably to the west of the Ndian" (CR 2002/8, p. 41). But what about the territory between the Rio del Rey and the Ndian, Mr. President? By the same token, it should be regarded as part of the domain of the Kings and Chiefs of Old Calabar and now, therefore, part of Nigeria. Counsel continued a little later by citing another British Consul of the era, Edward Hyde Hewett, as noting in the express context of the 1884 Treaty of Protection, that "the Chiefs of Tom Shot country, of Efut, the country about Rio del Rey, and of Idombi, the country about the River Rumby, made declarations that they were subject to Old Calabar". As you can see, we are now far beyond Bakassi and the whole logic of Nigeria's single thread argument demands that the territorial extent of Old Calabar at 1884 passed to Nigeria in 1960 and is subject to its claim, whether made now or perhaps in the future. And if not, how was the boundary established at the Rio del Rey as far as Nigeria argues? If this was achieved by British action prior to the 1913 Treaty, then this would validate Britain's territorial competence which would in turn validate the 1913 cession. If not, then — what? Counsel for Nigeria tried to retrieve the situation by claiming in a later pleading that, "in the absence of effective agreements, one must have recourse to the customary boundary, which is the Rio del Rey. Historically . . . the territorial authority of the Kings and Chiefs of Old Calabar extended at least as far east as that waterway" (CR 2002/11, p. 60). At least as far — yes, but much more than this, as Nigeria has itself claimed. Further, how was this customary boundary established and where is the requisite evidence of practice to found such an assertion? [End projection]

15. Mr. President, the more one looks at Nigeria's claim, the more one is reminded of a Magritte painting. At first sight, logical and clear and commonplace, but at second sight wholly illogical and senseless. A house in the dark with the sky above bright blue and sunny.

The protectorate

16. At this point, we turn to consider the question of the protectorate established in the Treaty of 1884. To treat this as if it were akin to the classic international protectorate over protected States is to fly from reality. The reality is that the concept of protectorates in so far as the

sub-Saharan region of Africa in the late nineteenth century was concerned mutated into a variation of straightforward colonialism with no implication of sovereignty with regard to the target territory. Authors such as Lindley (*The Acquisition and Government of Backward Territory in International Law*, 1926, pp. 183, 187 and 203), and Alexandrowicz (*The European-African* Confrontation, 1973, pp. 69-70) and others (e.g., Crawford, *Creation of States in International Law*, 1979, pp. 198 *et seq.*), pointed to this colonial protectorate as one where the international community accepted that the protecting State acquired external sovereignty, notwithstanding a certain variance in the level of purely internal sovereignty.

17. As Huber noted in the *Island of Palmas* case with regard to the notion of the colonial protectorate:

> "It is not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy for the natives. In order to regularise the situation as regards other States, this organisation requires to be completed by the establishment of powers to ensure the fulfilment of the obligations imposed by international law on every State in regard to its own territory. And thus suzerainty over the native State becomes the basis of territorial sovereignty as towards other members of the community of nations." (P. 858.)

Thus Crawford writes that as a result of international practice by virtue of the General Act of the Berlin Conference 1885: "the protecting State had international full powers: it was competent, for example, to cede protected territory without consent and in breach of the protectorate agreements" (*op. cit.*, p. 200, and see further Reply of Cameroon, pp. 262 *et seq.*).

18. In such a context, it was irrelevant to issues of external sovereign territorial title that the domestic law of the colonial power ascribed a different status to such protectorates as compared with colonies. Whether different nationality provisions applied to the inhabitants in question and whether the form of legislation adopted fell under the Foreign Jurisdiction Act or not are interesting issues, but simply not relevant to the key issue of territorial title *erga omnes*. As Lord Lugard wrote: "We arrive, then, at the general conclusion that 'for purposes of municipal law an African protectorate is not, but for purposes of international law must be treated as if it were, a part of British dominions'." (*The Dual Mandate in British Tropical Africa*, 5th ed., 1965, p. 35, and see further Reply of Cameroon, pp. 270 *et seq.*)

19. Nigeria has failed to provide any evidence as to the claimed international status of sovereign Old Calabar. No international acceptance of the sovereign status now claimed for Old Calabar has been evidenced, nor any reference to international recognition of its territorial title, still less of its territorial extent. This matters not only for the purposes of general international law regarding statehood, but also because the international law of the Berlin Conference period predicated the effective occupation of colonial and protectorate territories upon notification to, and essentially acceptance by, third States. To this extent, any international recognition of the Kings and Chiefs of Old Calabar as a sovereign entity under international law would have foreclosed the issue under consideration.

20. But what was British practice? Here, Nigeria would have us believe that the 1884 Treaty of Protection marked the end of history until Nigerian independence in 1960. Not so. In fact, practice demonstrates that within a very short time of this protectorate agreement, the constitutional and territorial situation affecting this area was altered and was further changed on several subsequent occasions. However, we must first put the 1884 agreement into its context and this context was the race to acquire territory in this whole area of West Africa.

21. Hertslet in his classic work, *The Map of Africa by Treaty* (3rd ed., 1909, 3 vols., reprinted in 1967) refers to the truly extensive number of treaties entered into between 1884 and 1892 more or less in standard predetermined form. In particular, Hewett in 1884 concluded a number of agreements with "native Chiefs of the Niger District" by which these territories were placed under British protection (Vol. 1, p. 116). Hertslet lists some 350 to 400 of these (pp. 131 *et seq.*). Essentially these prevented any correspondence or agreement with any foreign power without British sanction and in return Great Britain extended its protection. The Old Calabar Treaty was thus one small stone in a large edifice marking the extension of British control throughout the Niger delta region. To assert that Britain recognized the sovereign status in international law and international territorial title of each of the rulers with whom such agreements were signed would be pushing reality into fantasy.

22. At this stage we need to look a little at the 1884 agreement itself. Nigeria maintains that it was minimalist, simply restricting Old Calabar's powers to contact foreign States and extending British protection (CR 2002/8, p. 46). Nigeria's counsel goes no further in his analysis than this.

Wisely so for his own case. In fact, he declares, after noting the provisions in Articles I and II just mentioned, that: "And so far as is relevant for our present purposes, that is all it said." (*Ibid.*, p. 48.) Oh really? I don't think so. Because if we delve a little more deeply, a totally different picture emerges. Let us look at some of the other provisions — you should find this on the screen behind me and in the judges' folder at tab 126 [project text, Counter-Memorial of Nigeria, Ann. 23, p. 110]. Article III provides for full and exclusive civil and criminal jurisdiction over British subjects and foreign subjects enjoying British protection to be reserved to British consular and other officers. Not entirely incompatible with international personality, but let us proceed. Article IV provides that all disputes between the Kings and Chiefs of Old Calabar or between them and British or foreign traders or between them and neighbouring tribes who were, in the absence of amicable settlement, to be submitted to British officials for arbitration and decision or for arrangement. Arbitration and decision, no less; no advisory service here, Mr. President. Indeed, Lindley uses the example of precisely such a provision to demonstrate an implied relationship of paramountcy or protection (*ibid.*, p. 185). Here, of course, there is no need for implication, but the basic point is clear. We continue.

23. Article V is a general clause of truly striking scope. It provides that the Kings and Chiefs engaged to act upon the advice of the British consular or other officials

> "in matters relating to the administration of justice, the development of the resources of the country, the interests of commerce, or in any other matter in relation to peace, order and good government, and the general progress of civilisation".

Well, a pretty conclusive list of governmental activities, one might think. And note, the obligation is not just to seek British advice, it is to *act* upon that advice. There is a right of appeal against the decisions of such British officers, but, Mr. President, to Her Majesty's Secretary of State for Foreign Affairs [end projection] .

24. Mr. President, Members of the Court, this is hardly a declaration of independence. It is hardly a recognition of independence. It marked an acceptance of a degree of British control that is simply not consistent with any level of independence that may be required for international sovereignty. To say, as does counsel for Nigeria, that "[t]he co-contracting parties were international persons, equal in law; they were manifestly agreeing to certain dispositions within the framework of international law" (CR 2002/8, p. 46) reveals a gift for fantasy that J. R. Tolkien

himself would doubtless have envied. And the Court will be well aware that Nigeria's case outside of an asserted post-independence historical consolidation rests solely and exclusively upon this Treaty.

25. The large number — the *large* number — of protectorate agreements signed with the local chiefs did not mark the end of history. On the contrary, a process of rearrangement and consolidation took place almost immediately. In June 1885, less than one year after our protectorate agreement, a British protectorate was established over the Niger Districts (or Oil Rivers Protectorate), defined as the area between the British Protectorate of Lagos and the right bank of the mouth of the Rio del Rey. Two years later the areas subject to the government of the Royal Niger Company were included. In 1893 the area under protection was renamed the Niger Coast Protectorate. On 27 December 1899, an Order in Council was adopted constituting the Protectorate of Southern Nigeria comprising the Niger Coast Protectorate and certain territories formerly administered by the Royal Niger Company and regulating its administration. This constituted a much larger area than heretofore. This Order was, in turn, revoked by one dated 16 February 1906 which defined the area of the Protectorate of Southern Nigeria more extensively to include the whole area of southern Nigeria excluding the Colony of Southern Nigeria (see Hertslet, *op. cit.*, pp. 117 *et seq.*).

26. We have seen no evidence at all that the British Government felt constrained by the several hundred protectorate agreements (including our 1884 Old Calabar agreement) in so changing these internal boundaries and administrative arrangements. We have seen no evidence that the Kings and Chiefs of Old Calabar protested at the consequential violation of what is now claimed to be their sovereign status. In fact, practice with regard to Nigeria is remarkably consistent in demonstrating that the colonial power was fully able to alter the territorial extent of the various protectorates almost at will.

27. We should finally note that on 1 January 1914, the Colony and Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria were amalgamated to form the Colony and Protectorate of Nigeria, an arrangement that continued until independence in 1960 — 1960. But 1960 brings us to one further problem for Nigeria's thesis. And that is how — and that is the

question — how the sovereign Kings and Chiefs of Old Calabar, with international sovereign and territorial rights remember, came to join Nigeria.

28. Counsel for Nigeria sang in simple harmony. Very simple. One said that: "[t]he chain of identity from the Kings and Chiefs of Old Calabar to present-day Nigeria is clear enough" (CR 2002/8, p. 36). Another proclaimed that: "the link between today's Nigeria and yesterday's Old Calabar is clear" (*ibid.*, p. 39). A third counsel said that: "The original title of Old Calabar . . . was eventually absorbed in the emerging entity of Nigeria. At the time of independence in 1960 the original title to Bakassi vested in Nigeria as the successor to Old Calabar." (CR 2002/9, p. 19.) The same counsel referred further to "the original title to the Bakassi Peninsula inherited by Nigeria at the time of independence" (*ibid.*, p. 47). Perhaps, we in our turn may be permitted to ask: How was this title absorbed or vested or inherited? And by whom? And precisely when? And by what mechanism?

29. In Nigeria's own terms, Old Calabar possessed international legal personality and sovereign title to territory. There exists in international law a presumption against the incidental or accidental demise of States. So how did this claimed State lose formally its independent legal personality? We have no evidence whatsoever as to any process of succession by which the rulers of the Kings and Chiefs of Old Calabar formally renounced statehood and territorial title in favour of Nigeria. Perhaps there was a process of transfer over the years during the colonial period. But if this is so, and Nigeria has not argued this, then would not also this prescriptive mechanism consequentially transfer to Britain title to the territory in question and thus validate the 1913 cession to Germany? A Treaty which Britain never denounced, never attacked, never criticized with regard to Bakassi. Whichever way this is argued, Nigeria faces insuperable legal barriers.

The Treaty of 11 March 1913

30. The mention of the 1913 Treaty brings us to the legal core of Cameroon's case. Nigeria's approach is basic. It argues that it does not matter. It is irrelevant in so far as Bakassi is concerned. The reason for this is, as claimed, Britain did not have the competence in law to cede the area to Germany. There is no need now to argue the validity of this Treaty in general. Nigeria has in terms before this Court accepted it (e.g., CR 2002/10, p. 41). All it seeks to do is to argue

that it is not applicable to Bakassi. Or rather that the Articles referring to the boundary with regard to this peninsula are somehow severable from the Treaty and void. And Professor Simma has already addressed this argument. Only a couple of points will be made here.

31. First, there is no doubt and no dispute that the Bakassi Articles define a boundary that is congruent with Cameroon's claim. Nigeria does not claim that this line is unclear or inconsistent with Cameroon's argument. It simply disputes the legality of this line as introduced in the Treaty. Secondly, neither side disputes that in this Treaty the effect of Articles XVIII to XXII is to cede formally the Bakassi Peninsula to Germany, however much practice was previously moving in that direction. Thirdly, neither side disputes that on the British side of the pre-March 1913 line some form of protectorate arrangement was in existence. Fourthly, there is a disagreement as to whether this Treaty was accompanied by German *effectivités*. But Professor Tomuschat has already shown, using, *inter alia*, British documents, that there were German *effectivités* in this pre-allied occupation period with regard to Bakassi (CR 2002/3, pp. 61 *et seq.*).

32. The question to be decided by the Court is whether the terms of the 1884 Treaty of Protection were such as to preclude Britain from ceding the territory in question. Nigeria's argument is that sovereignty inhered in the Kings and Chiefs of Old Calabar and that included international legal personality and international territorial title. Nigeria prays in aid the doctrine of *nemo dat quod non habet*, stating that Great Britain acted "wholly in excess of any powers which she had . . . as such it was wholly ineffective in law to achieve the transfer of territory which it purported to effect" (CR 2002/8, pp. 55-56).

33. Cameroon has no argument with the doctrine of *nemo dat* — just its application here. We have shown that this argument is deeply flawed at several levels. First, it is, at the very least, dubious that the Kings and Chiefs of Old Calabar constituted an independent sovereign entity with territorial rights under international law. Second, the Treaty of Protection of 1884 did not recognize or confirm, still less confer any such powers or rights. Third, British practice during and after 1884 demonstrated that it did not feel constrained with regard to altering administrative arrangements or changing territorial lines affecting the area in question. Fourth, no international recognition or acceptance of any Old Calabar sovereign status or territorial competence was forthcoming at any stage prior to, at the time of, or subsequent to the agreement. Fifth, no evidence

of any such relevant activity on the part of the Kings and Chiefs has been presented. Sixth, while both Germany and Britain explicitly affirmed the competence of Britain to cede Bakassi, no international protest of any kind has been put forward in evidence. Seventh, international practice is consistent in accepting that colonial protectorates in sub-Saharan Africa during the late nineteenth and early twentieth centuries permitted the colonial power to exercise full external sovereignty with regard to the territory, including the right to cede part of such territory. Eighth, the process of replacing German authority with British and French authority during the First World War involved no attempt to denounce or modify the March 1913 Treaty. At this point, we turn to the mandate and trust periods.

The mandate and trust period

34. The practice of these periods was the subject of a specific pleading before the Court (CR 2002/4, pp. 18 *et seq.*). In response, Nigeria provides the usual answer. Bakassi was not German territory therefore the practice of the mandate and trust period is irrelevant. Counsel for Nigeria tells us: "And that answer undermines Cameroon's whole subsequent case." (CR 2002/8, p. 61.) Throughout the period, and up to 1961, "the 1884 Treaty of Protection was still in force and still binding upon Great Britain" (*ibid.*, p. 62). Well, Mr. President, nobody seems to have told Britain, or the League of Nations, or the United Nations, or indeed the Kings and Chiefs of Old Calabar.

35. Counsel for Nigeria accepts Cameroon's arguments with regard to the nature and scope of mandatory powers and trusteeship administering authorities, but declares that, "Before these limits to territorial authority can in any way be relevant, it has to be shown that Bakassi was part of the Mandate or Trusteeship territories" (*ibid.*, p. 63). We have addressed this point in some detail already; this will not be repeated (see CR 2002/4, pp. 18 *et seq.*). Suffice it to say that we have shown that British officials on the ground took the view that Bakassi was part of the mandated territory (see, e.g., the 1922 Report on "The Fish Towns in the Rio del Rey Area", Reply of Cameroon, Ann. 3, para. 6), as did the Governor of the Nigerian Protectorate himself in a letter of 1936 (Counter-Memorial of Nigeria, Vol. VII, Ann. NC-M 133).

36. Even more clear and authoritative, is British legislative practice. The Northern Region, Western Region and Eastern Region (Definition of Boundaries) Proclamation 1954, to which later Orders in Council referred, provides concerning the boundary between the Eastern Region of Nigeria and Southern Cameroons that, "From the sea the boundary follows the navigable channel of the River Akpa-Yafe" (Memorial of Cameroon, Anns. 201 and 202 and CR 2002/4, pp. 31 *et seq.*). This position is confirmed by the evidence of official British maps of the period presented to the supervisory organs (see, e.g., Memorial of Cameroon, Ann. 383, maps 36, 38, 41, 43, 45 and 46); the Court will recall the presentation by Professor Cot (CR 2002/4, pp. 58 *et seq.*).

37. To all of this, Nigeria's reaction is dismissive. Counsel states baldly: "*All* Britain's actions in the Mandate and Trusteeship periods which assumed the alienation of Bakassi from the Protectorate or which might be construed as having that result were tainted in that way." (CR 2002/8, p. 64; emphasis in original) — that is, Britain lacks capacity. Simply ignore all relevant practice and repeat the mantra. It is, of course, curious that Nigeria, while relying so heavily in general on claimed *effectivités* and historical consolidation, should so dismiss all of these *effectivités* by the legitimate administering power.

38. There is just one further point before I turn to the plebiscite process. On three separate occasions, two of Nigeria's counsel have returned to an old tune. In the first case, it was stated that: "After the First World War the whole of the mandated territory of the British Cameroons came to be administered as part of the Nigeria Protectorate" (CR 2002/8, p. 64). In the second instance, until 1960 "Bakassi was administered from and as part of Nigeria" (*ibid.*, p. 66). In the third case, counsel noted as one of the elements of historical consolidation, "The administration of Bakassi as part of Nigeria in the period 1913 to the date of independence." (CR 2002/9, p. 52.) We really thought we had seen the end of this particular spurious claim. The key British Cameroons Order in Council 1923 provided for the administration of the Northern British Cameroons "as if it formed part of" the Northern Province of Nigeria; the Southern British Cameroons "as if it formed part of" the Southern Province of Nigeria (Memorial of Cameroon, Ann. 130). Not "as part of", but "as if it formed part of". And in these words "as if it formed part" lies a whole legal world. This critical provision was repeated to the League of Nations (*ibid.*, Ann. 144) and the same situation continued through the trusteeship period. The insinuation by

counsel that the administration of Bakassi as part of Nigeria during the mandate and trust period was part of the process of the historical consolidation of title (CR 2002/9, p. 52) is legally totally wrong.

The plebiscite period and independence

39. The plebiscite process leading to independence is critical, for it marks the active intervention of the United Nations in a binding capacity. The British Cameroons achieved self-determination under the active supervision of the United Nations and as a direct consequence of a General Assembly resolution defined by this Court as having "definitive legal effect" (*Northern Cameroons, I.C.J. Reports 1963*, p. 32).

40. Counsel for Nigeria states that the evidence does not support the assertion that the plebiscite relating to the Southern Cameroons encompassed Bakassi (CR 2002/9, p. 43). It is also declared that there is no documentary evidence indicating that the population of Bakassi took part in the plebiscite. But since the United Nations Plebiscite Commissioner's Report 1961 provided the voting details by voting district and since Bakassi was not an identified voting district, but simply part of bigger units, it is not possible to produce now such figures. One is left with an aggregated figure for the districts in question. But as the annexed map clearly shows the relevant districts included Bakassi, and so the problem assumes little significance [project United Nations plebiscite report map, judges' folder, tab 127].

41. A word needs to be said about the map. Counsel for Nigeria points to the usual United Nations disclaimer noting that no official endorsement of the boundaries shown on the map should be implied (CR 2002/9, p. 44). That is correct as far as it goes, but the importance of the map is not as showing international boundaries as such, but as showing the territorial framework within which the United Nations supervised plebiscites took place, a process that was approved in resolution 1608 which had "definitive legal effect" and for which Nigeria voted and which was reaffirmed by Nigeria in its Agreement of 29 May 1961 with the United Kingdom.

42. The question of United Nations maps was addressed by the Tribunal in the *Eritrea/Yemen* case (Phase 1). The Tribunal noted, in relation to a United Nations map of 1950 that:

> "Whether the map was attached to the report of the United Nations Commission for Eritrea as an official commission map, or as a compromise — or even as a merely illustrative map — seems beside the point. What it bears witness to is that it was used and circulated — and received no objection. No protest was recorded in 1950 or at any later time, and Ethiopia itself voted in favour of the report with full knowledge of the map." (Para. 378).

And the Tribunal drew conclusions from this (para. 379). Unlike the *Eritrea/Yemen* case, Nigeria to our knowledge at least has not contested the accuracy, provenance or authenticity of the plebiscite map. The importance of this map is that it records the details of the plebiscite arrangements, in terms of the division and identity of voting districts and thus provides a definitive analysis of the territorial framework for the conduct of the United Nations supervised operation.

43. Let us look further at the map. We can see that Bakassi is included, in the main, within Victoria South West voting district but also partly within the Kumba district, and you can see on this map that Archibong is clearly identified — Archibong, a town referred to on several occasions as being part of Bakassi and Nigeria (e.g., CR 2002/11, p. 60). So we do have some explicit proof as to place names. Further, the Southern Cameroons (Constitution) Order in Council Proclamation of Constituencies 1961, specifies that Archibong falls within specifically the Kumba area — and you can see that at judges' folder, tab 128 [end projection of map].

44. To conclude: Nigeria hangs all on the one thread, the thread of the 1884 Treaty. But that thread cannot sustain these claims. The Kings and Chiefs of Old Calabar did not possess international legal personality and international territorial sovereignty. The terms of the Treaty show that virtually all meaningful control passed to Britain. The institution and practice of the colonial protectorate entailed the external sovereignty of the colonial power, including the power to cede territory. The 1913 Treaty with Germany validly passed title to Bakassi to Germany. The establishment of the mandate and the trusteeship froze the existing international boundaries, including the 1913 line in Bakassi. The United Nations supervised plebiscite in 1961 demonstrated that Bakassi fell clearly within Southern Cameroons. The plebiscite process was affirmed by resolution 1608, which terminated the trusteeship. Nigeria through all its dealings with the British authorities and the Cameroons territory was fully engaged in this independence process and accepted it by voting in favour of resolution 1608 and by formally endorsing it in the agreement of 29 May 1961 (CR 2002/1, pp. 61 *et seq.*). It continued, as we shall see, to recognise Bakassi as

Cameroonian after independence. The thread snaps. In truth, it never really existed. And now it asks you in essence and in part to judicially review the acts of international organizations.

45. I finally return to the map [project United Nations plebiscite map]. Mr. President and Members of the Court, this represents the territorial context of the plebiscite process. It proves Bakassi was within the Southern Cameroons which joined the Republic of Cameroon. It is the map of the colonial heritage. It is the photograph of territorial title of which the Chamber spoke in the *Burkina Faso/Republic of Mali* case (*I.C.J. Reports 1986*, p. 568). That is the *uti possidetis* picture at independence showing that Cameroon had title to Bakassi.

I thank the Court for its kind attention and would be grateful, Mr. President, if Professor Mendelson could now be called.

The PRESIDENT: Thank you very much, Professor Malcolm Shaw. Je donne maintenant la parole au professeur Maurice Mendelson.

Mr. MENDELSON: Merci, Monsieur le président.

V. BAKASSI

The situation since 1961

1. Introduction

1. Mr. President, Members of the Court, it is my task during this round of oral argument to deal with matters concerning the Bakassi Peninsula following the integration of the Southern Cameroons, including the peninsula, into the Republic of Cameroon in 1961.

2. The Nigerian oral arguments of the last few days on this subject have been a mixture of the startlingly new and the depressingly déjà vu. Both, alas, were equally devoid of any substance. Let us begin with the startlingly new.

2. "The shock of the new": the population of Bakassi

3. In her oral argument, Mrs. Andem-Ewa told us[1] how rich are the Bakassi waters in plankton and aquatic life, and that the population largely lives on fishing. We were later told by

[1] CR 2002/8, p. 29, para. 5.

my friend Professor Brownlie that the population of the peninsula numbers some 156,000[2]. This was not a slip of the tongue, since he and various other speakers used either this figure of "more than 150,000". Professor Pellet has touched on this surprising assertion in his introductory remarks, but the matter bears closer examination here.

4. In paragraph 3.25 of the Counter-Memorial of Nigeria of May 1999 (that is, less than three years ago), we were told that:

> "Figures given by the National Population Commission in Calabar state that the current population of Bakassi is estimated to be in the region of 37,500. This figure is *projected* [my emphasis] from the last census, which was carried out by Nigeria in 1991."

"Projected" — that must mean to May 1999. In January 2001, just 18 months later, the figure was already 100,000 — it has gone up from 37,500 to 100,00 — according to the Rejoinder[3]. And today, a mere 13 months on, it is apparently 156,000. You are expected to believe, it seems, therefore, that the people are even more prolific than the fish, to have multiplied more than fourfold in less than three years and by over 50 per cent in the course of a year. These leaps to 156,000 today seem wholly implausible, and the Court will note that the figure is unsupported by any evidence.

5. We were also told by counsel for Nigeria that this is a "permanent population"[4]. This is again a surprising transformation, given that the population was in the past always transient, being governed not least by the weather, which made fishing in the rainy season impossible. Indeed, it seems from Nigeria's own evidence that fishing was not only seasonal, but that it was not the same people who came and fished every year[5]. I am referring to documents in the Nigerian pleadings themselves. As one official put it:

> "It cannot be too strongly emphasised that the inhabitants of these Fishing Villages and settlements are a shifting population . . . The people have only one purpose when they stay in the Fishtowns and that is to fish and to fish fast."[6]

Again, we are given no evidence for the alleged striking change of behaviour.

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[2]CR 2002/9, p. 45, para. 134.

[3]Vol. I, p. 166, para. 3.275.

[4]CR 2002/8, p. 33, para. 22.

[5]See, e.g., Counter-Memorial of Nigeria, Ann. NC-M 115, para. 6; Ann. NC-M 117, para. 5.

[6]Ann. NC-M 121, para. 5.

6. And where is this huge permanent population to live? According to counsel for Nigeria[7] "large areas of the peninsula are conducive to habitation", large areas. How large, Mr. President? For earlier in her speech, she told you that "The vegetation in Bakassi is thick and dense, with the principal flora being mangroves . . . Further inland from the coast, the mangroves give way to very old and well-established rainforest." Indeed, a glance at plates 1 to 33 of the Counter-Memorial[8], which are apparently taken from the self-serving Nigerian video that you were shown the other day, confirms that impression of dense vegetation. Hardly conducive to habitation, one might think.

7. Of course, Cameroon does not claim that there is no dry land on Bakassi. Clearly, as counsel for Nigeria told you, there is some, "several metres above sea level"[9], she said. But once again, we have the objective reports of British officials, deposited by Nigeria, who tell us, for example, that

> "The fish towns . . . are mostly built on small stretches of land appearing among the mangrove swamps. Water usually invades these stretches at high tide and some times even enters the houses. The pervading stench of decaying fish refuse, combined with that of the swamps, is too terrible to describe."[10]

Indeed, paragraph 3.9 of the Counter-Memorial admits all of this: it seems, however, that in its enthusiasm to inflate its case before you, Nigeria has now lost even remote contact with the truth.

8. The fact is that by far the greatest part, well over 90 per cent, of the Bakassi Peninsula is either too wet or too densely covered by vegetation to be habitable, let alone permanently habitable. Once again, as so often in this case, I must acknowledge my debt to Nigeria for providing evidence to corroborate Cameroon's claim. I refer, for example, to the composite aerial photographs at tabs 6 to 8 of the atlas of the Counter-Memorial — I will not take you to that now, but I should just point out that the white patches, if you look, are not settlements but clouds — and I refer also to the Nigerian map at tab 4 of the Annex to the Counter-Memorial. And this is now being projected, and for convenience can be found at tab 129 of your folders. Unfortunately on your photocopies it is not very clear and it is not, I see, very clear on the projection but, on the bottom left of the legend, Members of the Court, you will see that there is a symbol third from the

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[7]CR 2002/8, p. 32, para. 19.

[8]Vol. XII.

[9]CR 2002/11, p. 63, para. 3.

[10]Ann. NC-M 114, para. XIV. Similarly Ann. RC 3, Vol. IV, p. 28, para. 7.

bottom which says "mangrove", and that is what this is showing. It is showing virtually the whole peninsula being covered by mangrove. Please bear in mind that further north this map does not even show the dense rainforest which Mrs. Andem-Ewa told us is to be found to the north, around Akwa, for example.

9. So where indeed is this permanent population to live? We were told that the total area of the peninsula is about 700 km^2. Let us assume, probably far too generously, that 10 per cent of it is at all habitable, even temporarily. That makes 70 km^2 to contain 156,000 people. Simple arithmetic tells us that this produces a population density of 2,229 inhabitants per square kilometre. Even the Netherlands, the most densely populated country in Europe, has only 387.5 inhabitants per square kilometre[11] — that is, only about one-sixth of the alleged permanent population of Bakassi. How very surprising that it was only a few days ago, in this very courtroom, that the world first learned about a hitherto unknown Manhattan island on the west coast of Africa [end projection].

10. Mr. President, the facts speak for themselves. This is, I am afraid, yet one more example of the tendency of Nigeria to inflate and fabricate the facts to suit its case.

11. Before I leave the Nigerian video, which I mentioned and which is transparently self-serving, a couple of other points should be made. Heavy reliance has been placed on the Nigerian citizenship of some of the inhabitants of Bakassi, and — which is not the same thing — on the Nigerian ethnic affiliations of some others (by no means all, by the way). Various counsel for Cameroon have demonstrated why ties of citizenship and ethnicity are irrelevant as a matter of law and fact. In exchange for the self-serving Nigerian video, we would be pleased to offer our counterparts other videos, taken by members of the Cameroonian delegation, which show similar groups of happy Nigerians going about their daily lives in just the same way as on the video — except that there are no helmeted and life-jacketed soldiers to keep them in line, in our video. The importance difference, though, is that these videos of Nigerians were taken in locations deep into Cameroon, some of them even in francophone areas. We have not bothered the Court with them.

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[11]Source: *Statistics Canada*, www.statcan.ca/english/Pgdh/:People/Population/demo01.htm, 8.3.2002.

12. The point is, Mr. President, that as has already been submitted[12], Cameroon has long given hospitality to large numbers of Nigerians and others, without its ever having been pretended that this affected its title to territory before the Nigerian claims to the peninsula. And it is just the same in other parts of Africa. This is not just a legal or factual point, but a serious human one. One would not like to imagine the human consequences if States in Africa and elsewhere thought that the highest court in the world was telling them that sovereign title can be jeopardized by allowing foreigners to live within the host State's territory, especially if close to the frontier.

13. It is of course true that Africa was carved up by the colonial powers without always paying much attention to ethnic affinities. So, all over Africa boundaries do divide ethnic groups. The leaders of the newly independent African States in the 1960s knew this very well. But they also knew that to try and tear up the colonial boundaries and rearrange the continent on ethnic lines would lead to endless warfare and chaos. And that is why they adopted the famous OAU resolution enshrining the principle of *uti possidetis,* and which principle was so resoundingly endorsed in the *Burkina Faso/Republic of Mali* case[13], amongst others. Nor, Mr. President, is this a problem unique to Africa — important though the problem is there. Today, throughout the world, there are irredentist movements who would seek to destroy existing States on these very grounds of ethnicity. Cameroon hopes that this Court will treat such arguments with the disdain that they deserve.

3. Nigeria's failure to engage, either adequately or in some cases at all, with Cameroon's arguments

14. I said at the outset of my presentation that the Nigerian oral argument on sovereignty over Bakassi, in the first round, was a combination of the startlingly new and the déjà vu. So far as concerns the déjà vu, my friend and colleague Professor Pellet has already drawn attention to our opponents' habit of simply repeating in oral argument, and sometimes even reading out, what they had already said in writing, and of not engaging with our oral arguments. This tendency is very marked in their oral submissions on Bakassi. The inference to be drawn is that our points were not answered — or were not properly answered — because they are unanswerable.

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[12]E.g., CR 2002/4, pp. 44-45, para. 20.

[13]*I.C.J. Reports 1986*, pp. 565-567, paras. 20-26.

4. Nigerian acknowledgment of Cameroon's title

15. I begin with what I shall loosely call, for convenience, "acknowledgment of title", which includes recognition and acquiescence and sometimes overlaps with *effectivités*. It is, however, logically prior to the question of *effectivités*. For even if there were, purely for the sake of argument, any doubt about Cameroon's title at the beginning of the post-plebiscite period or at any time thereafter, acknowledgment by Nigeria of Cameroon's title would have resolved the matter definitively in Cameroon's favour. This general proposition is not contested by Nigeria. Nevertheless, it has ignored completely what we have submitted about some of these instances that we rely on, and has given a questionable or palpably false account of others. Please allow me to particularize.

***(a)* Nigeria's diplomatic Note No. 570 of 1962**

16. I refer, in the first place, to the Nigerian diplomatic Note No. 570 of 27 March 1962, which was discussed by my friend Professor Thouvenin in his oral argument on 22 February[14]. (The Note and accompanying diagram is already in your folders, at tab 74, but I need not take you to it now.) Essentially, the point of the Nigerian *démarche* was that there was a small overlap of offshore petroleum exploration zones to the south and south-west of Bakassi, which the Nigerian Minister for Foreign Affairs wanted to sort out. The letter — the diplomatic Note — recognized in terms that zone N, which was offshore Bakassi, "is now off shore the Cameroon Republic", to which, he said, it had reverted. He added "As shown on the map, the boundary follows the Akpa Yafe river, where there appears to be no uncertainty, and out into the Cross River estuary". A line on the sketch-map (tab 73-2) showed this. Professor Thouvenin, relying on the *Eastern Greenland* and *Minquiers and Ecrehos* cases in particular, submitted that this Note constituted a formal acknowledgment and recognition by Nigeria of Cameroon's title. In my own argument on the same day[15], I drew your attention to the fact that no less an authority than Dr. Elias, then Attorney-General of Nigeria, cited this Note, as well as other documents, and concluded "The principle of good faith in international relations demands that Nigeria should not disavow her word

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[14]CR 2002/5, pp. 27-29, paras. 5-14.

[15]*Ibid.*, p. 25, para. 19.

of honour as evidenced by the note of 1962." The report of his letter is already in your bundles, at tab 72. I mention it because I must point out that there has been no reply to this argument.

(b) The premise of the agreements on maritime delimitation and of the granting of hydrocarbon licences

17. There has, on the other hand, been a response — of sorts — to Professor Thouvenin's other points, which concerned the Yaoundé, Kano and Maroua Agreements of 1971 to 1975 on the delimitation of the waters to the west of the Bakassi Peninsula, up to — eventually — point G[16]. Essentially, Nigeria's response has been to deny that General Gowon had the constitutional right to bind Nigeria to these agreements, and my friend and colleague Sir Ian Sinclair will be dealing with this matter in his oral argument tomorrow. I do not want to anticipate what he is going to say about the binding force of these treaties, but I should just like to make two points in the present context. The first is that, quite aside from their status as binding treaties, these instruments reveal once again the *premise* of both sides, which was that Bakassi belonged to Cameroon, irrespective of their treaty status — it was the *premise*. The whole course of conduct of the two Parties in this matter was predicated upon that very fact. In the *Land, Maritime and Frontier Dispute* case the Chamber of this Court held to be "decisive" the fact that "the negotiations were conducted on the basis, accepted by both sides, that it was the boundary between the *ejidos* of Citalá and Ocotepeque that defined the frontier", even though this was at a time when both parties were in dispute about their boundary, and no admission had been made by Honduras[17]. The present case is *a fortiori*, since there was no dispute at the time between the Parties and, as we have just seen, there had already been Nigerian admissions.

18. As well as the treaties of 1971 to 1975, there was also a long-standing practice by Cameroon of granting hydrocarbon licences over the Bakassi Peninsula itself and its offshore, without protest from Nigeria, to which I drew attention on 21 February[18]. Once again, the premise was that the peninsula belonged to Cameroon. On 6 March, in attempting to deal with this serious problem, my learned friend Professor Crawford told the Court that the two issues — sovereignty

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[16] *Ibid.*, pp. 29-33, paras. 15-35.

[17] *I.C.J. Reports 1992*, p. 405, para. 72.

[18] CR 2002/4, pp. 46-47, para. 24.

over the land and sovereignty and similar rights over the adjacent territorial sea and a little beyond — were regarded by the two States as entirely separate and unrelated, that these issues were so treated by virtue of a tacit agreement which he had to invent for the occasion[19]. He told the Court "The conduct of the Parties is incomprehensible except on the basis that the two issues were considered as separate." Mr. President, it is the thesis of Professor Crawford that is "incomprehensible". It is inconceivable that Nigeria, which had shown itself so careful to protect its legal rights — see, for example, the Diplomatic Note of 1962 — that Nigeria would have failed to say something about its alleged sovereignty over the land which controlled the relevant sea areas during the lengthy period when Cameroon was granting licences, or during the period from 1970 to 1975 when the two States were concluding agreements and negotiating about their delimitation of the offshore waters. One sympathizes with the impossible task of counsel in having to try and square the circle but, with respect, this really will not do.

(c) Consular and ambassadorial visits

19. The next set of acknowledgments, and so on, relates to the visits and arrangements for visits by Nigerian consular and ambassadorial staff to the peninsula, as well as to other places in Cameroon, on various occasions between 1969 and the mid-1980s[20]. Nigeria had contented itself, in its written pleadings, with an irrelevant query as to whether the ambassadorial visit actually took place, and a denial that consuls had the right or power to grant recognition of sovereignty over the territory. In oral argument, I pointed out that that was not the issue. Again there has been no response from Nigeria. Mr. President, I will not burden the Court by reciting over again the facts referred to in Cameroon's first round, but I would just like to remind you very briefly of some of the conclusions which we said could be drawn from this history. First, asking for Cameroonian permission and co-operation, and thanking Cameroon after the event, constituted the clearest possible acknowledgment of Cameroon's sovereignty and effective control over the areas in question, including Bakassi. Secondly, on more than one occasion, the Nigerian Consul-General told his countrymen in Bakassi that they were living on Cameroonian soil and should obey its laws:

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[19]CR 2002/12, pp. 61-64, paras. 13-19.

[20]CR 2002/5, pp. 20-24, paras. 9-16.

again, a clear acknowledgment. Thirdly, consuls and ambassadors do not make official visits to their own country. Fourthly, whilst consuls issue passports to their own nationals in foreign countries, they do not do so in their own country. Fifthly, the fact that Nigerian fishermen in Bakassi needed passports is at least highly suggestive of the fact that they were not in Nigerian territory. And, sixthly, the many Nigerian officials involved in these activities could hardly have arranged and made the visits, or obtained and issued the passports, without the knowledge and assistance of their government. What all of this amounts to, therefore, is both express and tacit recognition by Nigeria of Cameroon's title to Bakassi, and we respectfully request the Court to draw that conclusion.

(d) The Elias letter

20. On the same day, you were shown the famous Elias letter — tab 72 in your folders[21]. This document has been before the Court ever since the Memorial was deposited, and its authenticity has never been questioned by Nigeria. In view of the standing of its author, and of the fact that it is evidence against interest, so to speak, it is of the greatest significance and speaks for itself with the greatest eloquence.

(e) The opinions of the Nigerian Ministry of Justice, 1985-1986

21. If I now cite another similar but later letter, it may seem that I am "gilding the lily". However, it is of great importance for reasons which will become apparent. The document in question is Annex 275 to the Memorial of Cameroon[22]. Because the original photocopy is long and difficult to read, you will find in your folders, at tab 130, certain extracts to which Sir Ian Sinclair and I will make reference. I should emphasize that this document too has been with the Court since the deposit of the Memorial.

22. What you now have, then, are extracts from a letter from Mr. K. B. Olukolu, of the Nigerian Ministry of Justice, dated 6 June 1985. It appears from it that the Minister of Foreign Affairs, who headed the "Special Task Force on Chad and Cameroon" — ominous sounding name — had asked for formal advice on the "present maritime and territorial boundary" with

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[21] *Ibid.*, pp. 24-25, paras. 17-20.

[22] Vol. VI, p. 2291, and Ann. OC 34.

Cameroon, and this was the advice. It is also to be noted incidentally that Dr. Geoffrey Marston, who is a member of the present Nigerian team, had apparently been asked for his views. The document is a long and fascinating one, which repays careful study, but I shall just highlight some of the key passages, especially those that state conclusions, rather than the full reasoning. May I first take you to paragraph 7? After reviewing a whole series of legal arguments, many of which later turned up in Nigeria's pleadings in the current proceedings, Mr. Olukolu says, at the bottom of the first page of this extract: "It is a futile attempt to contend at this stage that Bakassi Peninsula is part of Nigerian territory." Over the page, which is double-sided, he goes on to rely on various further arguments, such as the fact that the United Nations Secretary-General had himself confirmed that Bakassi was within the area covered by the Southern Cameroons plebiscite. He dismisses as immaterial arguments based on the fact that many Nigerian citizens inhabit the peninsula. He expressly rejects arguments that were later presented to you as evidence of *effectivités*, such as registration and voting in Nigerian elections, payment of taxes to Nigeria and the fact that certain Bakassi villages were included in a Nigerian census. This is all in paragraphs 7 and 8, where he also states in terms, at the bottom of page 2 of the extract, and the top of page 3, that Cameroon has been exercising administrative authority there, and that the peninsula has not been abandoned by Cameroon and is not *terra nullius*. In paragraph 10, on page 3, he goes on, presciently as it turned out: "Except we are prepared to use force (and that has its attendant consequences) I cannot see how Nigeria can validly now lay claim on Bakassi Peninsula", and encourages negotiations with Cameroon. In paragraph 11 he concludes — the grammatical errors are in the letter — "There is overwhelming legal documents and conducts *[sic]* passive or active on the part of Nigeria which will make Nigeria to be estopped from denying that Bakassi Peninsula is Cameroon's territory." He then goes on to consider the maritime boundary. I do not want to trespass on the waters of my colleagues, so to speak, but may I just draw your attention for now to paragraph 18, in which, after examining all possible legal arguments, international and constitutional, by which the Yaoundé and Maroua agreements could be repudiated, he finds all such arguments and objections, and consequently the proposed rejection of the Maroua agreement, to be without any legal foundation.

23. A brave and honest man, Mr. President and Members of the Court, whose sage advice should have been heeded by Nigeria. But as well as the fact that it reiterates and brings up to date, so to speak, the opinion of Attorney-General Elias, the document also has another significance for us. It proves that the Nigerian Government had long had designs on the peninsula, and was now contemplating the use of force. If I can take you back to the top of the first page, in paragraph 2, Mr. Olukolu says that there have been several previous legal opinions given by his Ministry on the matter, the last being in August 1977. And in paragraph 10, as I have already mentioned, there is a hint that the use of force is being considered. It seems clear from this that the campaign to annex Bakassi was already under way, or at least under consideration. My friend Professor Tomuschat will demonstrate this further in a few minutes.

24. A similar report, dated 6 June 1986, by the Legal Adviser of the Federation and Secretary-General of the Ministry of Justice in Lagos, which has unfortunately been found only in its French translation, forms Annex 279 to the Memorial[23]. Though less elaborate, it is to exactly the same effect as Mr. Olukolu's, and incidentally Dr. Marston, whose concurrence is noted, will be pleased to hear that he is there described as an "internationally renowned Nigerian expert".

25. Mr. President, these reports seem to say it all. And even if we did not have them, any — I repeat *any* — of the other acts of recognition and acknowledgment of Cameroon's title to which I have referred would be sufficient to destroy completely any shadow of a claim to Nigeria's sovereignty. But before I leave this subject, there is one more important form of acknowledgment to which I must refer — and it will only take a couple of minutes — and which is map evidence.

(f) Map evidence

26. If I may say so, counsel for Nigeria's response[24] to the very compelling map evidence produced by my friend Professor Cot[25] was woefully inadequate. Our opponent's main criticism seems to be that the maps were small-scale. Mr. President, Members of the Court, the scale was certainly big enough for everybody in this courtroom to see that the maps put Bakassi clearly on the Cameroonian side of the line. A further argument of our opponent was that "none of the maps

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[23] *Ibid.*, p. 2335.

[24] CR 2002/9, pp. 47-49, paras. 143-153.

[25] CR 2002/4, pp. 53-63.

was prepared by experts concerned with highly localized and specialized issues of sovereignty". Decoded, this means that none of those officials who drew up the maps, including officials in Nigeria before and after independence, were expecting so far-fetched a claim to sovereignty and had not yet been instructed to manufacture evidence in support of one. Official maps are official maps. *Ratione temporis,* Nigeria tries, as usual, to have it both ways, or perhaps three ways, this time. It relies on three of its own maps from 1990, 1991, and 1992; but it rejects two earlier maps dated 1989 and even 1976 as "of a late date and self-serving". But then again, counsel told you, "Three of the maps relied upon by Cameroon are maps at or soon after the independence of Nigeria . . .; in other words, very early in the post-independence phase of historical consolidation." As a whole, then, Nigeria seems to be saying the maps from the early 1990s which suit them are fine, other maps are too late even though they were published earlier and other maps again are too early. Mr. President, how many ways does Nigeria want to have it? To complete this very brief survey of Nigeria's argument on maps, one cannot help but admire my learned friend's *sangfroid* in relying on administrative map No. 10 of Nigeria, published by the Federal Survey in Lagos in 1990. He emphasized that this puts Bakassi on the Nigerian side of the line — which indeed it does — whilst ignoring the fact that earlier editions of the very same map — of the very same map — put it on the *Cameroonian* side, as Professor Cot showed you. And this is a Nigerian set of maps. Enough said, I think.

Mr. President, I have come to a natural break in my presentation and perhaps you would care to consider that, as in *Astérix chez les Bretons, c'est l'heure de l'eau chaude.*

Le PRESIDENT : Je vous remercie, Monsieur le professeur. La Cour va suspendre pour le thé ou le café pendant une dizaine de minutes.

L'audience est suspendue de 16 h 35 à 16 h 45.

Le PRESIDENT : Veuillez vous asseoir. Je vous prie tout d'abord d'excuser le retard avec lequel nous reprenons nos travaux, mais j'ai dû procéder à des consultations pendant cette période et, bien entendu, le Cameroun disposera du temps nécessaire pour finir ses plaidoiries ce soir, selon

le programme qui avait été prévu. Je donne maintenant la parole au professeur Mendelson pour qu'il poursuivre sa plaidoirie.

Mr. MENDELSON: Merci, Monsieur le président.

27. Mr. President, in the light of the weakness of Nigerian arguments based on *nemo dat quod non habet* and on the invalidity of boundary treaties, and in the light of all the instances of recognition and acknowledgment of Cameroon's title to which I have just eluded, in our submission the whole question of *effectivités* is irrelevant, purely academic. However, in view of the huge effort that counsel for Nigeria and their collaborators have evidently invested in this subject, perhaps it would be discourteous not to say at least something about them, even if they have not really dealt with our own oral arguments.

5. *Effectivités*

28. On 1 March my learned friend and opponent Professor Brownlie angrily rejected what he considered to be a mischaracterization of the issues and of his case[26]. He said:

> "Professor Mendelson pays little or no attention to historical consolidation of title, which is the basis of Nigeria's claim, but refers instead to the concept of prescription, which is generically distinct and has not been invoked by Nigeria. In his [Mendelson's] opinion, if Nigeria had invoked prescription, this would have eliminated many of Nigeria's *effectivités*. But this assertion is unfounded and in any event Nigeria has not relied upon prescription. Counsel for Cameroon cannot expect to reinvent Nigeria's case in order to attack it."

Fine words, but let us see what they amount to.

29. A few moments earlier, my learned friend claimed the benefit of a concession which had not in fact been made. He asked the Court to note that I conceded that Nigeria had more *effectivités* than Cameroon. That was not, in fact, so. I simply conceded that Nigeria had, as it were, taken up more pages in listing its *effectivités* but I question their legal force of relevance for reasons which I will come back to. But now we will make him not one, but two concessions — so long as he does not try to distort what we said again. I do not think that they will help him, but he is welcome to make of them what he can.

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[26]CR 2002/9, p. 68, para. 250.

30. The first concession is this: if Nigeria's other assertions are right, and if it did have title in 1961, then — unless Nigeria recognized, acknowledged, or otherwise acquiesced in Cameroon's title — then we would be talking about something that, so far as Nigeria is concerned, would be a confirmation of its title and not prescription. Of course this is not really a new concession: it has been explicit or implicit in our approach all along. I do not think, in fact, it will help Nigeria, for two reasons. First of all, it as acknowledged Cameroon's title, explicitly and implicitly, as we have seen. And secondly, we submit that Nigeria is extraordinarily far from being able to establish that, immediately after the plebiscite, it held legal title to the peninsula, or even that the title was uncertain. If the Court were to consider us wrong on both of these points — and it has to be both — then we are indeed in a situation where Nigeria can meaningfully invoke its *effectivités*. But if not, not.

31. Our second, related, "concession" is this. What is sauce for the goose is sauce for the gander. If the contentions of Nigeria about having title in 1961 are right, and if Nigeria never acknowledged Cameroon's title, then this time it would be on Cameroon that the law of prescription would weigh, including rules regarding the heavy burden of proof. This must be right in law and it has always been our position: it is just that, on the facts, we do not think that this helps Nigeria.

32. Mr. President, Cameroon has seriously tried to engage with Nigeria's claim to historic consolidation of title. It has tried to avoid a dialogue of the deaf, where each side simply shouts that it has the title and is effectively consolidating. You will see that, in my own speech, I carefully analysed — I hope fairly — what appears to be Nigeria's case in the Rejoinder, and said in what respects we disagreed. I refer, for example, to the verbatim record of the hearing of 21 February, in which a serious attempt was made to analyse the overlapping strands of Nigeria's argument; there is a deliberate vagueness and blurriness about some of them[27]. But in grappling with Nigeria's arguments, we were neither obliged to accept the tendentious legal framework in which it set them, nor its account and interpretation of the facts. Once again, we did not just generically deny the framework, the facts and the interpretation given, but explained how and why we differed.

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[27]CR 2002/4, pp. 35-53, esp. at pp. 36-40 and 50-53.

Cameroon's account of its own *effectivités* was briefly given, by way of response to what was said in the Rejoinder. But Nigeria's counsel did not engage with the oral argument, choosing instead simply to repeat, and often to read out, Nigeria's earlier written pleadings. It is not Cameroon who is responsible for this dialogue of the deaf, and it wishes to emphasize that it does not accept an account and characterization of its administration of the peninsula which is grossly inaccurate and has already been refuted.

33. Having analysed Nigeria's claims that the sovereignty of the Kings and Chiefs of Old Calabar over Bakassi both existed and survived until independence, and the further argument that the United Kingdom had administered Bakassi in right of Nigeria, and not in right of the Southern Cameroons, I went on to deal with the third basis of Nigeria's claim, quoting directly from the Rejoinder, which said that it was "To provide, if this were to prove legally necessary, an independent source of title based on the process of peaceful possession, acquiescence, and historic consolidation in the period since Independence."[28] In his oral argument, Professor Brownlie attached particular importance to the post-independence period[29]. It is to the characterization of this third claim as being, albeit *sotto voce*, one of prescription, that exception has been taken. But if Nigeria were to fail on either of its first two submissions — which we claim it must — then it is the adverse possessor and the law which applies to it is the law of prescription.

34. Let us clarify matters. In the first place, Nigeria does not claim that the peninsula is *terra nullius*[30]. That much, at least, is common ground. But my learned friend goes on to say that "The legal situation appears to the respondent State to be in certain respects similar to that obtaining in the *Minquiers and Ecrehos* case." We are not told exactly in what respects it is similar, but presumably therefore not identical. But in any case, Mr. President, this is yet another example of Nigeria's trying to cover itself all ways, and the two cases are actually very dissimilar. In the 1953 case, the root of title was lost in the mists of history, with assertions that the title went back as far as the Norman conquest of England in 1066, and both parties putting forward arguments about mediaeval feudal law which the Court characterized as "more or less uncertain

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[28]CR 2002/4, pp. 38-39, para. 9.

[29]CR 2002/9, p. 19, para. 8.

[30]CR 2002/9, p. 50, para. 157.

and controversial"[31]. It therefore felt it appropriate to examine acts relating to actual possession, and not simply to decide the case on the basis of who had original title. But that is very far from the circumstances of the present case. In particular, there was a consistent and relatively intensive exercise of State authority by the United Kingdom over the peninsula in the 40 or so years preceding the plebiscite. Where the Parties differ is as to the consequences of that exercise — we differ on who can count these *effectivités* as our own. But that is the nub of the matter. And this, incidentally also disposes of my learned friend's reliance on the reference to uncertainties in the *Land, Island and Maritime Frontier Dispute* case; and in any case the passage he quoted relates to uncertainty as to the *exact territorial expanse* to which a sovereign title relates, which is not the issue here[32]. Nigeria cannot really have it both ways: either it was the sovereign of Bakassi in 1961, or Cameroon was. There is no need to obscure the situation here by the introduction of a wholly irrelevant *tertium quid.*

35. That being so, what does this claim of "historical consolidation" amount to? The game is given away by my learned friend in paragraph 162, when he says that "treaty-based titles can be modified by means of historical consolidation". Cameroon strongly rejects this assertion, for reasons given by my friend Professor Cot this morning. But even leaving that aside, what Professor Brownlie is talking about is plainly the establishment of title by adverse possession, which has traditionally been labelled "acquisitive prescription". Admittedly, what matters are not labels, but the particular circumstances. And admittedly, too, there can be times when the expression "historic consolidation of title" can be a convenient way of describing the *ratio decidendi* of cases like *Minquiers and Ecrehos,* or even perhaps a handy blanket term to cover a series of different rules which cover different situations. But what we do not accept is the use to which Nigeria has put the concept in the present case. And it is interesting to note that even Charles De Visscher himself, in a passage quoted by my learned friend, says that the notion of consolidation encompasses, amongst other things, the case of adverse possession[33]. So where, on the facts, one of the parties must be the adverse possessor, the law applicable to adverse possession

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[31] *I.C.J. Reports 1953*, p. 56.

[32] CR 2002/9, pp. 51-52, para. 165.

[33] *Ibid.*, p. 51, para. 160.

applies, and that can conveniently be labelled for present purposes, as prescription. If I might be permitted a vulgarism, Mr. President, if it walks like a duck, quacks like a duck, and looks like a duck, then I prefer to say that it is a duck, whatever my learned friend likes to call it. And no amount of citation of academic support for the general concept of historical consolidation is going to save Nigeria from having its conduct judged by the standards which international law has consistently applied — consistently applied — to adverse possessors.

36. Our opponents insist — have always insisted — that Nigeria is not the adverse possessor. But it is certainly not unreasonable for Cameroon to canvass the hypothesis that it is, and to examine the legal consequences flowing from this, especially when, as we have shown, the hypothesis we are canvassing is far from implausible. By the same token, it is not unreasonable of us to expect Nigeria to deal with it too.

37. So, after all that fuss and bother about names, we come back to where we started in the first round: the application of the criteria imposed by international law to establish whether an adverse possessor has acquired good title — the law relating to prescription, if I may be permitted to put it that way. These are the rules which we say clearly have to apply if Nigeria fails to establish its Calabar claim, so to speak, and fails to establish its claim to be the successor of the British administrators of Bakassi. As a matter of fact, even then the issue only arises if we fail to make good our claim to acknowledgment of title by Nigeria.

38. In the first round, as I have mentioned, it was submitted on behalf of Cameroon that there are five criteria that have to be satisfied before conduct can even qualify as a potential *effectivité*, for example the conduct has to be *à titre de souverain.* Nigeria has not questioned this list, nor directly engaged with the claim that many of its alleged *effectivités* would fall foul of these tests. Instead, counsel simply reiterated the list set out in Nigeria's written pleadings. It was of course accepted by Cameroon that not all of the alleged Nigerian *effectivités* would fall foul of these five tests, and that there might quite possibly have been some acts done by Nigeria, on the peninsula, concurrently with those performed by Cameroon. But I then went on to list three more criteria which, it was submitted, would be fatal to Nigeria's claims. One was the need for absence of protest. It was demonstrated that Cameroon had protested against Nigerian incursions, an example

from 1969 being given[34]. My learned friend's attempt to dismiss this by saying that "No reference is made to the extent of the Cameroon claim"[35] is singularly unconvincing. Cameroon, seeing what it considers to be the unlawful exercise of foreign authority in one of its towns, protests about that act. Nothing abnormal here.

39. A further requirement mentioned by Cameroon was that prescription by adverse possession could not occur if the existing title holder was concurrently itself exercising administrative control. A substantial part of my oral argument was devoted to showing that Cameroon had done so. In the first place, it was shown that Cameroon could rely on the acts of its predecessors in title, the British mandatory and trusteeship authorities and indeed Germany. And turning to the period after independence, it was pointed out that, although Cameroon had not cited many examples in its pleadings, there was enough there to rebut the suggestion that it had acquiesced in Nigerian sovereignty. That argument was not seriously addressed in reply. And it will be recalled, Mr. President, that amongst the other things that Cameroon had done was that it had been consistently granting hydrocarbon licences over the peninsula and its offshore from as early as 1963[36]. And, as Nigeria itself admits, Cameroonian *effectivités* in the area gradually increased over time. They make a point of this — but not, as our opponents suggest, in order to "create facts" — that is their speciality — but in the normal way that a newly independent State gradually increases its control over its territory. This does not happen overnight, especially when — as in the special case of Cameroon — two different legal, linguistic and political systems have to be integrated after independence.

40. As well as arguing that these eight criteria between them destroyed the whole of Nigeria's list of *effectivités*, we also made another important point. Relying on the famous pronouncement of the Chamber in the *El Salvador/Honduras* case, which itself encapsulates a long line of authority, that where there is an existing title, preference must be given to the title holder, I observed that this means that it is not sufficient for each party to pile up its *effectivités* in its pan of the scales, so to speak: the law requires the Court to tilt the balance heavily in favour of the title

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[34]CR 2002/4, p. 50, para. 34.

[35]CR 2002/9, p. 21, para. 18.

[36]*Ibid.*, pp. 46-47, para. 24. See also pp. 47-50, paras. 25-34.

holder. My learned friend's only response to this was to suggest that I was complaining about being given too much work to do by Nigeria[37]. Even allowing for the rough-and-tumble of advocacy, this is hardly a serious answer to a very serious Cameroonian objection to Nigeria's claims.

6. Conclusion

41. Mr. President, Members of the Court, Nigeria has failed to justify in law its repudiation of the treaty instruments that confer and confirm Cameroon's title over the Bakassi Peninsula. It has also recognized and acknowledged that title on numerous occasions. That being so, the question of its alleged historical consolidation of title and *effectivités* does not even arise. But even if, purely for the sake of argument, it did arise, Nigeria has failed to establish that the Kings and Chiefs of Old Calabar had effective control over the peninsula and that that sovereignty continued until independence; it has failed to establish that the United Kingdom administered the peninsula in right of Nigeria, as opposed to Southern Cameroons, and finally, it has failed to establish a prescriptive title, or any other kind of title however you call it, after independence. What it has been trying to consolidate is a house of cards.

42. Thank you for your kind attention. May I ask you, Mr. President, kindly to give the floor to my friend and colleague, Professor Tomuschat.

The PRESIDENT: Thank you very much. Je donne maintenant la parole au professeur Christian Tomuschat.

M. TOMUSCHAT : Merci, Monsieur le président.

VI. RESPONSABILITÉ

Monsieur le président, Madame et Messieurs de la Cour,

1. Il m'incombe de répondre aux arguments du Nigéria qui a cherché à établir lors des plaidoiries de vendredi dernier que sa responsabilité n'est pas engagée. Mais c'est une tentative qui a échoué, comme je le montrerai par la suite. La responsabilité du Nigéria résulte principalement de son invasion de la péninsule de Bakassi et d'un large secteur de territoire camerounais dans la

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[37] *Ibid.*, pp. 67-68.

région du lac Tchad ainsi que de son non-respect des mesures conservatoires indiquées par la Cour le 15 mars 1996. Afin de ne laisser planer aucune équivoque, il convient de remarquer dès à présent que les deux grandes opérations annexionnistes entreprises par le Nigéria ont été accompagnées ou suivies de nombreux incidents d'usage illégal de la force que le Cameroun considère comme faisant partie de ces deux grands blocs. Ces incidents ne peuvent avoir une existence séparée ou autonome, étant donné qu'ils constituent les conséquences directes de l'ambition malheureuse du Nigéria de s'emparer tant de la péninsule de Bakassi que d'une grande partie du territoire camerounais du lac Tchad. Le Cameroun s'est déjà prononcé abondamment sur cette question (CR 2002/7, p. 37-39, par. 9-16). Il n'y reviendra plus.

2. Le Cameroun reconnaît donc ouvertement que, pour lui, le centre de gravité du différend réside dans l'extrémité nord ainsi que l'extrémité sud de la ligne qui sépare les deux Etats sans séparer les peuples, qui ont toujours vécu amicalement côte à côte, malgré les tensions qui ont pu se développer sur le plan des relations intergouvernementales. Dans sa jeune histoire, le Cameroun a fait un effort délibéré pour créer une bonne entente entre ses populations et celles du Nigéria. C'est ainsi, surtout, qu'il a accueilli des millions de Nigérians qui aujourd'hui vivent paisiblement sur son territoire, mais dont il attend évidemment qu'ils respectent la loi camerounaise. Malheureusement, le Nigéria a interprété cette générosité du Cameroun comme une faiblesse. D'où des actions inconsidérées, attentatoires à la souveraineté camerounaise, qui finalement ont abouti à des opérations militaires qui cherchent à arracher au Cameroun des centaines de kilomètres carrés.

3. Le Nigéria a critiqué la jonction des revendications territoriales du Cameroun avec ses demandes en réparation en insistant sur le fait qu'une telle situation ne s'était pas encore présentée devant la Cour (CR 2002/14, p. 47, par. 4; p. 48, par. 6, 8). Mais cette jonction ne suit que les règles de la logique juridique. Ce que le Cameroun cherche avant tout à atteindre, c'est la libération de son territoire national, conséquence qui selon le régime de la responsabilité découlera automatiquement du constat par la Cour que les zones en question ont été occupées de façon illicite, conséquence toutefois qui devra être dite explicitement par la Cour pour que la mise en œuvre de son arrêt ne soulève pas de nouveaux problèmes d'incompréhension de la part du Nigéria.

4. Monsieur le président, laissez-moi vous le dire d'emblée : cette affaire n'est pas une affaire de délimitation comme les autres. Le Nigéria n'a pas seulement contesté une frontière conventionnelle établie, ce qui, après tout, était son droit. Il a aussi, et en toute connaissance de cause, choisi d'envahir militairement les territoires qu'il revendiquait. Permettez-moi de vous confier une chose, Monsieur le président, Madame et Messieurs les juges. Si le Nigéria n'avait pas envahi militairement Bakassi en 1993, alors même que des négociations étaient en cours avec le Cameroun, la question de la responsabilité n'aurait jamais été portée devant la Cour. Seulement, les autorités nigérianes *ont décidé* d'ajouter à leurs prétentions territoriales l'usage de la force. Et ce fait ne peut être resté sans conséquence. Ce que le Cameroun demande, c'est tout simplement que la Cour le constate et qu'elle exige avant tout que le Nigéria cesse immédiatement son occupation illicite. Aucun Etat ne peut, en toute impunité, tenter de régler un différend, fût-il territorial, par la force. Politiquement et moralement, les particularités de cette affaire rendent donc opportune une jonction du territorial et de la responsabilité. Juridiquement, rien ne s'y oppose.

5. Le fait qu'on ne retrouve que peu ou pas d'hypothèses similaires dans le passé s'explique très aisément par le caractère particulier et de la présente affaire et du système juridictionnel international. Lorsque deux parties concluent un accord pour soumettre un différend à la Cour, elles le font presque toujours après avoir surmonté quelques hésitations. On va donc normalement exclure du compromis les points les plus épineux, en se concentrant sur l'essentiel qui, dans le cas des différends territoriaux, est l'appartenance de la zone contestée à l'une ou l'autre des parties en litige. D'autre part, en ce qui concerne la clause facultative de l'article 36, paragraphe 2, du Statut de la Cour, beaucoup d'Etats ont pris l'habitude d'exclure de leur acceptation de la compétence de la Cour ou bien tout acte se rapportant à un conflit militaire (ainsi, par exemple, la Grèce, le Honduras, la Hongrie, l'Inde, le Kenya, le Malawi) ou bien la réparation qui est due en cas de violation d'une obligation internationale (ainsi, par exemple, Chypre, la Guinée, le Libéria, le Liechtenstein, Madagascar, le Malawi). On a qu'à lire l'*Annuaire de la Cour* pour s'en convaincre. Le Nigéria n'a en revanche émis aucune réserve de ce type. Rien n'empêche donc le Cameroun de mettre en cause sa responsabilité devant la Cour. En fait, en l'absence de réserves un différend peut être résolu dans son intégralité sans qu'il faille, après le prononcé de l'arrêt de la Cour,

s'engager encore une fois dans de longues négociations avec un partenaire ou adversaire parfois difficile.

a) ***Les éléments constitutifs de la responsabilité du Nigéria***

6. Tout le monde présent dans cette salle connaît le contenu du projet d'articles produit par la Commission du droit international après de longues années de travail et achevé l'année dernière sous la direction intellectuelle du professeur Crawford. Il n'est donc pas nécessaire d'expliquer quoi que ce soit sur les origines et le contexte de ce projet. Ce qui importe dans l'espèce, c'est l'application des règles définies par la CDI aux faits en présence ici. Généralement, on considère que cette œuvre de codification reflète le droit coutumier en vigueur et, concernant la première partie du projet, la partie largement façonnée par le juge Ago quand il était membre de la CDI, il n'y a pratiquement pas de controverse. L'unanimité la plus complète règne en ce qui concerne les articles sur le fondement de la responsabilité internationale.

7. Or, la Commission du droit international a précisé que ce sont deux éléments dont la présence conduit à la responsabilité de l'Etat en question. Tout d'abord, les actes en question doivent être imputables ou attribuables à cet Etat. Concernant les événements dans la péninsule de Bakassi et dans la région du lac Tchad, et également concernant les reproches que le Cameroun fait au Nigéria de n'avoir pas respecté l'ordonnance de la Cour du 15 mars 1996, cette condition se trouve évidemment remplie. Bakassi a été occupé militairement, et pareillement dans les zones du lac Tchad le Nigéria a déployé d'importants éléments de ses forces armées et de sa police. Il ne reste qu'à montrer qu'il y a eu — et qu'il y a toujours — des violations d'une ou de plusieurs règles du droit international que le Nigéria a commises au détriment du Cameroun.

8. Le Cameroun s'est prévalu à cet égard en premier lieu du principe du non-recours à la force, inscrit à l'article 2, paragraphe 4, de la Charte des Nations Unies. Il est clair que le Nigéria a gravement enfreint cette règle qui constitue le fondement du droit international de l'époque contemporaine. En fait, le Nigéria se trouve dans l'impossibilité d'arguer que le Cameroun a procédé à des constructions «fantaisistes». La présence des troupes nigérianes dans les deux zones est une réalité incontestable, réalité très amère pour le Cameroun.

9. Assez curieusement, pourtant, le professeur Abi-Saab, vendredi dernier, nous a fait part d'une nouvelle théorie sur la signification et la portée du principe de non-recours à la force. Selon lui, le Nigéria n'a pas engagé sa responsabilité, parce qu'il n'a jamais remis en cause le *statu quo* territorial et que, sur le terrain, il n'a fait qu'administrer paisiblement un territoire qu'il croyait le sien (CR 2002/14, p. 21, par. 18). Le professeur Abi-Saab voit dans ces circonstances une nouvelle exception à l'interdiction de franchir par la force une frontière internationalement reconnue.

b) ***L'invasion et l'occupation de la péninsule de Bakassi***

10. Il ne sera pourtant pas nécessaire de s'engager dans de grandes controverses théoriques sur la portée exacte de l'interdiction du recours à la force pour réfuter cette argumentation. Pour que cela puisse être envisagé, il faudrait d'abord que le Nigéria démontre que sa présence à Bakassi a toujours été consolidée et pacifique.

11. Mais, en vérité, le Nigéria n'a jamais administré la péninsule de Bakassi de façon «paisible». Il s'y est introduit par la force. Evidemment, dans ses plaidoiries le Nigéria a habilement tiré parti du fait que la partie sud-occidentale du Cameroun avait été placée sous administration britannique tout d'abord comme mandat de la Société des Nations, et après 1945 comme territoire sous tutelle. C'est ce qui explique que l'influence des populations nigérianes et de l'administration nigériane y a été nécessairement considérable. Néanmoins, il est patent qu'avec la fin du régime de tutelle et l'indépendance des deux pays, la situation a changé. Le fait que quelques écoles financées par le Nigéria ou des églises nigérianes aient pu rester à Bakassi n'y change absolument rien. Il est tout à fait normal pour beaucoup d'Etats de maintenir des écoles à l'étranger pour les enfants de leurs citoyens qui y résident. Or, le Cameroun ne nie point et n'a jamais nié que Bakassi est en large partie habité par une population nigériane — certainement pas 156 000 personnes, chiffre qui fait penser à des villes comme Angers, Brest ou Grenoble en France ou Blackpool et Aberdeen au Royaume-Uni et qui se concilie mal avec la *«measured consistency»* dont s'est vanté l'agent du Nigéria en clôturant le premier tour de son équipe (CR 2002/14, p. 65, par. 2).

12. Après le départ de la puissance administrante, il était tout simplement difficile de mettre en place une administration camerounaise. Mon collègue Maurice Mendelson vient d'en parler il y

a quelques instants. Le Cameroun n'a pu le faire du jour au lendemain. Mais, dès l'année 1968, tous les principaux services se trouvaient en état de fonctionner. Le professeur Brownlie l'a indirectement confirmé en disant qu'en 1968 *«there were acts of harassment by Cameroonian soldiers»* (CR 2002/9, p. 19, par. 9; p. 27-28, par. 50-52; p. 30, par. 61). Il faut le souligner : à cette époque, en 1968, il n'y avait pas un seul poste militaire nigérian à Bakassi, ni un seul poste de la police nigériane. On n'a qu'à lire les développements que le professeur Brownlie a consacrés aux prétendues effectivités nigérianes dans la péninsule de Bakassi. Dans un passage traitant du système de l'ordre public, on ne trouve que des références au système tribal (CR 2002/9, p. 54-55, par. 177-184), qui fonctionne indépendamment du système de l'Etat et n'en affecte pas les compétences. Ce n'est qu'à partir de la seconde moitié des années 80 que le Nigéria a commencé à ériger une «tête de pont» à Jabane (réplique du Cameroun, p. 517 et suiv.). Finalement, c'est le mois de décembre 1993 qui a vu s'abattre les forces armées nigérianes sur la presqu'île de Bakassi dans le cadre d'une invasion bien planifiée et programmée. Le professeur Brownlie, bien qu'il ait fait l'inventaire complet de la prétendue présence nigériane à Bakassi, n'a pas été capable de faire la démonstration d'une présence militaire couvrant des secteurs en dehors de Jabane avant la date de l'invasion. C'étaient les autorités camerounaises qui assumaient la responsabilité suprême pour l'ordre public. Elles le faisaient sans ignorer que la population étrangère des Nigérians restait attachée à ses autorités traditionnelles.

13. Il n'est pas nécessaire ici de prouver que Bakassi revient de plein droit à la souveraineté camerounaise. Mes collègues Bruno Simma, Malcolm Shaw et Maurice Mendelson en ont déjà présenté tous les éléments de fait et de droit pertinents. Je ne rappellerai que les points les plus marquants : le traité de 1913 est une convention internationale valide exempte de vices entachant sa régularité; Bakassi a fait partie du territoire placé sous mandat et sous tutelle; dans un avis de 1971, le ministère de la justice nigérian a conclu à la camerounité de Bakassi[38]; le Nigéria a confirmé l'appartenance de Bakassi au Cameroun notamment en vertu de l'accord de Maroua de 1975; en 1981, le Nigéria a installé une *Task Force* mandatée pour réfléchir sur la manière dont on pourrait contourner la traité de 1913 pour s'approprier Bakassi; en 1985, on a encore fait produire

[38] V. Bassey E. Ate, Nigeria and Cameroun, in : Bassey E. Ate/Bola A. Akinterinwa (eds.), *Nigeria and its Immediate Neighbours. Constraints and Prospects of Sub-Regional Security in the 1990s*, p. 140 (141).

un avis au ministère nigérian de la justice spécifiquement pour cette *Task Force*, dont l'auteur, un certain M. K. B. Olukolu, est arrivé à la conclusion que Bakassi était incontestablement camerounais, comme l'a souligné, il y a quelques minutes, mon collègue Maurice Mendelson[39]. Il est remarquable que dans ce document officiel du ministère de la justice nigérian on fait sérieusement allusion à la possibilité d'employer la force pour s'emparer de Bakassi au cas où il résulterait que la contestation juridique n'offrait pas de chance de succès[40]. Malheureusement, ce n'était pas une initiative isolée. A la même époque, le service des renseignements militaires nigérian a également fait une étude sur les moyens et méthodes appropriées pour acquérir Bakassi pour le Nigéria, et éventuellement même par des moyens militaires. Mais l'auteur de cette étude est «sage». Selon ses recommandations, «le Nigéria n'aurait recours à la guerre qu'après avoir épuisé toutes les ressources et par nécessité»[41].

14. On se demande comment, dans de telles circonstances, les conseils du Nigéria ont pu prétendre que, en effet, Bakassi avait toujours été sous administration nigériane. La masse des preuves en faveur du Cameroun est telle qu'on ne peut pas naïvement invoquer le bénéfice de *«honest belief and reasonable mistake»*. Mais c'est cette notion qui est devenue le joker juridique de la partie défenderesse, destiné à combler toutes les failles et lacunes de l'argumentation nigériane. Pourtant, il s'est avéré extrêmement difficile de trouver une classification adéquate pour cette notion dont l'origine et l'existence en droit international sont plus que douteuses. Tels qu'ils ont été présentés, *«honest belief and reasonable mistake»* sont des enfants naturels, des apatrides qui n'ont aucun droit de séjour acquis.

15. Dans un premier temps, on pourrait songer à les classer comme une indication de la nécessité qu'une comparaison mécanique entre la réalité et le droit n'est pas suffisante pour l'engagement de la responsabilité. Le seul fait pour un soldat de se trouver en territoire étranger ne signifie certainement pas que l'Etat dont son unité relève ait commis une violation de la souveraineté de l'Etat territorial. Le soldat peut s'être égaré, et même toute une compagnie peut se perdre dans une région montagneuse ou dans la jungle. Mais nous ne sommes pas devant le cas de

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[39] Mémoire du Cameroun, Livre VI, annexe 275.

[40] *Ibid.*, point 10.

[41] Mémoire du Cameroun, livre VI, annexe 276, p. 2313 (2325).

quelques soldats ou d'un aéronef qui, égarés et sans moyens de s'en rendre compte, auraient par mégarde traversé une frontière internationale. Nous ne nous trouvons donc pas dans l'hypothèse d'un «cas fortuit», un temps envisagée par la Commission du droit international (*Annuaire de la Commission du droit international*, 1979, vol. II (deuxième partie), p. 135) mais finalement écartée du projet en raison des craintes émises par plusieurs Etats des dérives que cela aurait pu entraîner[42].

16. En second lieu, on peut sans trop de peine constater que *«honest belief and reasonable mistake»* ne sont certainement pas des «circonstances excluant l'illicéité» au sens du projet d'articles de la Commission du droit international, contrairement aux affirmations faites par le Nigéria dans sa duplique (p. 579, par. 15.57). Il est tout à fait erroné de prétendre que la CDI n'ait pas cherché à *«specify exhaustively the circumstances precluding wrongfulness in relation to every case that may occur»*. Pour elle, la liste des circonstances susceptibles d'exclure l'illicéité revêt un caractère exhaustif. Il y a des experts dans cette salle qui sont capables de confirmer cette interprétation.

17. Il n'est donc pas étonnant que les écritures du Nigéria et ses plaidoiries orales montrent un flottement général en ce qui concerne le classement correct de *«honest belief and reasonable mistake»*. Ses conseils ont déployé des efforts désespérés afin de trouver une catégorie juridique appropriée pour la notion, mais la vraie patrie n'a pas été trouvée. Ce qui était présenté au début comme un élément s'apparentant au concept de «faute», rejeté par la CDI (voir contre-mémoire du Nigéria, p. 638, par. 24.34), s'est transformé par la suite en une circonstance excluant l'illicéité pour finalement surgir dans la plaidoirie du professeur Abi-Saab comme une circonstance qui permettrait de conclure qu'aucune atteinte n'a été portée à la règle primaire pertinente dans le présent contexte, le principe du non-recours à la force (CR 2002/14, p. 23, par. 27). Sir Arthur s'est implicitement exprimé dans le même sens (CR 2002/14, p. 33, par. 35-36).

18. On peut tout de même concéder au Nigéria qu'il faut en effet se poser la question de savoir ce qui est l'élément constitutif d'une violation. Quand est-on en droit de parler d'une violation du principe énoncé à l'article 2, paragraphe 4, de la Charte des Nations Unies, principe qui est source d'obligations *erga omnes* ?

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[42] Voir les observations des Etats dans Assemblée Générale, doc. A/CN.4/488, 25 mars 1998, et le rapport final de la Commission du droit international, Nations Unies, doc. A/56/10.

19. Or, ce que le Nigéria dit peut se résumer en deux mots. Il se croyait chez lui. Il avait toujours été présent à Bakassi. Il n'avait donc aucune raison de douter de la légitimité de ses actions. Toutefois, il est assez curieux de vouloir invoquer un manque de *blameworthiness* dans les circonstances de l'espèce. Le Nigéria connaissait toutes les circonstances qui militaient en faveur du Cameroun. Dans ses ministères, on se creusait la tête pour trouver une solution à un dilemme auquel on ne pouvait échapper. On savait que le titre territorial revenait au Cameroun. Et même ceux qui ne partageaient peut-être pas la *communis opinio* devaient se dire que la situation était hautement délicate. Le Nigéria, en endossant la thèse de l'invalidité du traité de 1913, savait à tout le moins qu'il pouvait se tromper. Toutes les apparences étaient en faveur du Cameroun. Alors, dans ces circonstances, qu'est-ce que pouvait, qu'est-ce que devait faire le Nigéria ?

20. Pour me renseigner un peu sur la *common law*, qui dans le présent contexte est si chère aux conseils du Nigéria, j'ai étudié deux manuels élémentaires sur la *law of torts*. On y trouve des recettes très nettes, mais aussi très simples, des recettes qu'on peut appliquer sans difficulté aucune aux faits de l'espèce. C'est ainsi qu'on peut lire dans la quinzième édition de *Pollock's Law of Torts* :

> *«the standard of duty is fixed by reference to what we should expect in the like case from a man of ordinary sense, knowledge, and prudence... If a man will drive a car, he is bound to have the ordinary competence of a motorist, if he will handle a ship, of a seaman; if he will treat a wound, of a surgeon ... and so in every case that can be put.»*[43]

Je suppose que ce test, bien qu'il ait été décrit il y a plus d'un demi-siècle, correspond toujours à l'orientation générale de la jurisprudence britannique. Or, quelle peut être sa signification dans le contexte concret de la présente affaire ? Qu'aurait dû faire un homme — ou une femme — pour agir conformément au concept de *reasonableness*, qui correspond exactement au principe de la *due diligence* qu'ont invoqué d'innombrables décisions internationales ?

21. Le Cameroun n'a pas de doutes à cet égard. Le gouvernement d'un Etat est la plus haute instance dans les matières relevant de la politique étrangère. Il a une grande responsabilité non pas seulement envers sa propre population, mais encore envers ses voisins et toute la communauté internationale. Par conséquent, il doit se comporter notamment selon les règles contenues dans la

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[43] London 1951, p. 21.

Charte des Nations Unies. Dans cette perspective, il est tenu de régler ses différends avec ses voisins de façon pacifique, en évitant le recours à la force sauf dans des situations de légitime défense.

22. S'il avait respecté ces règles, le Nigéria aurait montré un comportement foncièrement différent de celui qu'il a pratiqué en fait. En premier lieu, il aurait été de son devoir de communiquer immédiatement de façon formelle au Cameroun son appréciation subjective selon laquelle le traité de 1913 était entaché de vices graves et qu'il manquait donc de force obligatoire. Après une telle communication, le Nigéria aurait dû offrir au Cameroun d'ouvrir des négociations pour arriver d'un commun accord à une solution pacifique. Mais rien de tout cela ne s'est passé. Le Nigéria a suivi le chemin de l'unilatéralisme, en jouant la carte de l'intervention militaire. Ce n'est qu'au cours de la présente procédure que la contestation du traité de 1913 a été explicitement formulée. Cependant, un gouvernement doit se comporter comme un gouvernement, c'est-à-dire en conformité aux exigences que la communauté internationale impose à la plus haute instance d'une entité qu'on respecte comme un Etat souverain. De toute évidence, on est ici en présence d'une convoitise mal dissimulée que le Nigéria a cherché à réaliser par la force des armes. Un article de l'auteur nigérian Bassey E. Ate est révélateur à cet égard. En énonçant les options qui, selon lui, étaient ouvertes au Nigéria, il écrit :

> *«As option one, Nigeria could unilaterally occupy Bakasi Peninsula. In deciding to do so, of course, the military, logistic, political, financial and other factors bearing on the calculations of the outcome of such operation should be considered. Assuming the level of this action, Nigeria might then force the Camerounians to enter into serious negotiations aimed at establishing a mutually acceptable boundary.»*[44]

Avec cet article, on n'est pas non plus dans un monde «fantaisiste». On se retrouve bien dans la réalité des rapports entre les deux pays. L'auteur, Bassey E. Ate, en même temps coéditeur du volume entier consacré aux problèmes de la politique de la sécurité du Nigéria, n'est pas tout juste un esprit libre qui s'adonnerait à ses spéculations subjectives. Comme professeur à l'Institut des relations internationales à Lagos, il avait accès aux travaux de la *Task Force* déjà mentionnée et ne faisait qu'en reproduire les conclusions. Administration «paisible» ? Possession de longue durée ? Rien que des rêves pieux, très loin de ce qui s'est passé au sol dans les mangroves de Bakassi.

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[44] *Op. cit.*, p. 149.

23. Revenons encore un petit moment à la construction juridique de la partie adverse qui tente de se prévaloir d'une interprétation erronée mais «de bonne foi» du traité de 1913. L'erreur invoquée par le Nigéria ne porte pas sur tel ou tel fait, mais sur l'interprétation du droit et des instruments juridiques pertinents. En d'autres termes, et comme le Cameroun l'a déjà signalé sans être démenti par son contradicteur, le Nigéria se prévaut d'une erreur de droit (CR 2002/7, p. 45, par. 34). Et cette seule raison suffit pour écarter toute idée de *reasonable mistake*. L'erreur de droit n'a en effet jamais été admise en droit international, tout simplement parce que l'on considère que chaque Etat est présumé connaître le droit.

c) L'occupation d'un large secteur de territoire camerounais dans la région du lac Tchad

24. Je me tournerai maintenant vers la région du lac Tchad. La situation factuelle qu'on y retrouve se distingue de celle qu'on a rencontrée à Bakassi dans son déroulement concret, mais non pas dans ses effets. Ici encore, le Nigéria cherche à s'approprier une partie du territoire camerounais. Mais le fil des événements est différent. On n'a pas affaire à une attaque bien identifiée par son temps et par son lieu, mais d'une pénétration par étapes, que l'on désignerait dans le domaine de la protection de l'environnement sous le nom de «*creeping pollution*» — qui en est d'ailleurs la plus dangereuse forme, la plus difficile à combattre.

25. Sur le plan humain, les effets malencontreux de l'assèchement progressif du lac Tchad sont aisés à comprendre. Pour un pêcheur, il est essentiel, il est vital de vivre au bord des eaux où il exerce son activité professionnelle. Sur la terre ferme, j'hésite à dire cette banalité, le poisson ne peut pas être rencontré. Donc, en bonne logique, les pêcheurs ont suivi le lac qui s'est progressivement éloigné d'eux. Et, Monsieur le président, encore par un geste de générosité, le Cameroun ne les a pas empêchés de le faire au moment où ce mouvement humain a franchi la frontière entre le Nigéria et le Cameroun pour s'installer sur le territoire camerounais. Toutes les cartes montrent à l'évidence que là où aujourd'hui se trouvent les villages réclamés à tort par le Nigéria, les eaux du lac couvraient toute la surface il y a trente ans encore. Aucun village ne pouvait y exister. Ce n'est que la fuite du lac qui a rendu possible l'installation de communautés humaines en territoire camerounais sur la rive occidentale du lac Tchad. Il y a vingt ans encore, cette rive se trouvait au Nigéria. Mon collègue Jean-Pierre Cot a mis en exergue ce point ce matin.

26. Tout aussi compréhensible que puisse paraître cette migration d'une population en quête d'assurer sa survie, elle était tout d'abord un phénomène social et n'aurait pas dû être prise comme prétexte par le Nigéria pour étendre ses structures administratives à ces nouvelles «colonisations». Il n'avait aucun droit d'y établir des postes de police, d'y envoyer ses forces armées et de s'y livrer à d'autres activités relevant de la puissance publique. Le droit international ne connaît pas le concept d'une frontière roulante, d'une *«boundary on wheels»*. Il est vrai que l'assèchement du lac Tchad est une calamité de tout premier ordre pour le Nigéria — comme pour tous les autres Etats riverains du lac Tchad. Mais le droit international met à la disposition des Etats une vaste gamme de possibilités pour affronter une telle difficulté sur la base de la coopération.

27. Revenons maintenant à l'affirmation du Cameroun selon laquelle par ses actes le Nigéria a violé l'interdiction du recours à la force également dans la région du lac Tchad. Les faits sont pratiquement incontestés. Il est inutile de refaire la démonstration de mon collègue Jean-Pierre Cot. Le Nigéria a exporté ses structures étatiques, y compris ses forces armées, à travers la frontière qui sépare les territoires des deux pays. Il s'est installé à l'est de cette ligne, en prétendant qu'il s'y trouve de bon droit.

28. Est-ce que cette invocation de la bonne foi est suffisante pour se décharger de l'accusation qu'une violation du principe de non-recours à la force a été perpétrée ? La réponse doit être claire et nette : elle ne suffit pas. La seule présence de troupes sur un territoire étranger est en elle-même la preuve concluante de la responsabilité, sauf circonstances exceptionnelles qui visiblement n'existent pas en l'espèce. Le Nigéria n'a pu faire valoir aucune justification excluant l'illicéité. D'autre part, même si l'on part de l'hypothèse que la notion de «violation» implique un élément de *«blameworthiness»*, quels sont les résultats auxquels on aboutit ?

29. Monsieur le président, Madame et Messieurs de la Cour, dans la région du lac Tchad la situation ne permettait aucun doute. Il y avait un instrument obligatoire qui délimitait la frontière. Dans le cadre de la CBLT, cette frontière avait toujours servi comme base pour les travaux de démarcation. Le Nigéria savait donc exactement jusqu'où s'étendait son territoire. Comment peut-il sérieusement invoquer *«honest belief and reasonable mistake»* ? Un gouvernement a une responsabilité tout autre qu'un pêcheur, pour qui il importe peu où il prend ses poissons, pourvu que poisson il y ait. S'il croyait que ses citoyens qui s'étaient installés au Cameroun manquaient de

services sociaux, il aurait pu proposer au Cameroun d'ouvrir des négociations. Encore une fois, malheureusement, le Nigéria a préféré la solution unilatérale *manu militari*, sans étudier les possibilités de trouver une solution en accord avec le Cameroun. Il faut le répéter : même si une invasion se fait sans se traduire par des hostilités entre forces armées des deux côtés, il s'agit bel et bien d'une violation de l'Article 2, paragraphe 4, de la Charte des Nations Unies. La lutte armée n'est pas un élément constitutif de la violation du principe interdisant le recours à la force. De toute façon, même si la Cour devait estimer que, dans les circonstances particulières des événements tels qu'ils se sont déroulés dans la région du lac Tchad, il serait inapproprié de parler d'agression armée ou de violation de l'Article 2, paragraphe 4; les faits démontrent clairement une violation de la souveraineté territoriale camerounaise. Donc, de toute manière, la responsabilité du Nigéria se trouve engagée.

30. Pour compléter la démonstration, permettez-moi, Monsieur le président, de me référer enfin au dernier rapporteur spécial de la Commission du droit international sur la responsabilité des Etats. Je vais citer le deuxième rapport, daté du 30 avril 1999 :

> «Dans certains systèmes juridiques, la revendication de bonne foi d'un droit peut justifier ou excuser certains comportements, même si cette revendication est juridiquement infondée. Aucun auteur ne semble défendre une telle doctrine en droit international.»[45] [Le texte original est en anglais et c'est une traduction officielle des Nations Unies.]

d) Le non-respect par le Nigéria de l'ordonnance de la Cour du 15 mars 1996

31. J'en viens maintenant au troisième chapitre de mon intervention de cet après-midi : le non-respect par le Nigéria de l'ordonnance de la Cour du 15 mars 1996. A cet égard, sir Arthur a voulu démontrer dans sa plaidoirie de vendredi dernier que les affirmations du Cameroun sont insoutenables. Mais son discours a plutôt montré que les accusations du Cameroun ont du poids.

32. Je commencerai par un petit commentaire sur la mission d'enquête qui a échoué, grâce à — ou plutôt en raison de — la résistance du Nigéria (voir CR 2002/7, p. 63, par. 13). Les événements qui se sont succédé à Bakassi auraient facilement pu être clarifiés si le Nigéria avait donné son consentement à la création de cette mission. Mais en raison de sa résistance, cette

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[45] Deuxième rapport du rapporteur spécial James Crawford sur la responsabilité des Etats, 30 avril 1999, Nations Unies, doc. A/CN.4/498/Add.2, par. 260.

mission d'enquête s'est transformée en une mission anodine de bons offices, précisément sans compétence d'enquête, qui en fait n'a pas pu se rendre dans la partie de Bakassi occupée par le Nigéria. Sir Arthur a répondu (CR 2002/14, p. 36, par. 49) qu'il s'agissait là d'une affaire politique *«to be determined in New York»*. Or, chacun sait que de telles décisions essentielles sont prises dans les capitales et non pas par les représentants diplomatiques qui se trouvent à New York. Il est vrai, comme le dit sir Arthur, que l'échec de cette tentative de mener une enquête soigneuse et détaillée est un *«political fact»*. Mais les faits politiques ne suivent pas les lois de la nature. Ils sont le résultat des décisions humaines. On est donc bien en droit d'en tirer les conclusions appropriées. Je ne vais pas le faire moi-même pour laisser toute la discrétion nécessaire à la Cour.

33. Je me permets, par contre, de me référer à l'arrêt dans l'affaire du *Détroit de Corfou* où la Cour a précisément dû s'occuper de la situation d'un Etat qui, en raison de l'obstruction pratiquée par l'autre partie, se voyait dans l'impossibilité de fournir toutes les preuves qui, dans une situation de normalité, seraient requises pour démontrer la véracité de ses allégations. Qu'il me soit permis de citer quelques lignes textuellement :

> «l'Etat victime d'une violation du droit international se trouve souvent dans l'impossibilité de faire la preuve directe des faits d'où découlerait la responsabilité. Il doit lui être permis de recourir plus largement aux présomptions de fait, aux indices ou preuves circonstancielles *(circumstantial evidence)*. Ces moyens de preuve indirecte sont admis dans tous les systèmes de droit et leur usage est sanctionné par la jurisprudence internationale. On doit les considérer comme particulièrement probants quand ils s'appuient sur une série de faits qui s'enchaînent et qui conduisent logiquement à une même conclusion.»[46]

Le Cameroun se prévaut de cette règle, et il considère que son application est d'autant plus justifiée que le Nigéria a empêché que soit menée à bien l'entreprise commune d'enquête qui avait été suggérée par le Secrétaire général des Nations Unies et endossée par la Cour dans son ordonnance du 15 mars 1996.

34. En ce qui concerne les différentes violations perpétrées par le Nigéria, je ne peux, dans le cadre limité de cette intervention du second tour, revenir sur tous les incidents qui ont été relevés par le Cameroun. Mais quelques-uns valent bien qu'on les examine encore une fois. En premier lieu, il convient de s'attarder sur les combats d'avril/mai 1996. Sir Arthur a répété la position du Nigéria selon laquelle *«it was Cameroon which launched attacks against Nigeria positions between*

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[46] *C.I.J. Recueil 1949*, p. 4 (18).

21 April and 1 May 1996» (CR 2002/14, p. 36, par. 47). Mais les suites de ces combats parlent pour elles-mêmes. Je me permets, Monsieur le président, Madame et Messieurs les juges, de vous inviter tout simplement à relire la présentation du Cameroun sur l'enchaînement des événements : le Cameroun a tout de suite protesté auprès du Conseil de sécurité le 30 avril 1996 (voir CR 2002/7, p. 60, par. 7), alors que le Nigéria n'a eu l'idée de protester lui-aussi que sept à huit semaines plus tard (*ibid.*, p. 61-62, par. 11). Un Etat qui était attaqué et qui, de plus, est faussement accusé de porter la responsabilité pour les hostilités, serait-il resté muet pendant presque deux mois ? On ne peut vraiment pas le croire.

35. Le Cameroun relève, d'autre part, le silence complet du Nigéria concernant le reproche qu'on lui fait d'avoir formellement érigé en collectivité territoriale la péninsule de Bakassi. Le fait est indéniable. Mais le Nigéria a complètement dénaturé les affirmations du Cameroun en précisant qu'il n'y avait rien dans l'ordonnance de la Cour qui aurait ordonné *«all civilian administration to come to a halt»* ou qui aurait interdit au Nigéria *«to make arrangements for the health, the education and social welfare of the Nigerian population of Bakassi»* (CR 2002/14, p. 38, par. 54). Le Cameroun n'a rien suggéré de ce genre. Par contre, il s'est plaint de la création de la commune de Bakassi, ce qui est tout à fait autre chose, à savoir une tentative de consolider la situation de fait pour lui donner une apparence de normalité et donc de légitimité constitutionnelle. En effet, la situation juridique était bien curieuse même au regard du droit interne nigérian : d'une part, le Gouvernement nigérian affirmait que Bakassi avait toujours fait partie intégrante du Nigéria. D'autre part, il devait reconnaître que Bakassi n'existait pas sur le plan de l'organisation de l'Etat au plan municipal. Il est évident que la «régularisation» de Bakassi aux fins du droit interne a enfreint l'ordonnance de la Cour dans la mesure où elle a cherché à créer et renforcer des liens de loyauté de la population de Bakassi à l'égard du système politique nigérian. C'était un acte d'exercice de puissance publique qui ne revient qu'au détenteur de la souveraineté territoriale.

36. C'est dans la même perspective qu'il convient d'aborder la question de l'interdiction de vols sur Bakassi. De façon assez légère, le conseil pour le Nigéria a affirmé dans sa plaidoirie qu'il ne pouvait être interdit au Nigéria *«to provide for the safety of civil aviation in the skies above Bakassi»* (CR 2002/14, p. 38, par. 54). Est-ce que le Royaume-Uni se croirait habilité à assurer la sécurité des vols au-dessus de l'Irlande ? Clairement, quand un Etat s'arroge la compétence de

régler le trafic aérien au-dessus du territoire d'un autre Etat il empiète sur les droits souverains de ce dernier. La conclusion est très nette : à cet égard également, le Nigéria n'a pas tenu compte de l'ordonnance de la Cour.

e) ***Les demandes reconventionnelles du Nigéria***

37. Monsieur le président, Madame et Messieurs les juges, dans une dernière partie de mon intervention je vais maintenant examiner les demandes reconventionnelles du Nigéria. Le Cameroun s'abstient de contester formellement l'admissibilité de ces demandes, même de celles qui ont été introduites à un stade assez tardif de la procédure par la duplique, laissant à la Cour le soin de trancher. Quant au fond, il est évidemment impossible de traiter en détail tous les faits allégués par le Nigéria à l'appui de ses demandes (voir réplique du Cameroun, p. 563-587). Je vais donc essentiellement me borner à répondre aux faits repris par le professeur Crawford dans sa plaidoirie orale.

38. Permettez-moi de revenir tout d'abord sur l'incident du 16 mai 1981 qui est constamment exploité par le Nigéria comme preuve des mauvaises intentions du Cameroun. Le Nigéria en a parlé dans ses exceptions préliminaires (introduction, par. 34-39), dans son contre-mémoire (contre-mémoire du Nigéria, par. 2.20-2.21 et 24.65-24.67) ainsi que dans sa duplique (duplique du Nigéria, p. 611-615), et sir Arthur y est revenu dans sa plaidoirie (CR 2002/14, p. 41, par. 67 et suiv.). Il ne fait pas l'objet du présent litige, parce qu'il a été réglé à l'amiable. Néanmoins, cet incident a été introduit dans l'affaire pour dépeindre le Cameroun comme un Etat agressif, non respectueux de ses obligations internationales. Le Nigéria se livre à cette mise en cause du Cameroun en tirant les conséquences qui ne se justifient aucunement à la lecture de l'échange des lettres entre les deux présidents se rapportant au règlement de la controverse. Il est vrai que, en fin de compte, le Cameroun, par la voix de son président (lettre du 16 juillet 1981, contre-mémoire du Nigéria, vol. XI, p. 2623, annexe 345), a exprimé ses regrets pour la perte de vies humaines et qu'il a offert de payer une compensation aux familles des victimes. On remarquera, à cet égard, que le président Ahidjo a exprimé ses regrets, sans s'excuser. Même un diplomate peu expérimenté connaît la différence entre les deux formules, ce qui n'a pas empêché nos contradicteurs de parler d'une *«letter of apology»* (CR 2002/14, p. 41, par. 69). En effet, cette issue diplomatique d'un

incident tragique dit très peu sur l'enchaînement des événements. Le président camerounais a maintenu sa version selon laquelle l'incident était survenu sur le Rio del Rey, donc en territoire camerounais, alors que le président nigérian a manifesté sa conviction que le lieu de l'accrochage était le fleuve Akwayafé (lettre du 20 juillet 1981, contre-mémoire du Nigéria, vol. XI, p. 2627, annexe 346). La divergence des vues sur les circonstances de cet accrochage a donc persisté jusqu'à la fin, contrairement à ce que cherche à insinuer le conseil du Nigéria (CR 2002/14, p. 43, par. 76).

39. Il n'est pas difficile de deviner pourquoi le chef d'Etat camerounais s'est finalement résigné à offrir une compensation financière, même s'il avait de bonnes raisons pour croire que l'incident était la conséquence directe d'une violation de la frontière camerounaise. Le langage employé par le président Shagari dans sa lettre du 25 mai 1981 est dictatorial, n'admettant aucune objection. Au lieu d'accepter une commission d'enquête, qui aurait été le moyen le plus sûr pour clarifier les liens de causalité, il rejette toute idée en faisant valoir que le Nigéria *«has not the slightest doubt as to where the incident took place»* (contre-mémoire du Nigéria, vol. XI, p. 2620, annexe 344). Derrière cette lettre se cachait mal la menace de faire usage de la force pour obliger le Cameroun à se plier aux demandes nigérianes. Assez clairement, la deuxième lettre du président Shagari du 20 juillet 1981, qui met un terme définitif au différend, dit que l'incident aurait pu déclencher une guerre entre les deux pays. Etant donné les rapports de force entre le Nigéria et le Cameroun, on se demande vraiment comment sir Arthur a pu tirer de ces pièces la conclusion que le Cameroun pouvait avoir *«the hope of provoking Nigeria into starting a major, full-scale armed response»* (CR 2002/14, p. 43, par. 77).

40. Je me permets d'être très direct à cet égard : c'est une conclusion non seulement erronée, mais contredisant manifestement les lois de la logique politique. Le fait qu'il y avait comme arrière-fond de l'affaire une menace de recours à la force par le Nigéria, menace dont la réalité a été décrite en détail dans la réplique du Cameroun (réplique du Cameroun, p. 508-509), découle même du commentaire final de sir Arthur, un commentaire pour lequel il n'y avait aucune nécessité mais qu'il nous a présenté sous forme orale en disant que c'était le président Shagari qui a pu empêcher cet incident de se transformer *«into the major armed confrontation which Cameroon had been trying to provoke»* et que c'était lui, le président Shagari, également qui a été capable de

«quell the Nigerian people's justified outrage at this incident» (*ibid.*, p. 43, par. 78). C'est vraiment renverser les choses pour leur faire dire le contraire de ce qu'elles disent en réalité. Mais, l'interprétation de cet incident donne le ton de l'ensemble du comportement nigérian ainsi que de ses plaidoiries en l'espèce. Depuis 1981, le Cameroun a vécu sous menace militaire de la part du Nigéria, et il souhaite que ce cauchemar finisse le plus tôt possible grâce à l'arrêt final de la Cour.

41. La même méthode, qui consiste à créer une impression, impression selon laquelle le Cameroun serait l'agresseur, l'assaillant, alors que le Nigéria et les Nigérians seraient les victimes, se retrouve partout dans les écritures du Nigéria se rapportant au chapitre de la responsabilité et a également marqué les plaidoiries orales.

42. Je ne prends qu'un seul exemple, le combat du 3 février 1996. Le Cameroun a méticuleusement expliqué le déroulement des faits dans sa réplique (réplique du Cameroun, p. 529-530) ainsi qu'au premier tour des plaidoiries (CR 2002/7, p. 53-56). Toutes ses affirmations s'appuient sur des éléments de preuve fiables et incontestables. Le Cameroun a montré qu'il ne préparait aucune manœuvre, que les Nigérians en avaient profité pour ouvrir le feu sur leurs positions, les en chasser et les poursuivre jusqu'au milieu de Bakassi. Il y a eu des ripostes camerounaises. Le Cameroun l'a dit aussi. Mais nos contradicteurs ont déformé tout cela, en ajoutant des faits jamais évoqués (Watts, CR 2002/7, p. 34-35, par. 41-45).

43. Mais puisque le Nigéria a cherché à insinuer le doute dans vos esprits sur qui sont réellement les deux Etats qui se trouvent aujourd'hui devant vous, il me faut ajouter qu'il y a des éléments de preuve qui permettent de se forger une vision juste à cet égard. Des éléments de preuve plus solides que les «témoignages» ou autres documents douteux produits par le Nigéria, et auxquels il n'attache d'ailleurs pas plus de valeur probante que le Cameroun (CR 2002/7, p. 57, par. 31). J'en évoquerai trois.

44. D'abord cette consigne militaire, révélée en public, par le commandant de la 13e brigade motorisée de la 82e division de l'armée nigériane, le brigadier-général Womotimi Diriyai : *«for every one shot the gendarme fire at our men or any Nigerian, the Nigerian troops are ready to fire a hundred shots on retaliation»* (annexe MC 345). Cent balles contre une. C'est sans doute ce que le Nigéria appelle la proportionnalité. L'affaire du 3 février 1996 prend tout son sens à la lumière de cette consigne.

45. Ensuite cette lettre du comité international de la Croix-Rouge, délégation pour l'Afrique centrale, du 26 janvier 1996 (annexe OCDR 16). Elle est adressée au ministre camerounais chargé de la défense. Elle concerne la levée et remise du corps d'un officier nigérian aux autorités nigérianes le 22 décembre 1995 à Douala, en présence de l'ambassadeur de la République fédérale du Nigéria. Voilà comment le chef de mission de l'organisation humanitaire décrit la scène :

> «Malgré quelques difficultés de procédure introduites par la partie nigériane, la mission s'est déroulée dans le meilleur esprit possible, en particulier grâce aux dispositions exemplaires prises par les autorités militaires et administratives camerounaises.»

46. Laissez-moi enfin citer une autre lettre du comité international de la Croix-Rouge, adressée au ministre camerounais des relations extérieures le 25 avril 1997 (annexe OCDR 43). Le comité explique :

> «Dès les premiers affrontements qui ont eu lieu entre les forces armées de la République du Cameroun et de la République fédérale du Nigéria en relation avec la péninsule de Bakassi, le comité international de la Croix Rouge (CICR) a demandé formellement aux autorités des deux Etats de pouvoir avoir, entre autre, accès aux personnes militaires et civiles qu'elles détenaient.
>
> Le CICR a apprécié le dialogue constructif qui a pu s'établir avec les hautes autorités de la République du Cameroun, lui accordant toutes les facilités pour mener à bien sa mission humanitaire. Ainsi, le CICR a pu mener des actions d'assistance en faveur des citoyens camerounais déplacés par les combats de Bakassi. Dès le 19 mars 1996, il a, par ailleurs, reçu l'autorisation des autorités camerounaises de rendre visite aux civils nigérians, arrêtés et privés de liberté pour des raisons de sécurité. Cette autorisation a été étendue, dès le 21 mai 1996, aux prisonniers de guerre nigérians.
>
> Le CICR tient à assurer aux autorités camerounaises qu'il poursuit ses démarches au plus haut niveau auprès du Gouvernement de la République fédérale du Nigéria, afin d'obtenir des informations sur le sort des personnes capturées par les autorités nigérianes et de recevoir l'autorisation de visiter les prisonniers camerounais.
>
> Le CICR déplore que les autorités nigérianes n'aient à ce jour donné aucune suite à ses requêtes.»

47. Un tiers, parfaitement impartial, dépeint cette situation. D'un côté, le Cameroun, en plein accord avec ses obligations, notamment dans le domaine du droit humanitaire. De l'autre, le Nigéria qui refuse de donner des informations sur le sort des personnes capturées par ses soldats, qui refuse que les organisations humanitaires y aient accès, et qui traite par le mépris les requêtes de la Croix-Rouge.

48. Après cette introduction, nécessaire pour réfuter une «impression» délibérément créée par le Nigéria, je me tourne maintenant vers les points précis évoqués par le professeur Crawford. Et je vais le faire en toute vitesse.

49. En ce qui concerne les événements à Bakassi (CR 2002/14, p. 54, par. 21, 22), le Cameroun a réfuté en détail dans sa réplique les demandes contenues dans le contre-mémoire (réplique du Cameroun, p. 564-567). Il est certainement vrai qu'il peut y avoir eu des victimes civiles, ce que le Cameroun regrette profondément. Mais il faut se rappeler que le climat d'insécurité, hautement nocif pour la population civile, a été créé par le Nigéria du fait de son invasion militaire de la péninsule. Même selon le récit présenté par le Nigéria, les victimes ont péri à la suite d'opérations armées dont la responsabilité ne saurait être éclaircie. La Cour ne manquera pas de prendre acte du fait que tous les incidents résumés dans la liste remise à la Cour le jour des plaidoiries orales sous la cote V se situent chronologiquement dans les années 1994 à 1999. En ce qui concerne les nouveaux incidents évoqués dans la duplique nigériane (duplique du Nigéria, p. 749-750), on voit mal quel rapport ils peuvent bien avoir avec le différend territorial entre les deux Parties. Chacun d'eux demanderait un examen séparé. Le Cameroun tient à répéter qu'il regrette toutes les pertes et tous les dommages qui ont été causés, surtout la perte de vies humaines. Mais il est obligé de dire que, de son avis, les éléments de preuve fournis par le Nigéria ne sont pas suffisants.

50. En ce qui concerne les prétendues attaques du mois d'avril 1998, dont le Nigéria fait grand cas (CR 2002/14, p. 55, par. 25), il est utile de s'attacher à la lecture des documents produits pour étayer les accusations. Qu'est-ce qu'on y trouve ? Certainement pas cette exactitude dont s'est vanté le Nigéria tout au long de la procédure. Prenons quelques unes des déclarations des témoins (duplique du Nigéria, vol. IX, annexe 203). Un Monsieur Bassey Andem déclare : *«Anytime we go to the high sea the gendarmes used to pursue us and when they catch us, they will seize our engines and fire us inside the boat...»* (*Ibid.*, p. 1707.) Un autre témoin, Monsieur Ita Okon Simeon, raconte : *«Gendarmes have always been firing their guns on us...»* (*Ibid.*, p. 1709.) Concernant le jour en question, le 18 avril 1998, les déclarations divergent de façon considérable quant à l'heure où prétendument l'attaque a commencé. Alors que l'un des témoins affirme sans hésitation que les gendarmes camerounais ont commencé à tirer *«at around 12 o'clock noon»*

(*ibid.*, p. 1721), d'autres croient savoir que l'attaque a commencé à l'aube : «*At the dawn of the above-mentioned date, I heard ... firing and shelling from my sleep.*» (*Ibid.*, p. 1737.) Cette dernière version est confirmée par un autre témoin : «*On the early hours of the above stated date, the Gendarmes at the hostile creek fired indiscriminately at own location...*» (*Ibid.*, p. 1739.) Tout cela ne coïncide pas. S'ajoute que, selon le récit que donnent les témoins, des «bombes» auraient été lancées. Sous aucun angle, cette allégation ne semble être plausible. Des bombes avec leur potentiel de destruction auraient certainement causé des dégâts beaucoup plus importants. Donc, on peut admettre qu'il y a eu un incident de quelque sorte, mais cet incident n'a certainement pas eu lieu de la manière dépeinte par le Nigéria. Les déclarations des «témoins» présentés pas lui sont de toute évidence peu crédibles.

51. Le même jugement — un manque manifeste de crédibilité — doit être porté sur les autres incidents invoqués par le Nigéria. Sont particulièrement énigmatiques les incidents du 26 février 1993 et celui du 27 juin 1993 (voir contre-mémoire du Nigéria, p. 806, par. 25.11).

52. Le lecteur des documents pertinents n'est même pas informé sur le lieu où ces incidents auraient eu lieu. Tout reste dans le flou. Précision ? Fiabilité ? Il n'y en a pas.

53. On manque de temps, Monsieur le président, le Cameroun reviendra aux demandes reconventionnelles durant le temps supplémentaire qui lui a été accordé à cette fin après le deuxième tour pour le Nigéria. Monsieur le président, je veux arrêter à ce point mon intervention. Je reconnais qu'il est extrêmement délicat pour la Cour, encore plus que pour le Cameroun, de clarifier des faits à l'égard desquels les Parties ont donné des versions largement divergentes. Néanmoins, tout aussi embrouillé que puisse paraître le panorama général, il y a deux zones où la lumière n'est affectée par aucune ombre : des troupes ainsi que des forces de sécurité nigérianes sont déployées tant dans la péninsule de Bakassi que dans un large secteur du lac Tchad, chaque fois en territoire camerounais où elles n'ont aucun droit de présence. Cette présence constitue à elle seule un fait internationalement illicite.

54. Monsieur le président, je suis arrivé à la fin de mon intervention. Demain matin, avec votre autorisation, mon collègue Alain Pellet introduira les plaidoiries du Cameroun relatives à la frontière maritime. Je vous remercie.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Ceci met un terme à l'audience d'aujourd'hui. La prochaine audience aura lieu demain à 10 heures. La séance est levée.

L'audience est levée à 18 h 20.