DECLARATION OF JUDGE REZEK

[Translation]

It is rare to find in classic international law propositions as flimsy — and as inadmissibly so in moral terms — as those which would have it that agreements entered into the past between colonial Powers and indigenous communities — organized communities which had been masters of their territories for centuries and were subject to a recognized authority — are not treaties, because "native chiefs and tribes are neither States nor International Organizations; and thus possess no treaty-making capacity" (*The Law of Treaties*, 1961, p. 53). While expressing in these terms the doctrine prevailing in Europe in his time, Arnold McNair nevertheless pointed out that the matter had been understood differently in the United States, where the indigenous communities were recognized as foreign nations until promulgation of the Indian Appropriations Act of 3 March 1871, which made them wards of, and integrated them into, the Union. The agreements which these communities had entered into with the Federal Government were regarded as treaties, to be honoured as such; moreover, if they required interpretation, the Supreme Court applied the rule *contra proferentem*.

In the *Western Sahara* case, the Court appears to have rejected the notion that a European Power could unilaterally appropriate a territory inhabited by indigenous communities. It found that even nomadic tribes inhabiting a territory and having a social and political organization had a personality sufficient under international law for their territory not to be considered *terra nullius*. According to that jurisprudence, title of sovereignty over a territory thus inhabited cannot therefore be acquired by occupation but only "through agreements concluded with local rulers" (*I.C.J. Reports 1975*, p. 39, para. 80).

In the present case, the Bakassi Peninsula was part of the territory of Old Calabar, subject to the original rule of its *Kings and Chiefs*. The Applicant itself, paradoxically required by the circumstances to espouse some particularly unacceptable propositions of colonialist discourse, has sought to cast doubt on the existence and independence of that rule by recourse to considerations which, rather, confirm them. Moreover, only the 1884 Treaty, concluded with that form of local rule, could have justified the functions assumed by Great Britain when it became the protecting State of those territories, for, if the Kings and Chiefs of Old Calabar did not have capacity to enter into an international agreement, if the 1884 Treaty was not a treaty and had no legal force whatsoever, it must

be asked what was the basis for Great Britain to assert its authority over these territories, by what mysterious divine right did it set itself up as the protecting State of these areas of Africa.

Pursuant to the 1884 Treaty, Great Britain bestowed upon itself the *power to oversee* the African nation's foreign relations, without granting itself authority to negotiate in its name, let alone to settle or relinquish any claim of whatever nature during international negotiations, and in particular to dispose of any part of the nation's territory. The unlawfulness of the act of cession renders the Anglo-German Treaty of 11 March 1913 invalid in so far as, in defining the last sector of the land boundary, it determines the treatment of Bakassi.

The defect in the provisions concerning the Bakassi Peninsula does not however affect the validity of the remainder of the Treaty. This is the situation provided for in Article 44 (3) *(a)* of the Vienna Convention on the Law of Treaties, which could in theory be overridden by the effect of the next subparagraph, were it possible to show that the cession of Bakassi was an essential condition of Germany's consent to the rest of the Treaty; but, as far as I recall, no one so argued.

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Further, I am unable to regard the Maroua Declaration of 1 June 1975 as a treaty, and therefore to draw the resultant inferences. I even have some difficulty in viewing it as a treaty which was signed but never entered into force, failing ratification by the two parties. Rather, I see it as a declaration by the two Heads of States, further to other similar declarations that were never followed up, thus demonstrating that they were not definitive as sources of law. True, formal adoption of the document by the organs vested with treaty-making power would have given rise to a conventional instrument. That is to say that, no matter what the title or form of a text, no matter what procedure was followed in negotiating it, that text can obviously become a treaty if the parties' competent organs ultimately express their consent. Here, the Respondent has stated, without being challenged, that the Maroua Declaration was not ratified by Nigeria, failing approval by the competent organ under the constitution in force at the time.

The Vienna Convention provides a remarkably simple definition of the unusual circumstances under which a State can deny the legal force of a treaty by reason of flawed consent of this sort. The internal rule which was not respected must be a fundamental one and its violation must have been manifest, i.e., the other party could not under normal circumstances have been unaware of the violation. It is my view, however, that Cameroon was not entitled to believe that the Declaration in question was indeed a perfected treaty, entering into force on the date of its signing. I

know of no legal order which authorizes a representative of a Government alone definitively to conclude and put into effect, on the basis of his sole authority, a treaty concerning a boundary, whether on land or at sea — and *ergo* the territory — of the State. I ask myself whether there is any part of the world where such a failure to respect the most basic formalities would be compatible with the complex and primordial nature of an international boundary treaty.

It is to be expected that the case concerning the *Legal Status of Eastern Greenland* (*P.C.I.J., Series A/B, No. 53*, p. 22) would be referred to in a discussion of this sort. It is sometimes forgotten that the Court never said that one of the ways in which treaties could be concluded was by oral agreement. The Court did not state that the Ihlen Declaration was a treaty. It said that Norway was bound by the guarantees given by the Norwegian Minister to the Danish ambassador. Thus, there are other, less formal, ways by which a State can create international obligations for itself. That is not the issue. The question is whether an international agreement concerning the determination of a boundary can take a form other than that of a treaty in the strict sense, even when the land or maritime areas concerned are not large or when the boundary has not been the subject of long-standing dispute and uncertainty.

Thus, I cannot join the majority in respect of sovereignty over the Bakassi Peninsula and adjacent waters. In my view, those areas fall under the sovereignty of the Respondent.

(Signed) Francisco REZEK.