SEPARATE OPINION OF JUDGE RANJEVA

[Translation]

Undertaking by the Parties to comply with the Court's decision — Diplomatic declaration confirming prior consent to jurisdiction — Notion of "the law at the time" — Pacta non servanda sunt — *Rules of intertemporal law — Notion of non-"civilized" "nations" — Unilateralism — International law — National law — Respective scope of international law and colonial law.*

1. I subscribe both to the operative parts and the reasoning of the present Judgment, which will, I trust, achieve a final settlement of the dispute between the two Parties. I welcome the commitment made by the Presidents of Cameroon and Nigeria before the United Nations Secretary-General on 5 September last with a view to securing enforcement of the decision to be handed down by the Court (United Nations News Centre, 12 September 2002). Once again, African States have been concerned to reaffirm their faith in the law and in the judicial settlement of their disputes. In legal terms, the significance of this commitment should be viewed in light of the consensual basis of the Court's jurisdiction. Prior consent to jurisdiction is the basis of the parties' undertaking to accept without reservation any decision which the Court is called upon to give in disputes between them. Whether or not there is any specific diplomatic commitment, the parties to a dispute are bound once they have expressed their consent, and any objections regarding admissibility or jurisdiction have been dismissed. The Judgment is binding without any other special or additional condition. It follows that the declaration of 5 September 2002 merely constitutes a diplomatic *démarche* confirming the pre-existing legal obligation represented by prior consent to jurisdiction.

2. My purpose in this opinion is to consider the interpretation which in my view should be given to the notion of "the law at the time" (Judgment, para. 209). To understand the scope of this notion, reference should be made to the *Arbitral Award of the President of the French Republic between Great Britain and Portugal concerning Delagoa Bay* of 24 July 1875 (H. La Fontaine, *Pasicrisie internationale 1794-1900: histoire documentaire des arbitrages internationaux*), to the text of Article 38 of the Statute of the Court and to the silence of the Judgment regarding the characterization of the treaties concluded by the Chiefs of Old Calabar with the representative of Old Calabar. The criterion of "civilized nation" represented the qualifying condition in order to be accorded the juridical status of international subject. Without formal recognition of sovereignty on the part of the civilized nations, traditional indigenous societies, African societies in particular, did not have the

status of subjects of international law, even where their territory was not necessarily *res nullius*, as was made clear in the Advisory Opinion on the *Western Sahara* case (*I.C.J. Reports 1975*, p. 12). But does the refusal to accord any international status to such treaties justify reliance on the simple generic concept of "the law at the time" when characterizing in strictly legal terms territorial situations obtaining during the colonial period? The problem is whether, in this case, the rules of intertemporal law are sufficient to explain and justify the disappearance from the international scene of this ancient entity, the Chiefs of Old Calabar.

3. Literal application of the principles of intertemporal law leads to a surprising conclusion, which could be expressed in the following maxim: "in treaty relations with indigenous chiefs, *pacta non servanda sunt*". Thus it is difficult, without recourse to legal artifice, to justify the idea that a protected entity could consent to being dispossessed of its legal personality or of its territory. In a civil contract, any unilateral dissolution of an entity recognized under the terms of the contract is regarded as a breach of the contractual obligations and sanctions must follow. Can the absence of the conditions required for a valid international treaty render such surprising consequences acceptable? The inequality and denial of rights inherent in colonial practice in relation to indigenous peoples and to colonies is currently recognized as an elementary truth; there is a resultant duty to memorialize these injustices and at the same time to acknowledge an historical fact. The destruction of international personality is procured by an act of force: through *debellatio* or under an agreement between equals. But to contend that an international personality has disappeared by consent is verging on fraud. Application of the rules of intertemporal law cannot justify conclusions so contrary to fundamental norms, not even on the basis of the special nature of relationships with indigenous chiefs.

The International Court of Justice should be reluctant to accept that, in the name of intertemporal law, the maxim *pacta servanda sunt* may be circumvented. The Court's decision must not be interpreted as encouraging any impugnment of the principle of the sanctity of contracts. If we analyse the relationship between the various norms and principles of international law, it is clear that the maxim *pacta servanda sunt* cannot be treated on the same basis as the rules of intertemporal law, which serve merely as auxiliary means of interpretation of the primary rule, *pacta servanda sunt*. Any interpretation seeking to impugn that fundamental rule is misconceived. The main purpose of the rules of intertemporal law is to strengthen legal security in international relations. The binding nature of international treaties derives not from the mechanical or formal application of a principle but from the nature of commitments freely undertaken, expressing the consent of States to be bound. Only the impact of norms of *jus cogens* can justify any impugnment of the consensus principle. Thus the legal framework provides a tool for

analysing the consent and intentions of States but cannot replace those intentions.

4. In the present case, application of the rules of intertemporal law raises the problem of the Judgment's acceptance of the conduct of the protecting Power, which proceeded to liquidate the entity of Old Calabar. A distinction must be drawn between justification and acceptance of a legal situation. Thus the situations which the law addresses may have originated either in a legal instrument, that is to say a manifestation of wills intended to produce legal effects, or in a legal fact, that is to say an occurrence, a situation having taken place irrespective of any consent by the States concerned and producing effects in law. It follows that the instruments adopted by the colonial Power constituted legal facts, around which evolved and developed régimes governing territorial rights, as well as the personal rights of the populations concerned. This analysis is confirmed by the decision in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* (*I.C.J. Reports 1986*, p. 554). The Chamber directly applied French colonial law not *qua* colonial law but as the normative reference source applicable, without passing any judgment thereon or seeking to legitimize colonial law by reliance on the rules of intertemporal law.

5. Criticism of the "unilateralism" of the colonial Powers in ultimately treating agreements concluded with indigenous rulers as "scraps of paper" is nothing new. I would cite here the thesis of Mr. Nazif, submitted to the University of Batavia in 1928, on the disappearance of the Kingdom of Madagascar in international law *(De val van het Rijk Merina — La chute du Royaume de Mérina)*. I would also recall the position taken by the Malagasy plenipotentiaries in 1895 when they confronted France with the argument that the independence of the Kingdom was an issue distinct from its ability to repay its loan, the official pretext for the despatch of the expeditionary force. Conversely, the *tabula rasa* principle has been invoked in order to refuse a right of State succession to treaties concluded by the monarchy. This precedent was recalled at the time of the annexation of Czechoslovakia by the Third Reich.

6. For these reasons, it would have been preferable to speak of international law when referring to the law governing relations between the European Powers or with sovereigns recognized by the European Powers, and of colonial law or acts, as appropriate, when addressing the relationship between the European Powers and indigenous chiefs. Such a distinction or classification permits a better understanding of the legal framework of colonization.

(Signed) Raymond RANJEVA.