DISSENTING OPINION OF JUDGE AJIBOLA

Introduction — Lake Chad — Lake Chad and the work of the LCBC — Delimitation and demarcation — Lake Chad Basin: effectivités *and historical consolidation — Bakassi Peninsula — Severability of Articles XVIII-XXII of the Agreement of 1913 — The 1884 Treaty — Historical consolidation and* effectivités *in Bakassi — The question of legal title — Maritime delimitation — Maroua Declaration — State responsibility — Conclusion.*

INTRODUCTION

1. The Court, notwithstanding the unusually large request of Cameroon's Applications has comprehensively dealt with all the submissions presented to it by the Parties. However, I am compelled to write this dissenting opinion because it is difficult for me to agree with some of the Court's decisions. There are five main sectors involved in this case, Lake Chad, the land boundary, Bakassi Peninsula, maritime delimitation and the issue of State responsibility. I have no difficulty in accepting and voting in favour of the Court's decision on State responsibility (although my separate view on this will be stated later), some aspects of the maritime delimitation and land boundary. My dissenting opinion will therefore centre on the Court's decision as regards the issue of sovereignty over the Bakassi Peninsula and the delimitation of Lake Chad. But before dealing with these points, I intend to touch upon certain issues regarding the genesis of the case, the function of the Court and some general observations about the Judgment.

2. This is a unique case for many reasons; first, because of the unusually large claim filed by the Applicant, secondly because it is a claim dealing with maritime and land boundary issues at the same time, and thirdly because, apart from the request for land and maritime delimitation, there is also the request involving State responsibility against Nigeria. It is also a case that has taken over eight years before the Court, involving applications for interim measures, jurisdiction and admissibility, and the intervention of Equatorial Guinea on maritime delimitation.

3. On both sides of the boundary, it cannot be denied that incidents involving serious clashes and hostilities have occurred in recent times. On the other hand, a series of efforts have been made to resolve this boundary dispute between the Parties at regional and international levels. It can therefore be said that the situation on the ground is volatile and explo-

sive. Added to all this is the fact that Cameroon declared that there are over three million Nigerians in Cameroon. There are about 150,000 Nigerians living in the Bakassi Peninsula alone. In a situation of this nature and in a case of this kind, what is supposed to be the function of the Court? The Court must primarily concern itself with its judicial function and decide the Applications before it in accordance with its Statute and with principles of international law.

4. At the same time, the Court must constantly remind itself of its position and obligations as a principal organ of the United Nations (Art. 7, para. 1, of the Charter). The Court must therefore ensure that it has a cardinal duty to encourage, by its judgments, all member States of the United Nations to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations (Art. 2, para. 4, of the Charter). The paramount obligation of the Court is to give a decision that will do justice in accordance with the maintenance of international peace and security in any region of the world. The Court is constantly aware of this obligation, for example, the Court took cognisance of resolutions 731 (1992), and 748 (1992) of the Security Council, in the cases of the *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Libyan Arab Jamahiriya* v. *United States)*, when it refused to order the interim measure requested by Libya. Indeed, in the present case, at the interim measures stage, the Court ordered that "[b]oth Parties should lend every assistance to the fact-finding mission which the Secretary-General of the United Nations has proposed to send to the Bakassi Peninsula" (*I.C.J. Reports 1996 (I)*, p. 25). In performing this exercise it is part of the duty of the Court, in its application of international law, to ensure that conflicting considerations are balanced between opposing claims.

5. An aspect of the Award of Judge Max Huber in the *Island of Palmas* case of October 1924 threw some light on such conflicting interests:

> "It is accepted that every law aims at assuring the coexistence of interests deserving of legal protection. That is undoubtedly true also of international law. The conflicting interests in this case, in connection with the question of indemnification of aliens, are, on the one hand, the interest of the State in the exercise of authority in its own territory without interference or supervision by foreign States, and, on the other hand, the interest of the State in seeing the rights of its nationals in a foreign country respected and effectively protected." (H. Lauterpacht, *The Function of Law in International Community*, p. 121.)

6. The balancing of conflicting interests in a very sensitive case of this nature is not strange to the Court and this has reflected in some of its recent judgments, like the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark* v. *Norway*) (*I.C.J. Reports 1993,* p. 38), where equity played a major role to allow for a fair and just allocation and delimitation of the maritime boundary; the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*I.C.J. Reports 2001*, p. 40), a case decided in such a manner as to ensure peace and stability between both parties, to the extent that both felt satisfied with the Judgment of the Court; the *Kasikili/Sedudu Island (Botswana/Namibia)* case (*I.C.J. Reports 1999 (II)*, p. 1045), which encouraged both parties to settle their disputes amicably.

7. In matters of land and maritime boundaries such balancing of conflicting interests or adjustment in cases involving different legal or conventional titles cannot be considered as non-judicial. As will be mentioned later, these are cases where *effectivités* or historical consolidation have been given consideration over and above legal title. Some examples were given by A. L. W. Munkman in her article:

> "It is perhaps necessary to consider at this point the view that arbitrators dispose of wider powers of adjustment or minor legislation, a greater discretion in taking account of the 'equities' of the particular situation, than do strictly judicial tribunals, that is, permanent courts. There seems to be no real basis for any suggestion that the scope of considerations which judicial, as opposed to arbitral, tribunals may take account of is narrower: a wide range of social, economic and geographical criteria were explicitly taken account of in the *Anglo-Norwegian Fisheries* and *North Sea Continental Shelf* cases, and historical and cultural considerations were not of themselves described as irrelevant in the *Temple* case. In the *Jaworzina* case, the Permanent Court explicitly invoked the notion of the historic boundaries of the States in dispute, and the ethnographical factors presuming in their favour." ("Adjudication and Adjustment — International Judicial Decision and the Settlement of Territorial and Boundary Disputes", *British Year Book of International Law*, 1972-1973, p. 113.)

8. There are other cases decided by the Court or its predecessor, the Permanent Court of International Justice, that may also be mentioned, which lend credence to the fact that international permanent courts are determined to ensure that at the end of the day both parties to such disputes are happy about the decision and that it is not a case of giving judgment in favour of any of the parties considered to be the "title-holder". Recently, the Eritrea/Ethiopia Boundary Commission gave its decision in

the land boundary dispute which has for many years been the cause of serious armed conflict between the two parties. On 14 April 2002, when the decision was delivered, both parties returned to their respective capitals rejoicing that they were satisfied with the decision of the Commission.

9. Munkman went further to enumerate some other cases:

> "In the *British Guiana Boundary* cases decisions on 'allocation' of substantial portions of territory and on the 'delimitation' of the boundary between the areas awarded to each party were combined — as also in the *Rann of Kutch* award. In the *Jaworzina Boundary* case, the Permanent Court in effect gave a decision on the allocation and delimitation of a boundary on the basis of the *status quo ante*. The *North Atlantic Fisheries* and *Gulf of Fonseca* cases (in so far as they related to bays) and the *Anglo-Norwegian Fisheries* case involved decisions on the allocation of sea areas and their delimitation and, in the latter case, the technical problem of baseline demarcation." (*Op. cit.*, p. 115.)

10. In a case of this nature, the proper course for the Court to follow is not only one of mere legal formalism in favour of one party. It must weigh and balance the legal titles of both parties and take also into consideration the situation on the ground, particularly in Lake Chad and the Bakassi Peninsula. It will be difficult, if not impossible, for the Court not to recognize the status quo. To overlook such a situation will not ensure justice in this case. Such an oversight might have contributed to the protracted and judicially unsatisfactory course of the Hungarian Optants dispute between Romania and Hungary of 1927. A learned author (who was once a judge of this Court) offered a solution:

> "But the course which is believed to be the proper one, and which is suggested by the position adopted by international tribunals in other cases, would be to evolve a legal rule constituting a judicial compromise between the legally recognized claims of territorial sovereignty, on the one hand, and the internationally recognized rights of aliens, on the other hand." (H. Lauterpacht, *The Function of Law in the International Community*, p. 122.)

Lake Chad

11. As regards the Lake Chad Basin, I voted against the decisions of the Court as stated in paragraph 325 I (A) and (B) of the Judgment, because they fail to take into consideration the submissions of Nigeria based on *effectivités* and historical consolidation; hence my decision to write a dissenting opinion. Admittedly, the Thompson-Marchand Decla-

ration of 1929-1930 as incorporated in the Henderson-Fleuriau Exchange of Notes of 1931 is relevant, but that is only one aspect (but not all) of what the Court should consider in order to effect the necessary judicial delimitation. In the Court's interpretation of the Declaration it must effect the necessary adjustments of the boundary to give room for the situation on the ground as recognized by international law.

12. The Court, in reaching its decision on Lake Chad, relied very heavily or perhaps solely on certain instruments that formed the bedrock of Cameroon's case. These instruments are:

— the Milner-Simon Declaration of 10 July 1919, with the annexed Moisel map;
— the Thompson-Marchand Declaration of 1929-1930, as confirmed by the Henderson-Fleuriau Exchange of Notes of 9 January 1931 (paragraphs 50 and 58 of the Judgment);
— the LCBC Reports and the agreements emanating from them.

13. The Court, in its Judgment, rejects Nigeria's claim to the 33 villages in Lake Chad which is based on *effectivités*. The Court examines and relies on the Moisel map annexed to the Milner-Simon Declaration of 1919 and the map attached the Henderson-Fleuriau Exchange of Notes of 9 January 1931. It concludes that the co-ordinates of the tripoint must be 14° 04′ 59″9999 longitude east, rather than at approximately 14° 05′ longitude east, thus virtually reaching the same conclusions as the LCBC (para. 57 of the Judgment) . On the question of the location of the mouth of the Ebeji, the Court decides (paras. 58-60 of the Judgment) that it is located where the river bifurcates into two branches, with the geographical co-ordinates of 14° 12′ 03″ longitude east and 12° 13′ 17″ latitude north. However, the Court rejects the claim of Nigeria based on the historical consolidation of its title (para. 62 of the Judgment). Apparently, the Court rejects the contention of Cameroon that the proposals of the LCBC as regards the tripoint and the location of the mouth of the Ebeji constitutes an authoritative interpretation of the Milner-Simon Declaration of 10 July 1919 and the Thompson-Marchand Declaration of 1929-1930, as confirmed by the Exchange of Letters of 9 January 1931. Yet, it appears to me that the ultimate conclusion reached by the Court amounts to a difference without distinction because the Court, in finding the co-ordinates of the tripoint, reaches virtually the same conclusions as the LCBC having taken into consideration the same Moisel map and the Thompson-Marchand Declaration of 1929-1930, as confirmed by the Henderson-Fleuriau Exchange of Notes of 9 January 1931. This opinion therefore touches on all these instruments, the LCBC Report and agreements emanating therefrom, as well as the issue of *effectivités* and historical consolidation.

14. In its Additional Application to the Court, dated 6 June 1994, Cameroon asked the Court to confirm Cameroonian sovereignty over the

disputed parcel in the area of Lake Chad. Cameroon failed to describe with certainty what it described as the disputed area in the Lake Chad region. However, in its submission, the claim was further amplified in that it is seeking for sovereignty over the area of Lake Chad and, in particular, over Darak. In addition, Cameroon claims more specifically:

> "that the land boundary . . . takes the following course:
>
> — from the point at longitude 14° 04′ 59″ 9999 E of Greenwich and latitude 13° 05′ 00″ 0001 N, it then runs through the point located at longitude 14° 12′ 11″ 7005 E and latitude 12° 32′ 17″ 4013 N (Reply of Cameroon, Vol. I, p. 591, para. 13.01). *[Translations by the Registry.]*

15. The nature of the dispute can partly be gleaned from the pleadings of Cameroon:

> "The instrument of conventional delimitation is not in dispute. That instrument is the Exchange of Notes between Henderson and de Fleuriau of 9 January 1931 . . ., the validity of which is recognized by Nigeria, even if it disputes its applicability to Lake Chad . . ." (*Ibid.*, p. 101, para. 3.04.)

And that:

> "Initially, the boundary was delimited by the Milner-Simon Declaration of 10 July 1919 . . . However, this delimitation, while undergoing no change in relation to Lake Chad, was rendered more precise in 1931 by the two governments concerned, on the basis of a survey conducted by the two High Commissioners, the results of which are set out in the Thompson-Marchand Declaration of 29 December 1929 and 3 January 1930 . . ." (*Ibid.*, p. 102, para. 3.05.)

16. The position of Nigeria is reflected in its pleadings as follows:

> "The purpose of the present Chapter is to demonstrate that there has been no final determination of the boundary within Lake Chad between Nigeria and Cameroon. This demonstration involves the following elements:
>
> *First:* the colonial boundary agreements of the period 1906 to 1931 did not produce a conclusive delimitation in the Lake Chad region.
>
> *Second:* the uncertainties remained after the Independence of Nigeria and Cameroon.
>
> *Third:* the work of the Lake Chad Basin Commission did not produce delimitation, which was final and binding on Nigeria." (Counter-Memorial of Nigeria, Vol. II, p. 379, para. 16.1.)

17. What then is the nature of Cameroon's request to the Court? In this area of the boundary, Cameroon is asking for a confirmation of its sovereignty over Lake Chad and, in particular, Darak. In this case, going

through the oral and written pleadings, there appears to be a disagreement between the Parties on the issue of delimitation and demarcation. The argument of Cameroon is that the area of Lake Chad had been delimited and demarcated while, on the other hand, Nigeria asserts that the area had neither been so delimited nor demarcated.

18. Cameroon simply bases its claim on the Milner-Simon Declaration of 1919 and the Thompson-Marchand Declaration as confirmed by the Henderson-Fleuriau Exchange Notes of 1931. These are the documents, according to Cameroon that delimit the boundary in Lake Chad. Nigeria, on the other hand, whilst accepting the relevance of those instruments in principle, argues that the boundary is not delimited by these instruments as such. Nigeria goes further to state that these instruments relate only to the land boundary between Lake Chad and Bakassi and do not apply to the boundary in Lake Chad. In addition, Nigeria concludes that

> "Thus, as at 1 June 1961, the date upon which Northern Cameroons was incorporated into the independent Federation of Nigeria, the process of delimitation and demarcation of the boundary in Lake Chad was still at an embryonic stage." (*Ibid.*, Vol. II, p. 376, para. 15.99.)

Cameroon partially or tacitly agrees with this conclusion of Nigeria by responding that:

> "The observation [of Nigeria] is partially correct, concerning the demarcation of the lake boundary, since Nigeria has not formally accepted the result of the works carried out within the framework of the LCBC. It is without foundation for the delimitation, which was effected with satisfactory precision by the Exchange of Notes of 9 January 1931, in a manner which was not in the least 'embryonic'." (Reply of Cameroon, Vol. I, p. 103, para. 3.11.)

19. Unfortunately, all the attempts made to effect a delimitation and demarcation of the boundary in the Lake Chad area failed. Before World War I, all the correspondence, notes, declarations and agreements entered into between Great Britain and Germany failed to achieve the purpose of delimitation. Similarly, all the attempts made between France and Great Britain after World War I equally failed. Subsequent attempts made at the beginning of World War II did not achieve the purpose of delimiting the boundary, let alone demarcating it. The following are the attempts:

Before World War I

(a) Agreement between Great Britain and Germany respecting Boundaries in Africa, signed at Berlin, 15 November 1893 (Counter-Memorial of Nigeria, Vol. IV, Ann. 28);

(b) Convention between the French Republic and Germany for the Delimitation of the Colonies of French Congo and of Cameroon

and of French and German Spheres of Influence in the Region of Lake Chad, signed at Berlin 15 March 1894 (Counter-Memorial of Nigeria, Vol. IV, Ann. 29);

(c) Convention between the United Kingdom and France for the Delimitation of their Respective Possessions to the West of the Niger, and of their Respective Possessions and Spheres of Influence to the East of that River, signed at Paris 14 June 1898 (*ibid.*, Ann. 30);

(d) Anglo-German Agreement signed 12 December 1902 (*ibid.*, Ann. 33);

(e) Anglo-German Protocol signed at Ullgo, Lake Chad, 24 February 1904 (*ibid.*, Ann. 34);

(f) Convention between the United Kingdom and France respecting Newfoundland and West and Central Africa, signed at London, 8 April 1904 (*ibid.*, Ann. 35);

(g) Agreement between the United Kingdom and Germany respecting the Boundary between British and German Territories from Yola to Lake Chad, signed at London, 19 March 1906 (*ibid.*, Ann. 38);

(h) Convention between the United Kingdom and France respecting the Delimitation of the Frontier between the British and French Possessions to the East of the Niger, signed at London, 29 May 1906 (*ibid.*, Ann. 39);

(i) Convention between France and Germany confirming the Protocol of 9 April defining the Boundaries between French Congo and the Cameroons, signed at Berlin, 18 April 1908 (*ibid.*, Ann. 40);

(j) Agreement between the United Kingdom and France respecting the Delimitation of the Frontier between the British and French Possessions East of the Niger (approved by Exchange of Notes, 17 May/1 July 1911), signed at London, 19 February 1910 (*ibid.,* Vol. V, Ann. 43).

Since World War I

(a) The Picot/Strachey Lines, February 1916 and the Crewe/Cambon Exchange of Notes, March 1916 (*ibid.*, Vol. IX, Anns. 226, 228-229).

20. If we leave for the moment the two crucial Declarations of 1919 and 1931, which failed to delimit the boundary, all subsequent attempts to effect the delimitation from 1931 to 1938 equally failed. Even by that time, the Boundary Commission, under the Permanent Mandates Commission did not make any tangible progress to effect the proposed task of demarcation. Based on the *preliminary study* of the boundary that they had *provisionally defined*, it was in 1937 that the Joint Commission started its work. However, the outbreak of World War II put a halt to the Commission's work. A report of 15 January 1942, communicated to the Colonial Office by the Governor of Nigeria indicated that the commissioners had executed only 135 miles of the boundary out of a total length of approximately 1,200 miles (*ibid.*, Vol. IX, Ann. 371).

21. Going back to the 1919 Milner-Simon Declaration, it is described as an agreement

> "to *determine* the frontier, separating the territories of the Cameroons placed respectively under the authority of their Governments, as it is traced on the map Moisel 1:300,000, annexed to the present declaration and defined in the description in three articles also annexed hereto" (Counter-Memorial of Nigeria, Vol. V, Ann. 50, p. 481; emphasis added).

That boundary as described by the Milner-Simon Declaration is patently inaccurate, unreliable and deficient. It is admitted by both Parties that the Moisel map attached to the Declaration is unreliable, even as regards the co-ordinates (i.e., latitude 13° 05' N and longitude 14° 05' E), which was only drawn to approximation. In some aspects, the Agreement itself is vague. It is no surprise that the Declaration anticipates "further local delimitation". Article 2, paragraph 1, of the Declaration reads thus:

> "It is understood that at the time of the local delimitation of the frontier, *where the natural features to be followed are not indicated in the above description, the Commissioners of the two Governments will, as far as possible*, but without changing the attribution of the villages named in Article 1, lay down the frontier in accordance with natural features (rivers, hills or watersheds).
>
> The Boundary Commissioners shall be authorised to make such minor modifications of the frontier line as may appear to them necessary in order to avoid separating the villages from their agricultural lands. Such deviations shall be clearly marked on special maps and submitted for the approval of the two Governments. Pending such approval, the deviations shall be *provisionally recognised* and respected." (*Ibid.*, Vol. V, Ann. 50, p. 483; emphasis added.)

22. In fact, with regard to this Declaration, the letter of Lord Curzon, in its first paragraph, indicates that Great Britain only agreed with the French Government as "*provisional entry into force pending the definitive settlement of the régime to be applied in these territories*" (*ibid.*, Vol. IX, Ann. 239, p. 1865; emphasis added). Hence, by 27 May 1921, a suggestion was made by France to Great Britain, that it was preferable to leave the delimitation until after the mandates have been obtained from the League of Nations. The letter of the British Ambassador of 23 October 1921, in its second paragraph, gave a very clear indication of the problems with the Milner-Simon Declaration. In that letter, he suggested that Article 1 of the Draft Mandate should be recast to contain the following provision:

> "This line may, however, be slightly altered by agreement between

> His Britannic Majesty's Government and the Government of the French Republic *where an examination of the localities shows that it is undesirable, either in the interests of the inhabitants or by reason of any inaccuracies in the map (Moisel 1:300,000) annexed to the declaration to adhere strictly to the line laid down therein.*)" (Counter-Memorial of Nigeria, Vol. IX, Ann. 243, p. 1881; emphasis added.)

23. The advice of the British Ambassador, Hardinge of Penshurst, referred to above, was accepted by the League of Nations in July 1922, in order to effect the necessary amendments to the Milner-Simon Declaration. There again, in Article 1 of the League of Nations instrument, the interest of the inhabitants was to be taken into consideration as well as correcting the inaccuracies of the Moisel map of 1:300,000 scale, which incidentally is relatively too small for boundary delimitation exercises. The important point in all this is that the Court fails to give consideration to the interests of the Nigerian inhabitants in all 33 villages claimed by Nigeria in this sector of Lake Chad.

It can therefore be observed that even during the Mandate there is a tacit consideration given to *effectivités* in terms of the interest of the inhabitants in any of the localities where this is desirable.

24. The Thompson-Marchand Declaration was an improvement on the Milner-Simon Declaration because it introduced an improved map that was annexed to that Declaration. Furthermore, it mentioned the identification of a straight line as far as the mouth of the Ebeji. Here again, we find that the process had not yet reached the delimitation stage, let alone demarcation. In the same paragraph of the letter of de Fleuriau of 9 January 1931, he remarked:

> "Your Excellency will no doubt have received the text of same Declaration and will certainly have observed that it concerns a *preliminary survey* only. This is intended to describe the line to be followed by the *Delimitation Commission*, more exactly than was done in the Milner-Simon Declaration of 1919." (*Ibid.*, Vol. V, Ann. 54, p. 538; emphasis added.)

In reply to de Fleuriau's letter, Arthur Henderson correspondingly replied that a boundary commission would have to be constituted in order to take over *a preliminary survey* that had been conducted in order to carry out *actual delimitation of the boundary*.

25. Under the United Nations Trusteeship in 1946, attempts were also made at delimiting the boundary in Lake Chad, which did not materialize up to 1948, and after. The report presented by the United Kingdom Trusteeship for the Cameroons touched on the boundary issues vis-à-vis the Thompson-Marchand Declaration and states as follows:

> "The Territory to which this Agreement applies comprises that part of the Cameroons lying to the west of the boundary defined by

> the Franco-British Declaration of 10 July 1919, and more exactly defined in the Declaration made by the Governor of the Colony and Protectorate of Nigeria and the Governor of the Cameroons under French mandate which was confirmed by the exchange of Notes between His Majesty's Government in the United Kingdom and the French Government of 9 January 1931. *This line may, however be slightly modified by mutual agreement between His Majesty's Government in the United Kingdom and the Government of the French Republic where an examination of the localities shows that it is desirable in the interest of the inhabitants.*" (Counter-Memorial of Nigeria, Vol. V, Ann. 56, pp. 579-581; emphasis added.)

26. One remarkably persistent issue that kept recurring in many of the agreements just mentioned is the interest of the inhabitants, whenever delimitation or even demarcation had to be effected. Unfortunately, this modification has not been carried out till today. It started with the British Ambassador in 1921; was engrafted into the League of Nations instruments as Article 1; and was again contained in Article 1 in the Trusteeship Agreement of 13 December 1946, all clearly expressing the need to modify the boundary by "mutual agreement between His Majesty's Government in the United Kingdom and the Government of the French Republic where an examination of the localities shows that it is desirable in the interest of the inhabitants" (*ibid*, Ann. 56, p. 581).

27. Has this modification ever been carried out? Can that problem be ignored or dismissed, especially now that Nigeria is claiming 33 villages in Lake Chad? In any attempt to delimit this area of the boundary in the Lake Chad area, should this not be taken into consideration? Yet the Court fails to consider this claim of Nigeria regarding its inhabitants in Lake Chad.

28. In effect therefore, the judicial assignment of the Court entails a conclusive settlement of this dispute first, by interpreting the instruments involved, then take into consideration the interest of the inhabitants' *effectivités* and historical consolidation. A similar assignment was performed by this Court in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* in 1994 on what constitutes the initial task of the Court. The Court therein described its assignment thus:

> "The Court will first consider Article 3 of the 1955 Treaty, together with the Annex to which that Article refers, in order to decide whether or not that Treaty resulted in a conventional boundary between the territories of the Parties. *If the 1955 Treaty did result in a boundary, this furnishes the answer to the issues raised by the Parties: it would be a response at one and the same time to the Libyan request to determine the limits of the respective territories of the Parties and to the request of Chad to determine the course of the*

frontier. The Court's initial task must therefore be to interpret the relevant provisions of the 1955 Treaty, on which the Parties have taken divergent positions." (*I.C.J. Reports 1994,* p. 20, para. 38; emphasis added.)

29. In view of the claim of Nigeria over certain specific places, where the inhabitants are affiliated to Nigeria and are being administered by Nigeria, this provision in the Agreement ought to have been seriously taken into consideration by the Court in its interpretation of the boundary line, hence my disagreement with the decision of the Court.

30. The Parties' concept and arguments aside, it is important to determine the duty of the Court as regards the dispute in Lake Chad. Clearly, the Court is not called upon to demarcate and, quite obviously, this is outside the assignment of the Court. Is this therefore a case of delimitation or attribution for the Court? In a case of this nature, where there are conflicting claims by the parties as to the location of the boundary and disputed territorial sovereignty, the cardinal assignment of the Court is, first to deal with the determination of the boundary by way of judicial delimitation and subsequently to deal with the conflicting territorial claims of the parties.

31. As indicated earlier, there are claims and counter-claims as to whether the Lake Chad basin had been delimited or demarcated. Presumably, if both Parties had definitively concluded the agreements on delimitation and *a fortiori* demarcation, this Application might not be filed by Cameroon. The preliminary objection of Nigeria on this point was rejected by the Court. The duty of the Court here therefore is to determine whether the boundary in Lake Chad had been delimited or not. If it had not been delimited, it is the Court's duty to carry out such an exercise as a judicial function. Even if the Court finds that it had already been "delimited" by certain instruments, the Court will still need to examine those instruments and then carry out its own definitive determination of the boundary. The Court ought to ascertain the true legal line in terms of interpreting those instruments in relation to the descriptive content of such boundary which, *inter alia*, must relate not only to its toponomy, geography, topography and human factors, but also apply the rules of interpretation in accordance with the Vienna Convention on the Law of Treaties of 1969, particularly its Article 31. With respect to this Convention, the Court is bound to take into consideration not only the ordinary meaning of the instruments but also the conduct and practice of the Parties which, unfortunately, the Court fails to do in the Judgment.

Lake Chad and the Work of the LCBC

32. There is a curious turning point in the boundary dispute between Cameroon and Nigeria which is quite remarkable and worthy of mention here. The VIIIth Summit Meeting of the LCBC was held on 21-23 March

1994 in Abuja, Nigeria. At the meeting, the four Heads of State including that of Cameroon were present. The decision of the Summit echoes the consensus reached as follows:

"A. *Boundary demarcation*

— to approve the technical document on the demarcation of the international boundaries of member States in the Lake Chad, as endorsed by the national experts and the Executive Secretariat of the LCBC.
— that each country should adopt the document in accordance with its national laws.
— that the document should be signed latest by the next summit of the Commission.
— to instruct state/local administrations of each country to mount social mobilization campaigns to educate the local populations on the demarcation and their rights and privileges on the Lake.

— congratulated the Commissioners, the national experts, the Executive Secretariat and the Contractor IGN-France for a job well done." (Counter-Memorial of Nigeria, Vol. II, pp. 407-408, para. 16.57.)

33. Yet, precisely five days after this apparently cordial meeting of Heads of State in Abuja, where they expressed the view that the work of the LCBC had been *satisfactorily* carried out, Cameroon filed the Application for the confirmation of its sovereignty over certain areas of Lake Chad and over Darak. This was the same area of boundary that the Cameroonian Head of State, along with his Nigerian counterpart had, only recently, endorsed.

34. The second unfortunate aspect of this litigation is that the LCBC, its Executive Secretary, members, experts and the IGN laboured from 1983 to 1994 to ensure the final determination of the border in this sector between Cameroon and Nigeria. However, it appears that this has now become an exercise in futility — much ado about nothing — with colossal waste of time, effort and money, since neither Nigeria nor Cameroon ratified the boundary agreement (Cameroon later ratified in 1997). Cameroon has now applied to the Court to start *de novo* what was close to an agreement between the Parties. Must Cameroon approbate and reprobate? The findings of the LCBC are not binding either directly or indirectly on the Court and neither is the LCBC bound by whatever may be the decision of the Court on this area of the boundary. The jurisdiction of the Court is consensual and it cannot bind other members of the LCBC, such as Niger and Chad, who are not parties before the Court (Art. 59 of the Statute of the Court). The Court is entitled to deal with the bipoint between Cameroon and Nigeria but not the tripoint between Cameroon, Chad and Niger.

35. The Court had already expressed its view and made some observations during the jurisdictional phase of this case as regards the dispute between both Parties in the Lake Chad area. It is pertinent to refer to the observations of the Court herein before we proceed further:

> "the Court notes that, with regard to the whole of the boundary, there is no explicit challenge from Nigeria. However, a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party. In this respect the Court does not find persuasive the argument of Cameroon that the challenge by Nigeria to the validity of the existing titles to Bakassi, Darak and Tipsan, necessarily calls into question the validity as such of the instruments on which the course of the entire boundary from the tripoint in Lake Chad to the sea is based, and therefore proves the existence of a dispute concerning the whole of the boundary." (*I.C.J. Reports 1998*, p. 315, para. 89.)

36. The assignment given to the LCBC's Sub-Committee on Boundary Matters, which started in 1983, was completed in March 1994. IGN of France was engaged to carry out the work which it completed in July-1993 and submitted to the Executive Secretary; eventually all the experts of the member States signed the report. Subsequently, at the meeting of Heads of State in Abuja in March 1994, all the Heads of State present signed the boundary documents, subject to ratification by each member State. Cameroon did not ratify until 1997 and Nigeria has not ratified to date. The IXth Summit of Heads of State was held in Chad in 1995. At that time, the Application of Cameroon was already pending before the Court and both Cameroon and Nigeria were absent from the Meeting.

37. What then is the legal effect of the work of the LCBC, with its report and documents not ratified by all the member States before the IXth Summit of Heads of State in 1995? Although all the Heads of State present during the VIIIth Summit signed it, each country still had to adopt it in accordance with its own national laws. The document had to be ratified no later than the next Summit of the Commission in 1995, in order to give it legal force. Cameroon and Nigeria failed to ratify before the "next Summit", even though Cameroon ratified subsequently. Since the other two countries, Niger and Chad, are not before the Court they are not bound by the decision of the Court. This is a fundamental principle that the Court has pronounced upon many occasions. In the jurisdictional phase of the case, this principle was once again reiterated thus:

> "The Court recalls that it has always acknowledged as one of the fundamental principles of its Statute that no dispute between States

can be decided without their consent to its jurisdiction (*Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32). Nevertheless, the Court has also emphasized that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case; and the Court has only declined to exercise jurisdiction when the interests of the third State 'constitute the very subject-matter of the judgment to be rendered on the merits' (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 61, para. 55; *East Timor (Portugal* v. *Australia), Judgment, I.C.J Reports 1995,* pp. 104-105, para. 34)." (*I.C.J. Reports 1998,* p. 312, para. 79.)

38. In the above circumstances, and as the Court rightly decided, the Agreement is not opposable to Nigeria and hence Nigeria is not bound by it. Similarly, it cannot be said that this Agreement must be recognized by all the member States of the LCBC. In the minutes of the VIIIth Summit of the Heads of State and Government in Abuja 1994, the decision reached was:

"— that each country should adopt the document in accordance with its national laws.
— that the document should be signed latest by the next summit of the Commission" (Counter-Memorial of Nigeria, Vol. X, Ann. 285, Decision No. 5, p. 13).

In the absence of any evidence that these decisions have been carried out by Cameroon and Nigeria, the document obviously will not be binding on the Parties in this case.

39. Article 46 of the Vienna Convention on the Law of Treaties is relevant here. Although all the Heads of State signed the documents in Abuja in 1994 (which Article 7 seeks to protect and validate), it is clear from their decision that before the Agreement could enter into force, it must be adopted and ratified by all the LCBC member States.

40. The task of the LCBC, which involves its Executive Secretary, the members and experts from member States, covered the period from 1983 until 1994. The establishment of the LCBC was prompted by the disturbances in that region during the year 1983, which necessitated the convening of the meeting of its members in Lagos from 21 to 23 July 1983. The Sub-Committee on the Delimitation of the Borders was saddled with the responsibility of the boundary determination. Necessary logistical problems (including funding) delayed the exercise until 1988 when the contract for the demarcation was signed between the LCBC and IGN International of France on 26 May 1988.

41. Cameroon puts emphasis on the stage of the work of the contractor in 1990. It referred to the Report on the Marking-Out of the Inter-

national Boundaries in Lake Chad.. The experts of the LCBC introduced this Report in the following terms:

> "We the undersigned,
>
> experts from the Member States of the CBLT/LCBC (Cameroon, Niger, Nigeria and Chad), duly designated by our States to supervise and monitor the work on the demarcation of our boundaries in accordance with resolution No. 2 adopted by our Governments at their Sixth Summit Meeting held in N'Djamena on 28 and 29 October 1987.
>
> . . . . . .
>
> have proceeded, from 13 June 1988 to 12 February 1990, to effect the delimitation and marking-out of the said boundaries *and submit to the approval of the respective Governments* the following description of the boundaries that we marked out." (Counter-Memorial of Nigeria, Vol. II, p. 403, para. 16.50; emphasis added.)

42. The argument of Cameroon as stated above can be faulted on five grounds: firstly, the document completed and to be submitted is a mere report and not a binding agreement; secondly, not all the experts from member States signed; thirdly, the Report was still incomplete; fourthly, the Report itself states that it was being submitted to the Heads of State for approval; and, fifthly, the task of the experts was not to approve the work of IGN of France: they were only mandated to supervise and monitor the work. As regards the nature of the document as a report, even the Memorial of Cameroon referred to above expressly described it as such. It was introduced as the Report on the Marking-Out of the International Boundaries and no more.

43. The task of the Commission on the Boundary was not concluded in 1990 but continued through 1991, 1992 and 1993. This was because IGN International of France had not completed the technical task and the expert of Nigeria and, at another stage, the expert of Chad, were not satisfied with the Report and they insisted on some technical amendments. The comment of Nigeria on this point is very illuminating:

> "At a meeting of LCBC Experts in January 1992, Nigeria indicated that it was now ready to implement the resolution of the 39th Meeting and to sign the 'report on demarcation' (NPO 75). The Commission noted the intention of the experts to implement the resolution by June 1992 (page 715 of NPO 75). At the 41st Session of the Commission in April 1993 (see extracts of Minutes at NC-M 284), it was reported that the experts has gone back to the field, finalized the technical aspects of the job and all signed the demarcation document. However, because of a dispute regarding the location of Beacon VI on the Chad/Cameroon boundary, the Chad Commissioner stated that he was unable to endorse that aspect of

the work, and as a result of there being a lack of consensus, it was resolved that the 'documents regarding the demarcation exercise' be signed by the Executive Secretary and made available to the Commissioners for presentation to their Governments so that the issue could be finalised at the next Summit." (Counter-Memorial of Nigeria, Vol. II, p. 406, para. 16.54.)

44. As reflected in the memorandum of Nigeria in November of 1990 at the 39th meeting of the Commissioners, the Nigerian delegation refused to sign the report for the reason that was expressed thus:

> "In November 1990, at their 39th meeting, the Commissioners resolved that the national experts should go back to the field to complete some specific jobs relating to two intermediate beacons . . . In the course of the discussions of the relevant subcommission, the position of the Nigerian delegation as recorded in the Minutes was as follows . . .
>
> > 'For its part, the fourth delegation, i.e. that of NIGERIA, considered that the project was not fully completed (the failure to number beacon II-III.1, substandard quality of numbering by LCBC, non-demolition of beacon II-V.1 which was wrongly erected, non stabilisation of GPS and Azimuth station on lines I-II and II-V and disappearance of two GPS stations on line I-II).'
>
> In consequence, Nigeria refused to sign the Report of the experts on the beaconing. At a June 1991 meeting of experts, Nigeria rejected this resolution of the 39th Meeting . . ." (*Ibid.*, Vol. II, p. 405, para. 16.52.)

45. As referred to earlier, the experts of member States were not mandated to sign the final agreement for or on behalf of the Governments or Heads of State. They were instructed to prepare and submit a report for the approval of the Heads of State at their Summit, which they did at the VIIIth Summit, for their signature. That precisely was their undertaking as stated in the Report. They unequivocally expressed the duty that they were called upon to carry out — "to supervise and monitor". Therefore, whatever was signed by the experts of member States cannot bind the Parties in this case. It cannot, therefore be said that the mission entrusted to the LCBC and the manner in which it was carried out resulted in the recognition by the LCBC member States that a delimitation in the Lake Chad area already existed. The Commission was not so mandated. The ultimate decision lies with the Heads of State. In 1994, the Report was accepted and approved by the Heads of State signing the document that was to be subsequently ratified. That ratification did not happen, at least

as far as Nigeria is concerned. Hence my view is that the Court ought to ignore the report and agreement of the LCBC. Tacitly, therefore, the decision of the Court to reject Cameroon's submission that the Parties are bound by the LCBC's Report is valid. However, the Court ought to have taken into consideration other factors, such as *effectivités* and historical consolidation in order to come to a determination on the delimitation of Lake Chad.

Delimitation and Demarcation

46. Reading through the oral and the written pleadings in this case one must admit that there is a degree of misunderstanding or even confusion in the use of the words delimitation and demarcation. Perhaps, for the purpose of elucidation and to clear the apparent convolution, we may borrow a definition of these two terminologies from a textbook on international law:

> "The distinction sometimes made between artificial and natural boundaries is geographical rather than legal, for so-called natural boundaries, making use of natural features such as rivers or mountains usually need further definition in order to produce a precise boundary line. The common practice for land boundaries is, in a boundary treaty or award, to describe the boundary line in words, i.e. to 'delimit' it; and then to appoint boundary commissions, usually joint, to apply the delimitation to the ground and if necessary to mark it with boundary posts or the like, i.e. to 'demarcate' it." (*Oppenheim's International Law*, 9th ed., Vol. 1 (Peace), Parts 2-4, Sir Robert Jennings and Sir Arthur Watts (eds.), p. 662.)

47. The claim of Cameroon is that the LCBC has delimited the boundary with the aid of the relevant instruments already mentioned. The view of Nigeria is that nothing has been delimited or demarcated conclusively. Nigeria agrees that certain instruments are relevant for the purpose of delimitation but that the area of Lake Chad is not part of it. Cameroon argues that the demarcation had been fully and finally effected by the LCBC and the same sanctioned by the Heads of State. For the reason already given above, I disagree with Cameroon, as the Court has also done. However, since delimitation precedes demarcation, and delimitation in this case is not just simply confirming the instruments that delimit, but these instruments must be given judicial interpretation having regard to the conflicting view of the Parties, the Court is therefore called upon to determine the issue of delimitation, whilst the Parties will undertake that of demarcation. But in doing so the Court fails to take into consideration factors other than the instruments.

Lake Chad Basin: Effectivités *and Historical Consolidation*

48. As mentioned earlier, and based on the evidence presented to the Court by both Parties on this matter and particularly Nigeria, I am strongly of the view that the issue of *effectivité* and historical consolidation ought invariably to be given consideration in this case. My reason for saying so has been partly explained in the introductory part of this opinion and partly in the sector on Bakassi Peninsula below. Here reference must be made to the jurisprudence of the Court, in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, particularly in terms of the pronouncement of the Court with regard to the position of *effectivités* in relation to legal title. There is enough reason and justification for the Court to take these legal principles of historical consolidation and *effectivités* into consideration. It has been established that in so many areas in Lake Chad, the Milner-Simon Declaration of 1919 with the annexed Moisel map and the Thompson-Marchand Declaration of 1929-1930, as confirmed by the Henderson-Fleuriau Exchange of Notes of 9 January 1931, are not sufficiently precise and in most cases inaccurate to present a clear picture of delimitation in Lake Chad. The boundary thus requires adjustments and clarifications which can only be taken care of by *effectivités* and historical consolidation.

49. The Lake Chad basin is constantly in a state of flux as to its waters and its inhabitants kept moving with the receding waters from time to time. Some of the settlements and villages have been there for over 40 years. Undoubtedly, this is a situation where *effectivité* has an important role to play. In the *Island of Palmas* case, Max Huber held that the island ought to be attributed to the Netherlands on the ground that:

> "the establishment of Netherlands authority, attested also by external signs of sovereignty, had already reached such a degree of development that the importance of maintaining this state of things ought to be considered as prevailing over a claim possibly based either on discovery in very distant times and unsupported by occupation, or on mere geographical position" (H. Lauterpacht, *The Function of Law in International Community*, p. 120).

Added to all these uncertainties in the area of Lake Chad is the fact that there has never been any definitive delimitation, let alone demarcation. A clear picture of the situation in Lake Chad is that the inhabitants have been living at large regardless of where the boundary lies, and some of them have been there for many years. It is precisely a situation like this that calls for justice in favour of these inhabitants, most of whom owe allegiance to Ngala local government in Nigeria and their Nigerian *Bula-*

mas (chiefs). This spread of inhabitants in Lake Chad is not unusual, we have similar examples in the area of the land boundary between Nigeria and Cameroon where, for example, in the Nigerian village of Koja, the Nigerian inhabitants have spread over into the Cameroonian side of the boundary. Again, in the Cameroonian village of Turu, the inhabitants have spread into the Nigerian territory. The Court in its wisdom has decided to allow the Parties to resolve these incursions themselves by peaceful settlement. The arbitrator in the *Island of Palmas* case established the general rules which ought to guide the judge in deciding matters of this nature by weighing the relative merits of the titles claimed. He said:

> "International law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection. If, as in the present instance, only one of two conflicting interests is to prevail, because sovereignty can be attributed to but one of the Parties, the interest which involves the maintenance of a state of things having offered at the critical time to the inhabitants of the disputed territory, and to other States, a certain guarantee for the respect of their rights ought, in doubt, to prevail over an interest which — supposing it to be recognized in international law — has not yet received any concrete form of development." (H. Lauterpacht, *op. cit.*, pp. 119-120.)

In my view, this statement of Max Huber is reflected in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, that:

> "*In the event that the* effectivité *does not co-exist with any legal title, it must invariably be taken into consideration.* Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice." (*I.C.J. Reports 1986*, p. 587, para. 63; emphasis added.)

50. In this particular case therefore, it is *effectivité* that can assist in fully complementing the content of the legal title. This definitely is not a case of *effectivité contra legem*, but one that must invariably be given recognition and consideration. Quite patently, the *Frontier Dispute (Burkina Faso/Republic of Mali)* case is the authority on this point. The Court cannot interpret a part of paragraph 63 of the Judgment in that case, and leave the other part uninterpreted. After all, Cameroon in effect accepted the overwhelming evidence of *effectivités* put forward by Nigeria.

51. Nigeria strongly and extensively pinpoints the obvious deficiencies in many of these instruments. Cameroon also agrees with many of the deficiencies as highlighted by Nigeria. One example is the Moisel map as

well as the map attached to the 1931 Declaration. Another problematic area is the mouth of the Ebeji. The difficulties encountered by the LCBC throughout the duration of their work on the Lake Chad boundary is not unconnected with the problems of inaccuracies, uncertainties and incongruities when it comes to delimitation and demarcation.

52. The role of *effectivité* which deals majorly with the conduct and practice of the parties and has its legal basis founded on some of the provisions of the Vienna Convention on the Law of Treaties of 1969, particularly its paragraph 31, has as its advantage, the need to ensure stability along the boundaries of two States. Short of invalidating a legal title that bears no relation to the situation on the ground, *effectivité* comes in to play the role of sustaining complementarily the boundary based on the practice and conduct of the parties over the years which, in effect, is similar to the principle of *uti possidetis juris (de facto)*. Consequently, *effectivité* comes in to adjust, vary or amend such boundary as may be structurally established by the legal title.

53. This view is not strange to the Court. Apart from certain inferences made by it on a similar matter in the *Kasikili/Sedudu Island (Botswana/Namibia)* case, an illustration of such a principle was made in the Advisory Opinion of 1971 in the case concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, where the Court states:

> "This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization." (*I.C.J. Reports 1971*, p. 22, para. 22.)

54. Similarly, in 1962, the Court had another opportunity to pronounce on the conduct and practice of the parties with regard to a map which the Court considered to have been accepted as the outcome of the work on delimitation between Cambodia and Thailand in the case concerning the *Temple of Preah Vihear*. In that case the Court decided that:

> "Thailand in 1908-1909 did accept the Annex I map as representing the outcome of the work of delimitation, and hence recognized the line on that map as being the frontier line, the effect of which is to situate Preah Vihear in Cambodian territory. The Court considers further that, looked at as a whole, Thailand's subsequent conduct confirms and bears out her original acceptance, and that Thailand's acts on the ground do not suffice to *negative* this. Both Parties, by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line." (*I.C.J. Reports 1962*, pp. 32-33; emphasis added.)

In this case, Nigeria relies very heavily on *effectivités* to justify its claim over the 33 villages mentioned in its Counter-Memorial and filed bundles of documents in support of it, which clearly show its uninterrupted occupation of such places over the years.

55. Nigeria describes with particularity that the settlements are not heavily populated, and are headed by *Bulamas*. The houses are generally built of grass and mud. Fishing and farming are practised on the available fertile land and water. The people there are Nigerians and are predominantly of Nigerian tribes, i.e., Hausa, Fulani, Kanuri, and in some cases Ibo, Yoruba, Shuwa Arabs and Sara. They also have in some places Malians, Cameroonians and Chadians who, even though few, also pay community taxes to Nigerian Local Government Authorities (Ngala and Marte Local Government Authorities).

56. According to Nigeria, some of these villages were established as far back as 1959. Documentary evidence in support of Nigeria's *effectivités* in the Lake Chad basin was rather overwhelming. Nigeria's activities in these villages, viz., the appointment of *Bulamas*, general and local administration, health services, education, collection of taxes, holding of elections, conducting census, proof of the affiliation of the local inhabitants to Nigeria and aid to inhabitants for agricultural purposes were all heavily pleaded and presented. Nigeria claims to have carried on these activities continuously in all these villages, undisturbed and uninterrupted by Cameroon over the years. Cameroon recognizes these facts. Cameroon persistently referred to a "long list" of documents presented by Nigeria. At a juncture counsel for Cameroon stated during the oral proceedings:

> "*Nigeria has presented you with a very long list of its alleged* effectivités. Many of them do not qualify as proper *effectivités*, for the reasons I have already outlined and for others I shall mention shortly. *Still, superficially, it is a long list. Cameroon's is shorter.* Deliberately so, however." (CR 2002/4 (Mendelson), p. 45, para. 23; emphasis added.)

57. In Cameroon's presentation of its own *effectivités*, it claims that Nigeria occupies 18 Cameroonian villages. Most of the claims and activities of Cameroon date from about 1983-1987. Cameroon has visited only 12 of these villages between 1982 and 1990. It claims to have carried out a census in 1983 in 14 villages including Sagir, which it admits belongs to Nigeria. Cameroon claims to have collected taxes from eight villages between 1983 and 1993. It also claims to have designated chiefs in 12 villages. Although Cameroon did not claim to have held elections in any of the villages, nevertheless it claims to have installed polling stations in six villages, conducted election tours in four villages and given notice of elections in seven villages. Cameroon further claims to have been in control

of markets, thereby banning illegal trading in four villages, and distributed provisions to nine villages in 1985. Cameroon intervened through its *gendarmeries* between 1984 and 1986 in three criminal cases in three villages, and in 1982 organized cultural and folk activities in four villages. However, Cameroon concedes that six of these villages are actually within Nigerian territory; these are: Koloram, Sabon Tumbu, Jribrillaram, Doron Mallam, Kirta Wulgo and Sagaya.

58. From the above report it can be seen that Cameroon's *effectivités* are admittedly very scanty, few, vague, mostly unsubstantiated and restricted to a limited period and cannot be compared with the overwhelming evidence of *effectivités* presented by Nigeria before the Court. As Cameroon pointed out, Nigeria's claim to the 33 villages and the justification for such a claim based on *effectivité* is all contained in Nigeria's pleadings. Nigeria's *effectivités* and historical consolidation in Lake Chad are sufficiently significant to be accorded recognition. But the Court unfortunately rejects all these claims.

59. It will be necessary in this opinion to dwell on another angle concerning the issue of title which Cameroon is relying on. Counsel for Cameroon added at the oral proceedings:

> "For the legal reasons I have already put before you Cameroon, as the party with the title, needs to prove very little (if anything) by way of corroboration of its title. So it has deliberately refrained from playing Nigeria's game, considering it quite inappropriate to go down the path of amassing one example after another." (CR 2002/4 (Mendelson), p. 45, para. 23.)

I wish to refer to yet another admission by Cameroon with regard to the overwhelming evidence of *effectivité* presented by Nigeria before the Court, where counsel for Cameroon stated:

> "So it will not do for Nigeria to pile up instance after instance of alleged *effectivités* in one pan of the scales, so to speak, and then point out that Cameroon has cited fewer. The law requires this Court to tilt the scales of justice in favour of the title-holder, and it will require a great deal to displace that title." (*Ibid.*, p. 39, para. 11.)

Here again Cameroon can be faulted with regard to its so-called "legal title" and its claim as "title-holder". In the first case, it must be clear that the *effectivités* of Nigeria in the Lake Chad basin is not meant to displace the conventional title. *Effectivité* as presented by Nigeria in this case will only vary or adjust the conventional title boundary. It will not tilt the scale of justice one way or the other, but merely recognizes the fact that by the acts of the Parties through their conduct and practice they have

"recognized" the necessary adjustments in an otherwise inaccurate conventional title boundary.

60. It is true that in this area of Lake Chad (as well as in the Bakassi Peninsula), Cameroon has fewer evidence of *effectivité*. This presumably is because they have never occupied these areas which Nigeria has proved to be under its occupation all along. However, and quite erroneously, Cameroon is relying on what it terms "legal title" by referring to itself as "title-holder".

61. Again, Cameroon gives the impression of being a title-holder, which it has repeated many times. Cameroon has referred to all those relevant instruments as the exclusive deciding factor in this case. Nigeria equally presents its case in a similar manner to that of Cameroon. Nigeria accepts in principle that all those instruments are relevant to the determination of the delimitation and demarcation of the Lake Chad basin, but, in addition, Nigeria says that this boundary described by inaccurate maps and incomplete or defective instruments must be interpreted in order to give an effective and legal boundary delimitation. Furthermore, Nigeria contends that other principles of delimitation must be taken into consideration as decided by the Chamber of this Court in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case. Hence, Nigeria is saying that historical consolidation and *effectivité* are all relevant factors that are to be taken into consideration in the interpretation of the delimitation of the Lake Chad Basin. Contrary to the decision of the Court, this *effectivité* will serve a corrective or amending role in this case by modification, adjustment and variation as the case may be in all the relevant places.

62. In other words, the position of Nigeria could simply be perceived thus: that despite the endorsement of all the relevant instruments and declarations in the early part of the twentieth century, movement of people within and around the Lake Chad area has never been static. In the absence of any conclusive and proper delimitation and demarcation in these places, settlements have been recognized by both Parties and this must be read into these instruments, if the same have to be interpreted in the year 2002, a period of well over 80 years. The Court must recognize the *status quo ante* in order to do justice and steer a path of peace and stability of relations in the region.

THE BAKASSI PENINSULA

63. As regards the Bakassi Peninsula (including the land boundary), the Court relies on

— the two agreements between Great Britain and Germany dated (11 March 1913 and 12 April 1913 respectively);

— the 1946 Order in Council;
— the Yaoundé Declaration of 14 August 1970;
— the Kano Agreement of September 1974;
— the Maroua Declaration of June 1975;
— the Yaoundé II Declaration of 4 April 1987;
— the League of Nations Mandate Agreements; and

— the United Nations Trusteeship Agreements.

64. In its Judgment, particularly in paragraph 325 III (A), (B) and (C), the Court fails to take into consideration the situation on the ground in the Bakassi Peninsula, despite the fact that no one is left in doubt that at the moment this territory, and indeed since independence, is occupied and firmly in possession of Nigeria and inhabited by Nigerian people; hence my reason for voting against the decision of the Court. This is an artificial decision that fails blatantly to take into consideration, contrary to all the accepted principles of international law and practice, that *effectivités* must invariably be given consideration in a matter of this nature. Furthermore, the Court fails to take into account the submission of Nigeria based on historical consolidation, which the Court now refers to as mere theory. It is my strong view that, if the principle of historical consolidation is a theory, it is one that the Court, over the years in its judgments (as will be shown later), has given its approval and support. The decision of the Court, in my view, is rather a political decision than a legal one.

65. Both Cameroon and Nigeria present very strong arguments over their respective claims to the Bakassi Peninsula and both urge the Court to "adjudge and declare" that sovereignty over the Bakassi Peninsula belongs to it. In its Application instituting the proceedings (para. 20 *(a)*), Cameroon asks the Court "to adjudge and declare: that sovereignty over the Peninsula of Bakassi is Cameroonian, by virtue of international law, and that that Peninsula is an integral part of the territory of Cameroon". In its pleadings, Nigeria requests the Court "as to the Bakassi Peninsula . . . to adjudge and declare that sovereignty over the Peninsula . . . is vested in the Republic of Nigeria" (Counter-Memorial of Nigeria, Vol. III, Submissions, p. 834).

66. Cameroon's case virtually stands on one leg, which it strongly presented, to the effect that what governs this claim is no other legal instrument than the Agreement of 11 March 1913 concluded between Great Britain and Germany. It considers the other leg of its argument, which is *uti possidetis juris* and *effectivité*, to be secondary and supportive of its main claim. Cameroon bases its view on what it perceives as the position of international law in relation to treaties, relying very heavily on the Judgment of the Chamber of the Court in the case of the *Frontier Dispute (Burkina Faso/Republic of Mali)*, particularly its paragraph 63

(*I.C.J. Reports 1986*, p. 586). Cameroon strongly contends that once it can lay claim to a legal title, then as title-holder, the Bakassi Peninsula is part of its territory. In particular, it relies mainly on Articles XVIII-XXII of the Agreement of 11 March 1913. Quite obviously, Cameroon's case is not strong on *effectivités* (which will be examined later), and hence it stands or falls mainly on its claim to legal title, which the Court, in my view, upholds, quite erroneously.

67. Nigeria rests its own case on four legs: first, it claims original title evidenced by the Treaty of 1884 between Great Britain and the Kings and Chiefs of Old Calabar; second, it relies very heavily on *effectivités*, which it overwhelmingly substantiates; third, it claims the long and uninterrupted occupation and administration of the Bakassi Peninsula, as indicating the pattern of "conduct and practice" of the Parties involving historical consolidation; and, fourth, Nigeria also claims title to the peninsula based on the acquiescence by Cameroon over many years.

68. The case presented by Cameroon to the Court is that the Agreement of 11 March 1913 between Great Britain and Germany is not only significant but that it is the Agreement that determined the boundary of the Bakassi Peninsula, ceding it to Germany. As far as Cameroon is concerned, it is the 1913 Agreement that ultimately determines the boundary although, according to Cameroon, there were a series of agreements before that date locating the boundary at the mouth of the Rio del Rey. These agreements are dated 29 April 1885, 27 July 1886, 1 July 1890 and 15 November 1893. Cameroon states further that the Agreement of 16 April 1901 is of considerable significance because it was the first time that the boundary was located on the Akwayafe River, thus placing the Bakassi Peninsula within German territory. Nigeria disagrees with this view and strongly denies that the 1901 Agreement ever changed the boundary from the Rio del Rey to the mouth of the Akwayafe. What counsel for Nigeria said during the oral proceedings about the 1901 Agreement is that:

> "Far from these propositions being accepted 'without hesitation', they call for the utmost hesitation. As a fact, the two Governments did not reach agreement on those matters. And in law, no mere proposals or reports, no agreements which have not entered into force, can be held to constitute an acknowledgment of, or agreement to, whatever it is that is being proposed. What the local officials in Nigeria and Cameroon may have agreed was, when referred back to these capitals, not approved by their Governments." (CR 2002/8 (Watts), p. 53, para. 62.)

69. It appears to me that Nigeria is right on this point, because, according to Cameroon's pleadings regarding the Protocol of the

Southern Nigeria-Cameroon Boundary Commission signed in April 1906, which was signed by Captain Woodroffe, the then British Commissioner and Captain Herrmann, the then German Commissioner, reference was made to the "*abortive* Moor-Puttkamer Agreement of 16 April 1901" (Memorial of Cameroon, Vol. I, pp. 69-70, para. 2.52).

70. It seems to me that, prima facie, both Parties recognize the significance of the Agreement of 11 March 1913. However, whereas Cameroon asserts that all 30 Articles should be given their full effect, Nigeria is asking the Court not to give any legal effect to Articles XVIII-XXII pertaining to the Bakassi Peninsula.

71. The reason why Nigeria is asking the Court not to enforce the provisions of Articles XVIII-XXII of the Agreement of 1913, is that it holds an original title, which it considers to be earlier in time and, for that matter, superior to the conventional title claimed by Cameroon on this part of the boundary. *Prior est tempore, prior est jure.* On the other hand, if the Court upholds the view of Cameroon regarding the effect of these Articles, as it does, then its effect would be that the Agreement of 1913 concerning the boundary along the Bakassi Peninsula is binding between Great Britain and Germany. However, the view of Nigeria is that whatever is the effect of those Articles, it cannot bind the Kings and Chiefs of Old Calabar and for that matter Nigeria, after independence.

72. Cameroon stated that Nigeria cannot pick and choose, and that if the Agreement is valid and binding, it must be so as a whole, and not truncated. Cameroon went further to state that the argument of Nigeria with regard to the five Articles in the 1913 Agreement cannot hold, because of the effect of the provisions of Articles 44, 60 and 62, paragraph 2 *(a)*, of the 1969 Vienna Convention on the Law of Treaties. Although the Court declines to deal with this issue, in my opinion I consider it important that all these Articles be examined and interpreted in relation to the 1913 Agreement. But before this exercise can be undertaken, I must refer briefly to the claim of Nigeria as regards its original title based on the Treaty of 10 September 1884 between the Kings and Chiefs of Old Calabar and Great Britain. The stand of Nigeria is that Great Britain, having signed a treaty of protection with the Kings and Chiefs of Old Calabar in 1884, was incapable of ceding the Bakassi Peninsula to Germany in 1913. Nigeria argues that Great Britain had neither the right nor the capacity to do so, that such transfer was invalid, null and void and that Great Britain was obviously in breach of its obligations to the Kings, Chiefs and people of Old Calabar which were merely to "protect" them, and not to alienate their land. *Nemo dat quod non habet.*

Severability of Articles XVIII-XXII of the 1913 Agreement

73. Article 62, paragraph 2 *(a)*, of the Vienna Convention on the Law of Treaties should be treated first. This paragraph reads: "A fundamental change of circumstance may not be invoked as a ground for terminating or withdrawing from a treaty." In my view, this provision is not appli-

cable to the request of Nigeria that these five Articles in the 1913 Agreement ought to be expunged. Nigeria is not asking for the withdrawal or termination of the Treaty. In fact, Nigeria's position regarding the 1913 Treaty can be divided into three.

74. First, Nigeria observes that there are certain anomalies, inaccuracies or defects in the Agreement that need to be "cured" by the Court through interpretation, but Nigeria does not say that these provisions, if considered relevant in another segment, may be rendered unenforceable or terminated.

75. Second, there is the sector of the boundary from Pillar 64 to Pillar 114, which both Nigeria and Cameroon accept as valid and which neither calls for withdrawal nor termination. However, Nigeria contends that the inherent defects in the five Articles in question render them unenforceable. Article 62, paragraph 2 *(a)*, refers to "fundamental change". This is not a case of fundamental change, but one of "fundamental defect" that cannot be cured because Great Britain was not only in breach of its obligations to the Kings and Chiefs of Old Calabar but also incapable of contracting any agreement of this nature, especially where the agreement negates its obligations under the 1884 Treaty.

76. Third, this act of Great Britain also translated into an act that it had no mandate to perform: *res inter alios acta alteri nocere non debet.*

77. Article 44 of the Vienna Convention needs also to be examined thoroughly in view of the opposing positions of the Parties. Its relevant part reads:

> "1. A right of a party, provided for in a treaty arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the Parties otherwise agree.
>
> 2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.
>
> 3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:
>
> *(a)* The said clauses are separable from the remainder of the treaty with regard to their application;
>
> *(b)* It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or Parties to be bound by the treaty as a whole; and

(c) Continued performance of the remainder of the treaty would not be unjust."

78. Because the Article refers to treaties arising under Article 56, it means that it is only relevant to treaties without denunciation, withdrawal or termination provision, as is the case in the Agreement in question. Therefore there is no doubt that this Article is very pertinent. Paragraph 1 of the Article deals with circumstances of denouncing, withdrawing or suspending the whole treaty. Since both Parties have expressed their position that the Agreement is applicable, at least in part, then this paragraph is inapplicable to the 1913 Agreement.

79. Therefore, the relevant paragraphs are paragraphs 2 and 3, because they deal with the conditions of separability. Although paragraph 2 mentions Article 60, this Article is also not relevant because it deals with cases of breaches, which is not the matter in this case. However, there are three conditions that could allow for separability.

80. The first condition pertains to cases where the clauses are separable. It is clear in the present case that the clauses we are dealing with in Articles XVIII-XXII, pertaining to the Bakassi Peninsula, are separable. The Articles dealing with Bakassi Peninsula are separate and independent in this sector, which has been so treated by Cameroon and Nigeria. Indeed, the Peninsula was the only independent sector filed in the first Application that relates to the Agreement of 11 March 1913.

81. The second condition is that acceptance of those clauses was not an "essential" basis of the consent of the other party. This cannot be because the Agreement determines a long stretch of the boundary between the European Powers. Although the negotiation resulting in the determination of this sector of the boundary took many years to conclude, because the Parties were undecided as to whether the boundary should be located east of the Rio del Rey or on the Akwayafe, the problem is one of location and there is nothing "essential" about the sector.

82. The third condition is that the continued performance of the remainder of the Agreement would not be unjust. Here the provision of the paragraph 3 *(c)* is unclear and to some extent vague. The question is, to whom would it be unjust? Is it to one of the Parties; or both Parties? The subparagraph ought to have been drafted in a more specific and elegant manner. However, whichever way we look at it, it may be sufficient to consider the use of the word unjust as referring to any of the two Parties. Here it is absolutely clear that invoking the provision of the five Articles would be unfair to Nigeria because it claims original title, and having regard to the fact that Great Britain could not give away the territory that it did not own and which it did not possess as a colony, either through conquest or treaty. Concluding this view, I see no reason what-

soever why Articles XVIII-XXII should not be separated from the remainder of the Articles which both Nigeria and Cameroon agree are generally enforceable and can be invoked to determine the remainder of the boundary in this sector.

83. The Court in its conclusions refuses to consider the arguments advanced by the Parties as to the severability (or non-severability) of some of the treaty provisions (para. 217 of the Judgment), i.e., whether Articles XVIII-XXII are severable or not from the remainder of the 1913 Agreement. This is an agreement with 30 Articles, of which Nigeria is urging the Court to separate these five Articles. As earlier stated, separating these Articles will not in any way prevent the remainder of the provisions from being implemented by way of delimitation of the boundary.

84. The remaining provisions of the Agreement are untouched by those expunged, since they are provisions standing on their own and their application and implementation are not dependent on the five Articles, thus, the remainder of the Articles can remain in force and binding on the Parties where necessary.

The 1884 Treaty

85. On 11 March 1913, Great Britain concluded an agreement with Germany apparently recognizing Germany's sovereignty over the Bakassi Peninsula. In my view, Great Britain had no authority to conclude such an agreement with either Germany or any other State after it had entered into a binding international treaty about 29 years before then, with the Kings and Chiefs of Old Calabar. As a matter of fact and law Great Britain was under an obligation not to enter into such an agreement with Germany; and such an act was a breach of agreement to which Great Britain was actionably liable in international law.

86. Firstly, the Bakassi Peninsula is part of the territory of the Efik and Efut peoples of the Old Calabar, having settled first in Creek Town and Duke Town, then extending to the entire Bakassi Peninsula.

87. Secondly, over the years, particularly after 1884, the British adopted extensive trading links with the Kings and Chiefs of Old Calabar. Counsel for Nigeria stated at the hearings that:

> "The political and legal personality of the Kings and Chiefs of Old Calabar were recognised in the treaty making of the British Crown. Thus, in the period 1823-1884 no fewer than *seventeen treaties* were made between the British Government and the Kings and Chiefs of Old Calabar." (Counter-Memorial of Nigeria, Vol. I, p. 71, para. 5.11; emphasis added.)

Thus, Great Britain in 1884 entered into a treaty of *protection* only with the Kings and Chiefs of Old Calabar.

88. Thirdly, Great Britain thus recognized the territory of the Kings

and Chiefs of Old Calabar including the Bakassi Peninsula as its protectorate but not as its colony, and dealt with the City States of Old Calabar as such *de facto* and *de jure* from 1884 till the time of independence of Nigeria in 1960. Great Britain throughout this period (and even after 1913) referred to the territory of the City States of Old Calabar as "Protectorate".

89. Fourthly, Great Britain (in many treaties with the Kings and Chiefs of Old Calabar and other European Powers such as Germany) recognized and treated the City States of Old Calabar including the peninsula of Bakassi as its area of influence only, which was indicatively and factually one of its African markets for commerce.

90. Fifthly, Great Britain at no time acquired sovereignty over the territory of the Kings, Chiefs and people of Old Calabar other than the obligation of protection. If the 1913 Agreement is considered valid and binding, *a fortiori* the prior Treaty of 1884 should be equally valid and binding — *pacta sunt servanda.*

91. Sixthly, the territory of the Kings and Chiefs of Old Calabar, which includes the Bakassi Peninsula, is not *terra nullius* and Great Britain had no mandate or authority at any time to transfer to Germany the territory of the City States of Old Calabar, thus the principle *nemo dat quod non habet.*

92. Seventhly, the 1884 Treaty, being a public international treaty, is deemed to be within the knowledge of Germany. Hence, Germany could not claim ignorance of the Treaty of Protection between Great Britain and the Kings and Chiefs of Old Calabar. Thus it is clear that Germany and for that matter Cameroon could not claim sovereignty over the Bakassi Peninsula.

93. The Court agrees with Cameroon in that it does not accept the submission of Nigeria that the City States of Old Calabar have international legal personality. As far as Cameroon is concerned, this is a myth or a kind of mirage. It argues that the City States of Old Calabar cannot claim any international legal entity separate from the State of Nigeria. During the oral proceedings counsel for Nigeria argued about the City States of Old Calabar thus: "These City States were the holders of an original historic title over the cities and their dependencies, and the Bakassi Peninsula was for long a dependency of Old Calabar." (Counter-Memorial of Nigeria, Vol. I, p. 67 para. 5.2.)

94. Although Cameroon accepts that "[w]ithout doubt, Efik trading took place over a vast area of what is now south-eastern Nigeria and western Cameroon" (Reply of Cameroon, Vol. I, p. 247, para. 5.24), yet it asserts that there were other ethnic groups in that area of the Bakassi Peninsula, which at that time showed a "complex pattern of human settlement" (*ibid.*, Vol. I, p. 247, para. 5.24).

95. In deciding whether the City States of Old Calabar is an international legal entity, one should look to the nature of the Treaty entered into between Great Britain and the Kings and Chiefs of Old Calabar in 1884. In the first place, this is not the first treaty of this kind signed by the Kings and Chiefs. As I have already mentioned, Great Britain signed altogether 17 treaties of this kind with the Kings and Chiefs of Old Calabar. Secondly, Great Britain referred to it not as a mere agreement, a declaration or exchange of Notes, but as a treaty — "Treaty with the Kings and Chiefs of Old Calabar, September 10, 1884" (Counter-Memorial of Nigeria, Vol. IV, Ann. 23, p. 109). How then could Great Britain sign a document, and call it a treaty if it were not so? It would have been described as an "ordinance" had it been a document involving a colony of Great Britain. There is therefore no doubt that the City States of Old Calabar have international legal personality.

96. Cameroon's contention regarding the territorial extent of the City States of Old Calabar is that Nigeria did not present a clear-cut picture, or the extent of the territory. In effect, this is how Cameroon puts it in its pleadings:

> "As regards the territorial questions, Nigeria wants to have it both ways. On the one hand, it states in its Counter-Memorial that Bakassi was situated 'within the domains of the Kings and Chiefs of Old Calabar' and, on the other, that 'the Efut country about the Rio del Rey" was covered by the declaration of the 'Kings and Chiefs of Efut' . . . Incidentally, it also maintains that the 1888 Treaty covered not only the region around Rio del Rey but also 'territory even further to the East' . . . It is regrettable that Nigeria has refrained from specifying the dividing line between the territory falling under the authority of 'Old Calabar' in accordance with its claim, and the territory belonging to Efut, and therefore pertaining to the Schedule to the Treaty as it interprets it." (Reply of Cameroon, Vol. I, p. 253, para. 5.45.)

In addition, Cameroon contends that Nigeria is not forthcoming about the nature and authority of Old Calabar and its title to the Bakassi Peninsula (*ibid.*, Vol. I, p. 254, para. 5.48). Further, it refers to the 1884 Treaty of Protection, which does not specifically mention the Bakassi Peninsula.

97. In my view, answers to all these queries are contained in the pleadings, particularly those filed by Nigeria. First, Nigeria referred to the works of many authors and what was said about the link of the City States of Old Calabar to the Bakassi Peninsula and the surrounding area. In this regard reference was made to the pre-colonial era in Bakassi. Mention was made of the establishment of these City States like Duke Town, Creek Town and Old Town (Obutong). A very vivid description

of the federation of these City States was given by Dr. Kannan K. Nair thus:

> "The political system of Calabar might be thought of as a federation or conglomeration of loosely-knit towns. Each town was a political unit with a territorial basis, its head having jurisdiction over his own town or house and representing the founding ancestors of his particular family. Each maintained its own administration and had the right to enforce sanction[s] on others. Both these factors point to the fact that each of the towns was recognized to be politically equivalent. The relations between the major towns — Duke Town, Creek Town and Old Town — were in the order of inter-town dealings. Thus, they were in their political relations similar to European nation states in the eighteenth and nineteenth centuries. Political power was ultimately resident in the segments rather than in a central government. (*Politics and Society in South Eastern Nigeria 1841-1906*, 1972, pp. 2-3)." (Counter-Memorial of Nigeria, Vol. I, p. 67, para. 5.1.)

Nigeria also refers to some historical link of the Kings and Chiefs of Old Calabar with the entire area of Bakassi as recorded in some of the books (already put in evidence) of authors like Captain J. B. Walker and E. O. Efiong-Fuller.

98. Further relevant evidence are the maps presented by Nigeria, which are annexed to its Counter-Memorial, particularly maps 13-22 in the Atlas. A careful study of map 13 shows that Old Calabar (otherwise called Cross River) covers the area where the Efiks and the Efuts had settled even before 1888. It clearly shows that their area of authority extends as far as the Rio del Rey, while indicating the boundary between Old Calabar and the German area of influence. The definition of the area under German influence was described by the independent Kings and Chiefs in the Agreement between Kings Akwa and Bell and Woermann and Jantzen & Thormahlen as follows,

> "the Country called Cameroons situated on the Cameroons River, between the River Bimba on the North side, the River Qua-Qua on the South side and up to 4° 10′ North lat. Hence, the extent of the area covered by 'Old Calabar' goes as far as the territory to the west of the area claimed by Kings Akwa and Bell. In other words, the entire area of Bakassi Peninsula is within the territorial domain of the City States of Old Calabar. This is illustrated in the map 'Old Calabar River'." (*Ibid.*, Atlas Map No. 27.)

99. Here I must stress the evidential value of these maps. Many of them date back to the seventeenth century and indicate clearly the extent of the territory of the Old Calabar people. In fact, the 1888 map of H. H. Johnson, then the Vice-Consul of Oil Rivers, of the Niger Delta,

indicates quite clearly that Old Calabar and the territory covered by the Efut people went beyond the Rio del Rey and far to the east of that estuary. It is fascinating to see these maps, many of which date from a period between 1662 and 1888 (i.e., 1662, 1750-1772, 1729, 1794, 1822, 1871, 1879 and 1888), distinctly depicting the territory occupied by the Efiks and Efuts and locating many of the important towns already mentioned. Map 18 of the Atlas Map of Nigeria's Counter-Memorial, prepared by H. H. Moll, indicates very clearly that it was the Rio del Rey that separates the territory of what he called "Kings City Callebar and Old Callebar" from "Afany Villages Old Camerones". During the oral proceedings it was argued by counsel for Nigeria (and undenied by Cameroon) that when the then British Consul, Mr. Hewett, was reporting about the 1884 Treaty to the British Foreign Secretary he said: "The Chiefs of Tom Shot country, *of Efut, the Country about the Rio del Rey* and of Indombi, the country about the River Rumby, made declarations that they were subject to Old Calabar." (CR 2002/8 (Watts), p. 45, para. 31.)

100. This is a statement emanating from the proper source, i.e., the person who directly signed the 1884 Treaty with the Kings and Chiefs of Old Calabar. The extent of the territory of the City States of Old Calabar is thus clear and definite to the extent that it runs to the mouth of the Rio del Rey. Equally there is later evidence in 1890 by the then British Consul, Johnston, that:

> "The trade and rule of the Old Calabar Chiefs extended, in 1887, considerably further to the east than the Ndian River . . . The left or eastern bank of the Akwayafe and the land between that river and the Ndian is under the rule of Asibon or Archibong Edem III, a big Chief of Old Calabar . . ." (*Ibid.*, p. 41, para. 13.)

Johnston concluded that the Old Calabar had withdrawn from the lands east of Ndian. Counsel for Nigeria stated that:

> "So Johnston's report was, in effect, that while the territory beyond the Ndian might only arguably be Old Calabar's, territory to the west belonged 'undoubtedly' to Old Calabar. Bakassi, and the Rio del Rey, are demonstrably to the west of the Ndian: Bakassi, Mr. President and Members of the Court, was part of Old Calabar's heartlands." (*Ibid.*, p. 41, para. 13.)

101. The view of Cameroon is that Nigeria's claim in terms of the extent of the territories of the Kings and Chiefs of Old Calabar is not clear, but Cameroon agrees with Nigeria that three separate groups of Kings and Chiefs of Old Calabar signed the Treaty of 10 September 1884. This is highlighted in the Treaty itself (Counter-Memorial of Nigeria, Vol. IV, Ann. 23).

102. Although Cameroon stated that the Bakassi Peninsula was not

specifically mentioned in the Treaty, it referred to the three Declarations of the Kings and Chiefs of Old Calabar that appended their signature to the Treaty. These are the Kings and Chiefs of Tom Shot, Efut and Idombi. Furthermore, Mr. E. H. Hewett, the then British Consul, who signed the Treaty of 1884 with the Kings and Chiefs of Old Calabar, attested to the fact that "[t]he Chiefs of Tom Shot country, of *Efut, the country about the Rio del Rey*, and of Idombi, the country about the River Rumby, made declarations that they were subject to Old Calabar" (Counter-Memorial of Nigeria, Vol. I, p. 94, para. 6.33).

103. In addition, the letter of Mr. Johnston, who took over as Consul from Mr. Hewett, was more revealing and quite explanatory. His letter of 23 October 1890 to the Foreign Office revealed that the extent of the rule of the Old Calabar Chiefs went as far as the base of the Cameroons and beyond the Akwayafe River. The trade and rule of the Kings and Chiefs of Old Calabar extended to the east of the Ndian River until Mr. Johnston advised the Chiefs to limit their claim to the Ndian River. Upon further advice, the Chiefs withdrew their claim for damages against the German Government for the destruction of their settlements, and it was obvious that they would not be prepared to yield over more territory in favour of the Germans.

104. The Kings and Chiefs of Old Calabar exercised control over their people through cultural, social and economic links. Many of the Kings and Chiefs were traders, and were served by many of their subjects. Cohesive control was ensured through the Ekpe Shrine. The main activity of the Kings and Chiefs was to secure the effective administration of justice, develop resources for their territories and ensure peace and security in their domains, with the co-operation and assistance of their people, and in partnership with the British Government.

* * *

105. As regards the territorial claim to the Bakassi Peninsula, it is the Treaty of 1884 that Nigeria relies upon essentially and preponderantly. It is the view of Nigeria that this Treaty, which is valid and binding, has the legal binding force and effect to render the provisions of the five Articles (i.e., Arts. XVIII-XXII) in the 1913 Agreement between Great Britain and Germany invalid and unenforceable against Nigeria. In other words, with the 1884 Treaty remaining valid until the time of independence, the five Articles mentioned above are not opposable to Nigeria. The Treaty of 1884 clearly confirms the Bakassi Peninsula as the territory of the Kings and Chiefs of Old Calabar, and at no time was it alienated to Great Britain or any other colonial Power.

106. The Court, in its Judgment, does not agree with Nigeria's claim

based on the Treaty between the Kings and Chiefs of Old Calabar and Great Britain of 10 September 1884, historical consolidation or *effectivité*.

107. Of all these instruments relied on by the Court, the earliest and perhaps the most important is the Anglo-German Agreement of 11 March 1913 and, in particular, its Articles XVIII-XXII that spell out the boundary within the Bakassi Peninsula. This is what Cameroon considers as its legal title. As against this claim, Nigeria pivots its claim partly on the Treaty of 10 September 1884 as an indication of its own original title, because it is this Treaty that demonstrates that the sovereign rights of the Kings and Chiefs of Old Calabar as an independent legal entity recognized under international law is indisputable.

108. In the Advisory Opinion on *Western Sahara* the Court explained that:

> "such agreements [such as this 1884 Treaty] with local rulers, whether or not considered as an actual 'cession' of the territory, were regarded as *derivative roots of title*, and not original titles obtained by occupation of *terrae nullius*" (*I.C.J. Reports 1975*, p. 39, para. 80; emphasis added).

This point on the international legal status of local rulers was amplified by Malcolm N. Shaw in his book *Title to Territory in Africa, International Legal Issues* thus:

> "it has been seen that practice demonstrates that the European colonisation of Africa was achieved in law not by virtue of the occupation of a terra nullius but by cession from local rulers. This means that such rulers were accepted as being capable in international law not only of holding title to territory, but of transferring it to other Parties." (P. 45.)

109. Although neither the Treaty of 1884 nor the Consular Reports suggest that it was concluded between two sovereign States, it can also be said that the Treaty or the Consular Report suggest nothing to the contrary. In fact, it appears to me that reference to the agreement as a treaty brings it into the international instruments realm. However, whatever may be considered as vitiating the Treaty of 1884 between Great Britain and the Kings and Chiefs of Old Calabar (and, in my view, there is none), would equally apply to the derivative root of title of Germany which it entered into with the local rulers of Cameroon also in 1884.

110. In view of the jurisprudence of the Court cited above, one important aspect which escapes the consideration of the Court in determining the nature, terms and validity of the 1884 Treaty is to compare it with what was contemporaneously happening in Cameroon around the same

time. In fact, the Court ought to trace the derivative root of title of Germany or what entitles it to enter into the 1913 Agreements with Great Britain. In other words, the Court is bound to ask what sovereign rights Germany had over the Cameroonian territory. Both Nigeria and Cameroon exhibit the relevant documents in their pleadings.

111. The claim to title by Germany emanates from at least four treaties involving the Kings, Chiefs and the rulers of Cameroon. They are:

— The Agreement with the Chiefs of Bimbia of 11 July 1884 (Counter-Memorial of Nigeria, Vol. IV, Ann. 17, p. 79);
— The German Proclamation of Protectorates on the West Coast of Africa of 12 July 1884 (*ibid.*, Ann. 18, p. 83);
— The Agreement between Kings Akwa and Bell and Woermann and Jantzen & Thormahlen of 12 July 1884 (*ibid.*, Ann. 19, p. 87); and

— The Agreement between Woermann and Jantzen & Thormahlen and Dr. Nachtigal, Consul-General and Imperial Commissioner for the Coast of West Africa of 13 July 1884 (*ibid.*, Ann. 20, p. 93).

112. These Treaties or Agreements including the Proclamation are important to the issue of title in this case. In the first place these Agreements trace the link between the rulers of Cameroon with German traders with whom they first entered into agreement to surrender sovereignty over their territory for consideration called "dash". These traders (Woermann, Jantzen, Thormahlen of Hamburg and Ed. Schmidt and Captain Johann) in turn passed their territorial title to Dr. Nachtigal, the then Consul-General and Imperial Commissioner for the Coast of West Africa. Hence, through this process Germany was able to proclaim Cameroon as its protectorate.

113. From the explanations given as regards these documents, certain indisputable facts now evolve. Contrary to the decision of the Court, the German Proclamation of 12 July 1884 did not mention a phrase like "colonial protectorate". The heading of the Proclamation reads "German Protectorate Togo Lands Cameroons, No. 212. — NOTES on German Protectorates on the West Coast of Africa". Some parts of this Proclamation of 12 July 1884 need to be quoted for emphasis:

"*Cameroons. Togoland. Slave Coast, &c.*

On the 12 July, 1884, a *German Protectorate* was *proclaimed over the whole of the Cameroons District*, and on the 15th October of the same year, the following official communication was made by the German Government to the principal Powers of Europe and to the United States Government, notifying the exact extent of territory on

the West and South-West Coasts of Africa *which had been placed under the protection of the German Empire*;—

Baron von Plessen to Earl Granville.

German Embassy, 15th October, 1884.

(Translation)

The Government of His Majesty the Emperor, *with a view to insure more effectually German commercial interests on the West Coast of Africa, has taken certain districts of this coast under its protection.* This has been effected in virtue of Treaties which have been in part concluded by Dr. Nachtigal, the Consul-General dispatched to West Africa, with independent Chiefs, and partly in virtue of applications *for protection* made by Imperial subjects, *who have acquired certain tracts by covenants with independent Chiefs.*" (Counter-Memorial of Nigeria, Vol. IV, Ann. 18, p. 83; emphasis added.)

114. Consequently, having regard to the content of the Proclamation referred to above, and within the intertemporal law of the period, it is clear that the derivative root of title claimable by Germany is in virtue of treaties which Dr. Nachtigal, the then German Consul-General entered into with "independent Chiefs" of Cameroon and partly in virtue of applications made on behalf of imperial subjects who have *acquired* certain *tracts* by *covenants* with independent Chiefs. It can therefore be clearly emphasized that the German derivative root of title emanated from its treaty with the Kings and Chiefs and the transfer of sovereignty by German subjects, the terms and conditions of which include consideration of *quid pro quo* on the basis of "dash" for territorial transfer to the Government of Germany. Germany was therefore in a position to say that these instruments enabled it to enter into the 1913 Agreement with Great Britain, as its derivative root of title.

115. What then is the derivative root of title of Great Britain? Great Britain cannot claim that its derivative root of title is based on the mere Treaty of Protection entered into with the Kings and Chiefs of Old Calabar. The Treaty did not transfer sovereignty from the Kings and Chiefs of Old Calabar to Great Britain. It is clearly a treaty of protection and no more. Contrary to Great Britain's intention about Lagos as a colony, it was not prepared to acquire any colony in the Old Calabar, and this I will refer to again later in my opinion. It can therefore be said that since there was no intention either by Kings, Chiefs and people of Old Calabar to transfer territorial sovereignty to Great Britain, sovereignty over the Old Calabar including Bakassi remained with the rulers and people of Old Calabar.

116. The issue now is what is the legal effect and legal significance of this Treaty of 1884 between Great Britain and the Kings and Chiefs of Old Calabar? First to be considered is whether this instrument is a treaty

properly so called. Unhesitatingly, my view is that it is a valid and binding international treaty, according to its form and text.

117. Before examining the Treaty itself, it must be borne in mind that each treaty, like any given case, must be interpreted according to its terms and conditions. In the Advisory Opinion of the Permanent Court of International Justice in the case of *Nationality Decrees Issued in Tunis and Morocco*, the Court observed:

> "The extent of the powers of a protecting State in the territory of a protected State depends, first, upon the Treaties between the protecting State and the protected State establishing the Protectorate . . . In spite of common features possessed by Protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development." (*Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, p. 27.)

Intrinsically, the instrument is described as a treaty in its title as "Treaty with Kings and Chiefs of Old Calabar, September 10, 1884" (Counter-Memorial of Nigeria, Vol. IV, Ann. 23, p. 107). Again in its provision on its operative date, the instrument starts: "This *Treaty* shall come into operation . . ." (*Ibid.*, Vol. IV, Ann. 23, p. 111; emphasis added.)

118. In the Treaty, there is clear evidence that it was based on an understanding of *quid pro quo*. While Great Britain agreed to protect the City States of Old Calabar, the Kings and Chiefs in turn agreed to protect British merchant ships "wrecked within the Old Calabar territories, the Kings and Chiefs will give them all the *assistance* in their power, will secure them from plunder . . ." (*ibid.*, Vol. IV, Ann. 23, p. 155; emphasis added).

119. The legal force and legal significance of the Treaty of 10 September 1884 is therefore as follows:

(a) the Treaty was valid and binding between Great Britain and the Kings and Chiefs of Old Calabar — *pacta sunt servanda*;

(b) the territorial extent of the land of the Kings and Chiefs of Old Calabar as City States of Old Calabar was well known and clearly defined by descriptions and map illustrations attached to the Nigerian Counter-Memorial and Rejoinder;

(c) having signed this Agreement with the Kings and Chiefs of Old Calabar, Great Britain was under obligation to protect Old Calabar territories and did not acquire sovereignty over the territories of the Kings and Chiefs of Old Calabar;

(d) for Great Britain to enter into an agreement in 1913 with Germany amounted to a serious breach of its international obligation against

the territorial rights of the Kings and Chiefs of Old Calabar;

(e) Great Britain could not give away what did not belong to it. The *Island of Palmas* case is an illustrative example. Just as the United States had no sovereignty over the Island of Palmas, ceded to it by Spain, so it is that Germany could not claim any conventional title over the Bakassi Peninsula. Max Huber, in the Arbitration Award states: "It is evident that Spain could not transfer more rights than she herself possessed." (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. II, p. 842.) Huber further adds that: "It is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers" *(ibid.)*;

(f) as already indicated, there is no doubt that the Kings and Chiefs of Old Calabar have legal personality in international law.

120. The *Western Sahara* Advisory Opinion of 1975 is a glaring example on this issue. The international personality was clearly demonstrated over the territories of the Kings and Chiefs of Old Calabar when they rejected certain provisions in the draft Treaty of 1884, particularly Article VI which guarantees free trade in every part of their territory. Thus, the 1913 Agreement did not deprive the Kings and Chiefs of Old Calabar of sovereignty over their territory and the right to this sovereignty continued till the time of Nigeria's independence in 1960. It is highly undesirable to create any distinction between the situation in the *Western Sahara* case (*I.C.J. Reports 1975*) and the present case, simply because one is in north Africa and the other in sub-Saharan Africa.

121. Consequently, and to the extent that the 1913 Agreement ceded Bakassi Peninsula to Germany, Nigeria argued in its pleadings that this:

> "would be *against* the nature and terms of Great Britain's 1884 Treaty of Protection with Old Calabar, *against* the interests of the inhabitants, *against* the financial interests of the title holders of Old Calabar who should have been compensated, *against* the recognised westward limit of the German Protectorate, *against* earlier undertakings by Germany to respect the Rio del Rey as the boundary and to make no acquisitions to the west of it, and *against* Germany's acknowledgement and understanding that the Treaty was not concerned with the acquisition or cession of territory" (Counter-Memorial of Nigeria, Vol. 1, p. 170, para. 8.52).

122. While Cameroon contends that the difference between a protectorate, protected State or colony is rather blurred, and that either is

tantamount to a colony in effect, Nigeria strongly disagrees with this view and gave many reasons. On the part of Cameroon, the misunderstanding in the use of the words protectorate or protected States or colony is quite understandable. The Agreement between the Kings of Akwa and Bell on the one hand and Woermann and others on the other hand, dated 12 July 1884, although referred to as an Agreement for Protection was in fact a surrender of sovereignty which in effect means that Cameroon from that date became a colony of Germany. The same is true of the other Agreement with the Chief of Bimbia of 11 July 1884. But this muddled concept is alien to the British system of administration.

123. In 1883 (a year before the 1884 Treaty) Sir Edward Hertslet, the then librarian of the British Foreign Office and an expert in international law, defined a protectorate thus:

> "A Protectorate implies an obligation on the part of a powerful State to protect and defend a weaker State against its enemies, in all, or specified eventualities . . . The usual form of establishing a Protectorate is by the conclusion of a treaty, either between the more powerful State which has undertaken to defend or protect the weaker one, and the weaker state itself, or between the protecting Power and other Powers, relating to such protection . . ." (Counter-Memorial of Nigeria, Vol. I, p. 102, para. 6.46.)

124. In fact at this period, the 1880s, the foreign policy of Great Britain was not to create or acquire more colonies but rather to enter into treaties of protection:

> "Lord Granville [Secretary of State for Foreign Affairs] will remember that it was recommended by the Committee of the Cabinet which considered the question that there should be no attempt at present to create a new British Colony or Settlement, with all the necessarily expensive machinery of government, but that the districts to be taken over should continue for the present under such control and supervision as the Consul for the Bights of Benin and Biafra can exercise by means of visits paid frequently as circumstances may permit . . ." (*Ibid.*, Vol. I, p. 103, para. 6.48.)

125. One of the English Judges in 1910 defined "Protectorate" thus: "The protected country remains in regard to the protecting State a foreign country . . ." (*Ibid.*, Vol. I, p. 122, para. 6.81.)

126. Thus, protectorates are neither colonial protectorates nor colonies. Protectorates are to all intent and purposes international legal personalities and remain independent States and they are not "colonial protectorates" of the protecting Powers. Therefore, after the Treaty of 1884, the City States of Old Calabar and their territories were simply protec-

torates of Great Britain. Before and after 1913 these City States of Old Calabar remained independent protectorates. There is nothing from the actions and instruments during this period which could describe the Old Calabar including Bakassi and other areas being claimed by the Kings and Chiefs, as a colony of Great Britain, nor is there anything in the Treaty indicating that Old Calabar, including Bakassi, acquired the status of a colonial protectorate. Even Great Britain did not describe the territory as such and this cannot be done by any inference. In line with the provision of Article 31 of the 1969 Vienna Convention on the Law of Treaties and having regard to customary international law, the ordinary meaning to be given to the word "protectorate" is protectorate and not colonial protectorate. Great Britain at no time possessed territorial control or sovereignty over them. As far as Great Britain was concerned they were foreign countries and they were so treated by the British Foreign Office. Great Britain was therefore under a strict legal obligation to protect the rights of the Kings and Chiefs of Old Calabar in international law and not to transfer their territorial sovereignty to another State without their knowledge and consent.

Historical Consolidation and Effectivités *in Bakassi*

127. Historical consolidation is Nigeria's strong point in its claim to the territory of the Bakassi Peninsula. This claim is based on the original title of the Kings and Chiefs of Old Calabar that has existed for a long time and as evidenced by the Treaty of 1884 with Great Britain. The Bakassi Peninsula has over the years been in physical possession and occupation of the Kings and Chiefs of Old Calabar since they settled there in the seventeenth century. They were in peaceful occupation throughout that period till 1884 and up until the time of the Agreement between Great Britain and Germany in 1913. This right of sovereignty over all these territories coupled with possession continued during the period of the Mandate of the League of Nations as well as the period of Trusteeship till the time of independence. Nothing therefore affected their territorial rights and occupation of the same, even after the Agreement of 1913. The Kings and Chiefs of Old Calabar were not parties to the 1913 Agreement nor were they consulted.

The constant questions which counsel for Nigeria asked throughout the oral proceedings and which the Court fails to address or answer in its Judgment are: who gave Great Britain the right to give away Bakassi? And when? And how?

128. Whatever may be the legal status of the 1913 Agreement, it has no binding force over and above the original title, or the basic possessory

rights of the Kings and Chiefs of Old Calabar, and thus they are not affected by it.

129. Cameroon raises a number of objections to Nigeria's claim to historical title. These objections centred on the issues of *effectivités*, stability of frontier and acquiescence. However, these objections cannot defeat the claim to historical title by Nigeria.

130. Nigeria has four bases of claim to original title which are as follows:

(a) long occupation by Nigeria and by Nigerian nationals constituting an historical consolidation of title and confirming the original title of the Kings and Chiefs of Old Calabar which title vested in Nigeria at the time of Independence in 1960;
(b) effective administration by Nigeria, acting as sovereign, and an absence of protest;
(c) manifestations of sovereignty by Nigeria together with the acquiescence by Cameroon in Nigerian sovereignty over the Bakassi Peninsula;
(d) recognition of Nigerian sovereignty by Cameroon (Counter-Memorial of Nigeria, Vol. I, p. 211, para. 10.2).

* * *

131. Since the original title of the City States of Old Calabar rests with the Kings, Chiefs and people of Calabar with all the rights over their territories, this remained so until the time of independence of Nigeria on 1 October 1960.

132. It must be borne in mind at all times that a legal title boundary can be shifted, modified or adjusted to give room for the practice and conduct of the inhabitants on the ground along such a boundary in accordance with Article 31, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties.

133. Furthermore, Nigeria claims that by virtue of its original title based on its historical consolidation, its rights to the Bakassi Peninsula survive to the time of the 1913 Agreement and beyond. It claims that:

(a) in and before 1913 the Kings and Chiefs of Old Calabar possessed sovereignty over the Bakassi Peninsula; and
(b) the Anglo-German Agreement of 11 March 1913, in so far as it purported to transfer to Germany a territorial title which Great Britain did not possess and which it had no power or authority to transfer, did not transfer territorial sovereignty over Bakassi to Germany. The *status quo ante* was undisturbed, and title accordingly remained

vested in the Kings and Chiefs of Old Calabar (Counter-Memorial of Nigeria, Vol. I, p. 203, para. 9.73).

134. The Court denies Nigeria's claim to the Bakassi Peninsula based on its argument of historic consolidation (para. 220 of the Judgment). The claim of Nigeria based on historical consolidation is not its invention and it is far from being a mere theory. Jurisprudentially, historical consolidation evolves from one of the early cases of the Court. In the *Fisheries* (*United Kingdom* v. *Norway)* case of 1951 the Court decided that against all other States, Norway had title to the territorial sea that she delimited by a system of straight baselines since 1869. The evolution of this principle is fundamentally based on toleration. For many years many States, including the United Kingdom, have come to recognize the "title" to this territorial sea as claimed by Norway. In the presentation of its submission, Norway referred to an "historic title" by saying that history was invoked together with other factors to justify her exceptional rights to this particular area of the sea. The United Kingdom raised certain contradictions and uncertainties discovered in the general Norwegian practice. The Court considered that too much importance or emphasis need not be attached to these contradictions. The Court therefore decided:

> "In the light of these considerations, and in the absence of convincing evidence to the contrary, the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose.
>
> . . . . . .
>
> The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it." (*I.C.J. Reports 1951,* p. 138.)

The case that follows in the footsteps of the *Fisheries* case is the *Minquiers and Ecrehos* case of 1953, where the Court observed that:

> "Both Parties contend that they have respectively an ancient or original title to the Ecrehos and the Minquiers, and that their title has always been maintained and was never lost. The present case does not therefore present the characteristics of a dispute concerning the acquisition of sovereignty over *terra nullius.*" (*I.C.J. Reports 1953*, p. 53.)

The Court then went on to decide that: "What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from

events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups." (*I.C.J. Reports 1953*, p. 57.)

135. This principle has evolved over the years, side by side with *effectivités*, that a territory that is not *terra nullius*, occupied by inhabitants, over many years with open claim of territorial sovereignty over the territory, undisturbed, uninterrupted and without any hindrance whatsoever, becomes a matter of recognition under international law in the name of historical consolidation. A long list of distinguished jurists and writers on international law including Charles De Visscher, Sir Robert Jennings and Professor George Schwarzenberger have lent their support to this principle.

136. Apart from the case of *Minquiers and Ecrehos* and the subsequent case of the *Western Sahara* Advisory Opinion, the Judgment of the Chamber in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* also supported this principle thus: "In the first place, it should not be overlooked that Spanish colonial divisions in Spanish America did not individually have any 'original' or 'historic' titles, as those concepts are understood in international law." (*I.C.J. Reports 1992*, p. 565, para. 345.) The Judgment went on to state:

> "Where the relevant administrative boundary was ill-defined or its position disputed, in the view of the Chamber the behaviour of the two newly independent States in the years following independence may well serve as a guide to where the boundary was, either in their shared view, or in the view acted on by one and acquiesced in by the other . . . This aspect of the matter is of particular importance in relation to the status of the islands, by reason of their history." *(Ibid.)*

137. Whilst referring to cases, reference should also be made to the development of this principle even when it conflicts with conventional or legal title, since the Court takes the view that invocation of the doctrine of consolidation of historic titles cannot vest title to Bakassi in Nigeria, "where its 'occupation' of the peninsula is adverse to Cameroon's prior treaty title" (para. 220 of the Judgment). The case in view is the *Frontier Dispute (Burkina Faso/Republic of Mali)* case. Much reliance has been placed on this case by Cameroon, particularly paragraph 63 thereof, which incidentally has been cited in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* case in 1992. The clear indication in the present case is that while giving due recognition to legal title, the City States of Old Calabar's *effectivités* on the ground, the toponomy of Bakassi, the administration of Bakassi as part of Nigeria in the period 1913-1960, exercise of authority by traditional rulers, acts of administration by Nigeria after independence in 1960

involving *effectivités* and peaceful administration, maintenance of public order and investigation of crimes, granting of oil exploration rights, public health, public education, participation in parliamentary elections, collection of custom duties, use of Nigerian passports by residents of the Bakassi Peninsula, and even evidence of Nigerian internal State rivalry over Bakassi, give the original title of Nigeria a preference. All these are catalogued and documented with a compendium of annexes as "fulfilment materials" to demonstrate beyond doubt the claim of Nigeria over Bakassi by historical consolidation. Cameroon did not deny most of these claims by Nigeria but all that it relies on is the conventional title based on the Agreement of 11 May 1913, which the Court accepts.

* * *

138. What was the relevance of German *effectivités* after 1913? For Germany to have set up effective administration in the Bakassi Peninsula between 11 March 1913 and August 1914, when World War I broke out, would have been, at least, of tacit significance because it would clearly indicate Germany's occupation of the territories claimed by the Kings and Chiefs of Old Calabar. In addition, it would have tested the ground as to whether such occupation would be accepted by the Kings, Chiefs and people of Old Calabar in the Bakassi Peninsula. This in turn would have served as a manifestation of Germany's claim of sovereignty. Presumably, that would have created an incident or even a revolt. For example in 1913, the same year in which the Agreement was concluded, the Kings and Chiefs of Old Calabar protested vigorously, both in Calabar and in London, against an apparent proposal by the British Government to amend the land tenure system which was then applicable in that area. The protest was so pronounced that it was debated in the British Parliament at that time, and the British Government denied entertaining such a proposal. Cameroon did not deny the fact that there was no *effectivités* on the ground by Germany between 1913 and 1914. After the war, there was still no evidence of *effectivités*, even when Britain, France and Belgium occupied the then German colonies and protectorates. Much of Cameroon's response to Nigeria's position on this point has nothing to do with *effectivité*. Instead, Cameroon contents itself with dealing with the non-ratification of the 1913 Agreement, both nationally and internationally.

* * *

139. The League of Nations came into existence after World War I, and as a result, the southern part of Cameroon was placed under the administration of Great Britain, based on a mandate agreement. After World War II, in 1945, Southern Cameroon came under the Trusteeship of Great Britain. France was entrusted with the administration of Cameroon during the Mandate and Trusteeship period. Cameroon's argument is that the situation of the administered territories changed during the Mandate and Trusteeship period, because Great Britain and France were under strict directives of the League of Nations (after 1919) and United Nations (after 1946) to adhere to the agreements entered into, concerning both the northern and southern Cameroons.

140. Cameroon contends that these administered territories were defined by the 1919 and 1931 instruments, and that the Administering Powers were unable to alter the boundaries without the consent of the League of Nations and subsequently the United Nations, who through their appointed committees constantly monitored the administration of the territories as assigned to the Administering Powers. Thus, Cameroon argues that these acts confirm the boundaries as already recognized.

141. Nigeria does not deny some of these historical facts. The point made by Nigeria in substance is that all this did not affect the territorial rights of the Kings and Chiefs of Old Calabar, and neither did it affect the rights of the Republic of Nigeria later in 1960. Much of the activities of the Council and the United Nations Fourth Committee did not go beyond the presentation of proposals, discussion about the possibility of delimitation and demarcation and obtaining reports about the administration of these territories (CR 2002/4 (Ntamark), p. 21, para. 13). However, counsel for Cameroon explained that,

> "on a number of occasions, the Committee concerned itself with proposals of a relatively minor nature to adjust the line so as to respect ethnic groupings. Of course, one cannot exaggerate the efforts made and all took place within the possibility reserved in the mandate instruments for minor modifications." (*Ibid.*, p. 20, para. 10.)

Could these adjustments and modifications "so as to respect ethnic groupings" relate to the Bakassi Peninsula?

142. It is remarkable, that both the instruments of the Mandate and Trusteeship touched on the need for adjustments and modifications to the boundary "in the interest of the inhabitants" (Counter-Memorial of Nigeria, Vol. V, Anns. 51 and 56). Coincidentally, this need for adjustments and modifications was mentioned in Articles I of both the Mandate and the Trusteeship instruments. Did they have the problem

of the Bakassi Peninsula in mind? As mentioned earlier, the Court, in its Judgment, fails to give effect to these concerns, which still subsist till today, unresolved.

143. The consistent view of Nigeria, as expressed in its pleadings, is that at all times, during the period of the Mandate and Trusteeship, the Bakassi Peninsula remained the territory of the Kings, Chiefs and people of Old Calabar and after 1960 it became part of Nigeria till this day:

> "In fact, the overall pattern of Nigerian and British official conduct in relation to the Bakassi Peninsula has been remarkably consistent for over a century. *Whether as originally part of the domains of the Kings and Chiefs of Old Calabar, or subsequently as part of their domains but subject to rights of Great Britain under the Protectorate Treaty of 1884, or during the Mandate and Trusteeship periods up to the time of independence in 1960, Bakassi has consistently been administered from Nigeria and as part of the Nigerian political entity.*" (Reply of Nigeria, Vol. I, p. 66, para. 2.27; emphasis added.)

144. Nigeria further argues that while there may be differences in principle between Mandate and Trusteeship on the one hand, and administration and protectorate on the other, there is no difference as such on the ground and in practice. In effect these changes have no effect on Nigeria's claim to historical title or *effectivité*. Nigeria explains this position thus:

> "In the event, after World War I the whole of the mandated territory of the British Cameroons came to be administered as part of the Nigeria Protectorate, so that the distinction between mandated and protectorate territory, while acknowledged in principle, had virtually no practical significance for the people of Bakassi and Calabar. There was no practical day-to-day need for the British of local administration to distinguish between what might have been former German territory and what was British protected Nigerian territory." (Counter-Memorial of Nigeria, Vol. I, p. 182, para. 9.11.)

Moreover, "[t]here was in any event no question of non-British rule, and no question of putting an end to the traditional authority of the Kings and Chiefs of Old Calabar" (*ibid.*, Vol. I, p. 182, para. 9.12) and "[e]ffective authority continued to be exercised by the traditional source of power and authority in the Peninsula, namely by the Kings and Chiefs of Old Calabar" *(ibid.)*.

145. In my view, and contrary to the Court's decision, the argument of Nigeria, which in effect is based on its historical consolidation and *effec-*

tivités, is sound, having regard to all the comments I have made earlier. Counsel for Nigeria at the hearings summarized its arguments thus:

> "Britain itself, of course, as a party to the 1913 Treaty, was likely to act on the assumption that that Treaty had determined the boundary between the Protectorate and what was to be the British Cameroons. But assumption, or belief, is not a basis for legal title; no amount of British believing that Bakassi was in British Cameroons would be enough to make it so in law; no amount of mistaken belief could retrospectively make good Great Britain's lack of authority to give away Bakassi; no amount of mistaken belief could give Britain a power which the Treaty of Protection had clearly not given it. *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. This applies whether they were acts of bureaucracy, or of local administration, or of government, or of legislation (such as the Governor's Northern Region, Western Region and Eastern Region (Definition of Boundaries) Proclamation, 1954 . . . For at all these times, one has still to answer the crucial question: Who conferred on Great Britain the authority to give away Bakassi? And when? And how?" (CR 2002/8 (Watts), p. 64, para. 109.)

The Question of Legal Title

146. The issue of title looms very large in this case as both Parties claim one form of title or the other. Reference has been made to it with different descriptions, i.e., legal title, original title, conventional title and historical title. In its presentation Cameroon claims sovereignty to the Bakassi Peninsula, alleging that its right to sovereignty with regard to the territory is its legal title derived, *inter alia*, from the Agreement of 11 March 1913 between Great Britain and Germany. On its part, Nigeria claims to hold original or historical title, partly evidenced by the Treaty of 10 September 1884 between the Kings and Chiefs of Old Calabar and Great Britain. The question here is that of the meaning of title in the context of this case and in international law. Cameroon tries to persuade the Court to hold that the only meaning attributable to the word is a conventional or legal title. The Court agrees with this. It appears to me that "title" bears a broader meaning than that and ought to be interpreted not necessarily or solely as documentary title but as the rights that a party holds in relation to a territory. This, to my mind, includes not only legal title but also possessory title.

147. In the case concerning the *Land, Island and Maritime Frontier*

Dispute (El Salvador/Honduras: Nicaragua intervening) the Chamber of the Court examined this issue of the meaning of title and defined it thus:

> "The term 'title' has in fact been used at times in these proceedings in such a way as to leave unclear which of several possible meanings is to be attached to it; some basic distinctions may therefore perhaps be usefully stated. As the Chamber in the *Frontier Dispute* case observed, *the word 'title' is generally not limited to documentary evidence alone, but comprehends 'both any evidence which may establish the existence of a right, and the actual source of that right'* (*I.C.J. Reports 1986*, p. 564, para. 18)." (*I.C.J. Reports 1992*, p. 388, para. 45; emphasis added.)

148. Furthermore in the same *Frontier Dispute (Burkina Faso/Republic of Mali)* case, the Court elaborated on the use of the words legal title and *effectivité* thus:

> "The Chamber also feels obliged to dispel a misunderstanding which might arise from this distinction between 'delimitation disputes' and 'disputes as to attribution of territory'. One of the effects of this distinction is to contrast 'legal titles' and *'effectivités'*. In this context, the term 'legal title' appears to denote documentary evidence alone. *It is hardly necessary to recall that this is not the only accepted meaning of the word 'title'*. Indeed, the Parties have used this word in different senses." (*I.C.J. Reports 1986*, p. 564, para. 18; emphasis added.)

149. In effect, it appears that the term "title" or even "legal title" should be given its broad and liberal meaning to include not only the strict documentary evidence, but also other evidence that could establish the legal rights of the Parties.

150. The Court, whilst giving Judgment in favour of Cameroon, based on its so-called legal title, dismisses the claim of Nigeria based on *effectivités* as *effectivités contra legem*, despite the long occupation and administration of the territory by Nigeria. In so deciding, the Court bases its decision on its jurisprudence in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case. Once again, and with due deference, it is my strong view that the Court failed to apply the full *ratio decidendi* of that case, the relevant part of which is in paragraph 63, which pronounces that:

> "*The role played in this case by such* effectivités *is complex, and the Chamber will have to weigh carefully the legal force of these in each particular instance*. It must however state forthwith, in general terms, what legal relationship exists between such acts and the titles on which the implementation of the principle of *uti possidetis* is grounded. For this purpose, a distinction must be drawn among several eventualities. *Where the act corresponds exactly to law, where*

effective administration is additional to the uti possidetis juris, *the only role of* effectivité *is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the* effectivité *does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The* effectivités *can then play an essential role in showing how the title is interpreted in practice.*" (*I.C.J. Reports 1986*, pp. 586-587, para. 63; emphasis added.)

151. The relevant paragraph quoted above spells out the relationship between *effectivité* and legal title. The Court, whilst basing its decision on this particular paragraph of its jurisprudence, ought to explain and apply its text fully. The Court cannot apply one part of it and exclude the other. This was the grave omission made by Cameroon whilst interpreting the paragraph in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case. Cameroon argues through its counsel, Professor Maurice Mendelson, in a *peculiar* way thus:

"The reason for my discomfort is to be found in the Chamber's lapidary explanation of the role of *effectivités* in the case of the *Frontier Dispute (Burkina Faso/Republic of Mali)*, the pertinent part of which, as you know, begins as follows: 'Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title.' Pausing there, this is precisely Cameroon's situation: having a good title, any evidence of *effectivités* that it adduces are merely confirmatory. In our submission, on the other hand, Nigeria falls squarely within the second sentence: 'Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title.' That being so, logically, there is little more to be said. Hence my mild embarrassment at addressing you on this subject." (CR 2002/4 (Mendelson), p. 35, para. 1.)

152. Obviously, the learned counsel for Cameroon has chosen to comment on the first part of this paragraph leaving the subsequent paragraphs unexplained. However, the subsequent paragraphs clarify the position of *effectivité*:

"*In the event that the* effectivité *does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are*

cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The effectivités *can then play an essential role in showing how the title is interpreted in practice.*" (*I.C.J. Reports 1986*, p. 587, para. 63; emphasis added.)

153. Was the Court misled? There is no doubt that according to paragraph 63 preference ought to be given to the "holder of the title". But with due deference, this does not mean that the holder of the title is absolutely entitled to sovereignty over the territory. All it indicates is that it should have preference, but this preference is not absolute. It leaves an equally legal right which the Court must grant to the party with *effectivités*. As explained in the final part of the above paragraph, "*[i]n the event that the* effectivité *does not co-exist with any legal title, it must invariably be taken into consideration*". That is the consideration that the Court must invariably give to *effectivités* in this regard. On a careful examination of the situation in the Bakassi Peninsula, the Court cannot rely on this authority to decide that the claim of a title-holder is exclusive and absolute.. The Court must take cognizance of the fact that Nigerians have settled in Bakassi from time immemorial, that they owe allegiance to their Kings and Chiefs, and that they have settled administration and other civil activities as Nigerians there.

154. The Court, in paragraph 222 of its Judgment, enumerates Nigeria's territorial activities and acts of public and social administration in Bakassi. Mention is made of activities dating back to 1959, that is, before Nigeria obtained its independence. The Court also accepts that Nigeria confirms many of these activities in Bakassi with supporting evidence and "in considerable detail" (para. 222 of the Judgment). The Court also agrees with Nigeria that "[n]or is there any reason to doubt the Efik and Effiat toponomy of the settlements, or their relationships with Nigeria" (para. 221). Furthermore, the Court accepts as true the fact that the provision of "education in the Bakassi settlements appear to be largely Nigerian" (para. 222). It is for all these reasons that the Court ought to find in favour of Nigeria based on historical consolidation and *effectivités*.

MARITIME DELIMITATION

155. Cameroon claims that the maritime boundary should start from the mouth of the Akwayafe, in reliance on its claim of a conventional title, based on the Agreement of 11 March 1913 coupled with map TSGS 2240 annexed thereto. On the other hand, Nigeria argues that the delimitation should start from the mouth of the Rio del Rey, based

on its historical consolidation. Having carefully weighed the arguments of both Parties, my view runs contrary to the decision of the Court: the maritime delimitation should start from the mouth of the Rio del Rey, hence I voted against the decision of the Court in paragraph 325 IV (B) of the Judgment.

156. Then there is the dispute as to whether any maritime delimitation has already been carried out by the Parties.

157. The maritime boundary can be divided into two sectors: the first, the delimitation up to point "G" and the second, after point "G" which, according to the Parties, remains undelimited. The Agreements to which the Court attributes the delimitation are: the Anglo-German Agreement of 11 March 1913; the Cameroon-Nigeria Agreement of 4 April 1971, comprising the Yaoundé II Declaration and the appended British Admiralty Chart 3433; and the Cameroon-Nigeria Agreement of 11 June 1975 (the Maroua Declaration).

158. Cameroon claims that the adopted line was a "compromise line" that arose out of the work of the Joint Commission set up to do the same. Therefore, Cameroon argues that the first segment of the maritime boundary from the mouth of the Akwayafe to point 12 was fixed on the basis of a compromise line.

159. Nigeria expresses its position very clearly — with which I agree — that it is not bound by these Declarations. The language of the Yaoundé II meeting made it explicit that the meeting formed part of ongoing sessions of meetings on the maritime boundary, subject to further discussions at the subsequent meetings. This intention is confirmed by the text of the contemporaneous Joint Communiqué, and by the internal Nigerian Brief on the then forthcoming meeting of 20 May 1975. Nigeria's position after the Yaoundé II meeting was further elucidated in the letter of 23 August 1974 from General Gowon of Nigeria to President Ahidjo of Cameroon.

The Maroua Declaration

160. Cameroon claims that the Declaration of Maroua is one of three international legal instruments that delimit the course of the first sector of the maritime boundary. Cameroon argues that the prolongation of the maritime boundary southwards from point 12 to point G was agreed when the two Heads of State "reached full agreement on the exact course of the maritime boundary".

161. Cameroon further explains that the explicit objective of the Agreement was to extend the delimitation of the maritime boundary line between the two countries, from point 12 to point G as evidenced in the Joint Communiqué, signed by the two Heads of State (CR 2002/6 (Tomuschat), p. 18, para. 1). In reply, Nigeria's primary contention is that it is not bound by the Maroua Declaration. The Declaration, along with preceding negotiations at the time formed part of ongoing sessions of meet-

ings on the maritime boundary, subject to further discussions at subsequent meetings.

162. For the Declarations to have become binding, the Military Administration Legislation of 1966 and 1967 required the publication of any decree made by the Military Council, in the Federal Gazette. This was not the case in this instance. Under the 1963 Constitution in force at the time, General Gowon did not have the power to commit his Government without the approval of the Supreme Military Council, which constituted the executive authority and Government of Nigeria. Thus, Nigeria concludes, the President of Cameroon is deemed to be aware of the constraints under which General Gowon was exercising his authority. Nigeria cites the letter sent by General Gowon to President Ahidjo on 23 August 1974 (Reply of Nigeria, Vol. IV, Ann. 2).

> "In paragraph three of the letter, General Gowon informed President Ahidjo:
>
> > 'You will recall, Mr. President, that the important question of demarcating the borders between our two countries was discussed at length during our meeting in Garoua. I still believe that the function of the joint commission of experts established to delineate the international boundary between our two countries, was to make recommendations on the basis of their technical examination of the situation, for consideration by our two Governments. As a technical commission, their views and recommendations must be subject to the agreement of the two Governments which appointed them in the first place. You will also recall that I explained in Garoua that the proposals of the experts based on the documents they prepared on the 4th April, 1971, were not acceptable to the Nigerian Government. It has always been my belief that we can both, together re-examine the situation and reach an appropriate and acceptable decision on the matter.' " (CR 2002/9 (Brownlie), pp. 37-38, para. 104.)

Nigeria asserts that in the above correspondence, General Gowon was emphazising to President Ahidjo that:

> "(i) the question of boundary demarcation between Nigeria and Cameroon is an 'important question';
> (ii) the function of the commission of experts was to make recommendations for the consideration of the two Governments;
> (iii) the proposals of the experts based on the documents they prepared on 4 April 1971 were not acceptable to the Nigerian Government;
> (iv) that both Governments must re-examine the situation and reach an appropriate agreement on the matter; and
> (v) that the arrangements which might be agreed between them were

> subject to the subsequent and separate approval of the 'Nigerian Government'." (CR 2002/9, (Brownlie), p. 38, para. 105.)

163. Thus, in light of previous dealings with Nigeria, President Ahidjo should have realized that General Gowon alone could not bind Nigeria in what would amount to a disposition of its territory, inhabited by its people. Executive acts were to be carried out by the Supreme Military Council or be subject to its approval. From the foregoing it is clear that the two Heads of State were left in no doubt as to the non-binding force of the Maroua Declaration.

164. Cameroon makes its stance on the above by referring to Article 46 of the Vienna Convention on the Law of Treaties, paragraph 1 of which reads:

> "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."

And paragraph 2 which states: "A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith." The argument of the Parties here turns to the distinction between Cameroon's interpretation and Nigeria's interpretation of the above Article.

165. Cameroon argues that the consent to the Declaration as expressed by General Gowon did not require the formal advice of anybody, including the Supreme Military Council. However, Cameroon states that, even if General Gowon were constitutionally restrained, his action of signing the Declaration of Maroua on Nigeria's behalf did not amount to a "manifest" violation of Nigeria's internal law regarding the competence to conclude treaties.

166. This is where the decision of the Court can be faulted. In 1967, the Executive Power of the Federal Government of Nigeria was vested in the Supreme Military Council. At that time, Gowon had taken over as Head of the Federal Military Government in Nigeria. In 1975, when the Maroua Declaration was signed, there were three military bodies set up, viz.: the National Council of States, involving the collective administration of the states as represented by the Governors; the Federal Executive Council; and, most importantly, the Supreme Military Council, which was then vested with the Executive Power of the country in accordance with the Federal Constitution as amended.

167. The Supreme Military Council was the ultimate executive body vested with the power to ratify any agreement made by the Head of State. The Maroua Declaration was not ratified by this Council. Hence the

Declaration had no binding force on Nigeria, contrary to the decision of the Court.

168. Thus, by virtue of Article 46 of the Vienna Convention on the Law of Treaties, internationally, the Maroua Declaration is not opposable and therefore not enforceable against Nigeria.

169. As regards the matter of delimitation of the maritime boundary, beyond point "G", Nigeria argues that there had been no negotiations between the Parties on this sector and that the first time it had notice of Cameroon's claim lines was when it received Cameroon's Memorial. Cameroon did not deny this fact.

170. Nigeria claims that, as far as the dispute over the maritime boundary on the areas around point G, and indeed to the areas of overlapping licences, the requirement that the Parties must negotiate under Articles 83 (1) and 74 (1) of the Convention on the Law of the Sea of 1982, has been satisfied; however, not beyond these areas.

171. Hence, as far as the area beyond point G, Nigeria maintains its position that the requirements of Articles 83 (1) and 74 (1) of the 1982 United Nations Convention on the Law of the Sea have not been fulfilled.

172. One of the preliminary objections made by Nigeria on jurisdiction and admissibility was that the Court had no jurisdiction to entertain the request of Cameroon for maritime delimitation beyond point "G". In my dissenting opinion to the Court's Judgment at that stage, I expressed the view that, since negotiation is a prerequisite under Articles 83 (1) and 74 (1) of the 1982 Convention on the Law of the Sea, the Court has no jurisdiction to entertain Cameroon's Application on this claim. However, the Court has assumed jurisdiction. I have reservations, because of the possibility of affecting the rights of Equatorial Guinea and Sao Tome and Principe. Nevertheless, because the Court is now seised of the matter, and regardless of the dispute between the Parties as to whether there has been negotiations or not, I consider the Court's decision to effect delimitation in the area beyond point "G" to be just and valid, hence I voted in favour of the Court's decision.

State Responsibility

173. Although I voted in favour of the Court's decision rejecting the claim of Cameroon on State responsibility against Nigeria, and rejecting a similar application by way of a counter-claim by Nigeria against Cameroon (paragraph 325 V (D) and (E)), I wish to express my reasons for doing so in this part of my opinion.

174. The first reason is that the claim of Cameroon is unprecedentedly excessive and indeed unique. I do not know of any case (other than the present case) which has taken over eight years, with so many claims presented at the same time to the Court. I am aware of exclusive land boundary claims by States; and I am also aware of exclusive maritime delimitation claims by States. Cases of maritime boundary *cum* land boundary claims are very few. However, I have not heard of an application involving a land boundary claim, a maritime delimitation claim, and a State responsibility claim, all presented at the same time. Little wonder that the case took a marathon hearing time of five weeks.

175. The second reason is that this case involves neighbouring States. Geography and history compel their eternal co-existence. The Court was not created to consciously or unconsciously create eternal disharmony between brother States. A claim of this nature can only engender bad blood between the States, and the Court should not lend its support to any decision that would create such eternal acrimony. The Court, as I have said earlier, is duty bound to ensure that "[a]ll Members shall *settle* their international disputes by *peaceful means* in such a *manner* that *international peace and security,* and *justice*, are not endangered" (Art. 2, para. 3, of the United Nations Charter; emphasis added). The paramount and fundamental objective of the Court, over and above all other considerations, is to ensure that litigants or disputants are satisfied at the end of the day that justice has been done, that the Court has been fair and impartial, and that parties can still live together in peace and security.

176. I am persuaded by the words of wisdom expressed by counsel for Nigeria when he observed:

> "Counsel sought also to show that it was perfectly normal for questions of State responsibility and territorial title to be joined. But this is not so in practice, nor is it appropriate. As the Court will know, there have been many cases in which territorial disputes have affected populated areas which one side or the other has administered and controlled — several such cases have indeed been considered by the Court. Yet Cameroon cited no case in which a territorial dispute has been resolved in favour of one State, and in which the losing State was then held internationally responsible for its acts of civil administration or maintenance of public order in areas in which, as a result of the decision on the territorial dispute, it was found to have had no right . . . Any other approach would turn every territorial dispute into a State responsibility case, sometimes of enormous magnitude." (CR 2002/20 (Watts), p. 26, paras. 9 and 10.)

177. Another reason for my decision touches on what may be termed

ratione tempore. The case between Cameroon and Nigeria was "brought" too late. If the Court were seised of such a complex and time-consuming case, as the present one, in the 1970s, and particularly in 1976 when there was less to do with few cases on its docket, then perhaps more time would have been devoted to such an unnecessarily lengthy claim, which ought to have been settled between the Parties themselves. However, at this time, the docket of the Court is full and time has to be rationed. To buttress this point, Cameroon has indicated that this is not the end. In its further claim, Cameroon requests the Court to adjudge on compensation thus:

> "The Republic of Cameroon further has the honour to request the Court to *permit it to present an assessment of the amount of compensation due to it as reparation* for the damage it has suffered as a result of the internationally wrongful acts attributable to the Federal Republic of Nigeria, *at a subsequent state of the proceedings*." (Memorial of Cameroon, Vol. I, p. 671, para. 9.2.)

178. Perhaps in effect, the Court may not see an end to this case even after Judgment. The Court, may still have to decide on the assessment of the amount of compensation as reparation for the damage claimed. Nigeria also requested in its submissions that:

> "Cameroon bears responsibility to Nigeria in respect of each of those claims, the amount of reparation due therefor, if not agreed between the parties within six months of the date of judgment, to be determined by the Court in a further judgment." (Reply of Nigeria, Vol. III, p. 766.)

Here again, were the Court to decide in favour of Nigeria, and were compensation not be paid to Nigeria within six months, then Nigeria might file another application for reparation against Cameroon, and who could tell how long this would take.

179. In effect, any decision of the Court in favour of either Cameroon or Nigeria, or both, would only prolong this case and continue to spread a feeling of disaffection between the Parties. The aim of the Court must be to discourage endless litigation. The Court, in its wisdom and considerable experience on boundary matters, has made valuable observations during the preliminary objection on jurisdiction and admissibility phase of this case, that even when a boundary has been definitively delimited and demarcated, misunderstandings are bound to ensue from time to time. In most cases, these misunderstandings are mistakes as to location, misunderstandings as to boundary lines and pillars, or uncertainties as to their locations, which have nothing to do with any deliberate acts involving State responsibility.

180. There is such an example in the present case: a location called Mberogo/Mbelogo. Cameroon is claiming Mbelogo; Nigeria is also claiming Mberogo. There are alleged incidents involving State responsibility in this location as well. Cameroon claims two incidents in Mbelogo, one involving a Nigerian census taker on 26 January 1994 and the other involving two Nigerian Immigration Officers on 26 September. In Nigeria's counter-claim it also reports the incident involving the Nigerian census taker, but this time in Mberogo. Now the question is, are there two locations, one called Mberogo and the other Mbelogo? Or are they one and the same place?

181. Examples like this can be multiplied, i.e., where inhabitants or officials of the Government have acted under a mistaken belief that a location belongs to its State (either Cameroon or Nigeria).

182. The Court, even before entertaining the present case on its merits, pronounced on this problem as follows:

> "The occurrence of boundary incidents certainly has to be taken into account in this context. *However, not every boundary incident implies a challenge to the boundary.* Also, certain of the incidents referred to by Cameroon took place in areas which are difficult to reach and where the boundary demarcation may have been absent or imprecise. *And not every incursion or incident alleged by Cameroon is necessarily attributable to persons for whose behaviour Nigeria's responsibility might be engaged. Even taken together with the existing boundary disputes, the incidents and incursions reported by Cameroon do not establish by themselves the existence of a dispute concerning all of the boundary between Cameroon and Nigeria.*" (*I.C.J. Reports 1998*, p. 315, para. 90; emphasis added.)

183. As regards Cameroon's application on State responsibility, it appears to me that it is labouring under a pre-emptive but erroneous notion that, once it can establish or assume subjectively that a legal title exists in a frontier matter, it automatically involves State responsibility. In other words, the claim of Cameroon on State responsibility is rather anticipatory. Cameroon believes that its position with regard to the conventional title is unassailable, and in anticipation of a judgment in its favour, goes further to ask for claims based on a judicial benefit that has not accrued to it.

184. Cameroon, reflecting on the pronouncement of the Court, had somehow reformulated its position based on the Judgment of the Court of 1998 on preliminary objections, which states:

> "All of these disputes concern the boundary between Cameroon and Nigeria. However, given the great length of that boundary, which runs over more than 1,600 km from Lake Chad to the sea, it cannot be said that these disputes in themselves concern so large a

portion of the boundary that they would necessarily constitute a dispute concerning the whole of the boundary.

Further, the Court notes that, with regard to the whole of the boundary, there is no explicit challenge from Nigeria. However, a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party. In this respect the Court does not find persuasive the argument of Cameroon that the challenge by Nigeria to the validity of the existing titles to Bakassi, Darak and Tipsan, necessarily calls into question the validity as such of the instruments on which the course of the entire boundary from the tripoint in Lake Chad to the sea is based, and therefore proves the existence of a dispute concerning the whole of the boundary." (*I.C.J. Reports 1998*, p. 315, paras. 88-89.)

185. Cameroon, in some part of its pleadings, positively responds to its misconception of invoking State responsibility in a matter of this nature. In its Reply, Cameroon referred to a part of the Judgment given at the preliminary objection phase, and stated further that it was no longer contesting these two points.

186. Nigeria has stated over and over again that a difference between States as to the proper application of a principle, or even a rule of international law, does not by itself give rise to any international responsibility for either of them.

187. Eventually, in its Reply, Cameroon acknowledged, accepted and admitted this basic principle which should have compelled Cameroon to withdraw its claim based on State responsibility. Presumably, it was then too late for Cameroon to do so. Cameroon also acknowledged that Nigeria had stated this point on at least five occasions. The following was Cameroon's admission on this point:

> "*Cameroon acknowledges, as stated by Nigeria on at least five occasions, that in itself 'a difference between States as to the proper application of a principle or even a rule, of international law, does not give rise to any international responsibility for either of them'* . . . It is therefore prepared to admit that the wording of paragraph *(d)* of the submissions in its Memorial, reproduced above, may lead to confusion on this point if taken out of context as the Respondent does: it is not the mere fact that Nigeria 'is disputing' the boundary which engages its responsibility, it is the methods it has used, and continues to use, to conduct the dispute. In order to eliminate all ambiguity, Cameroon has made this clear in the submissions in the present Reply . . ." (Reply of Cameroon, Vol. I, p. 489, para. 11.13.)

188. However, Cameroon has modified its position many times to correct some of its misgivings and misconceptions. For example, it started by stating that Nigeria is liable for the various incidents, jointly and severally. Cameroon had reneged from this standpoint and decided that the whole of the incidents should be considered together. Furthermore, it reformulated its submission as a result of all these points, stating in its final submission that:

> "in attempting to modify unilaterally and by force the courses of the boundary defined above under *(a)* and *(c)*, the Federal Republic of Nigeria has violated and is violating the fundamental principle of respect for frontiers inherited from colonization *(uti possidetis juris)* and its legal commitments concerning land and maritime delimitation" (Reply of Cameroon, Vol. I, p. 592, para. 13.1*(d)*).

However, what Cameroon should have done was to withdraw this claim entirely.

189. At this stage, it may be necessary for me to descend into the arena of conflicting facts. It is a cardinal principle of legal procedure that whoever asserts must prove. A claim is not sustainable *stricto sensus* unless and until it can be established and proved. Cameroon, alleging State responsibility, must prove those incidents alleged against Nigeria. However, before going into that, the picture that the disputed areas, particularly the Bakassi Peninsula and Lake Chad, presents to me, is that they are inhabited by Nigerians who have been living there for a long time, mostly before independence and some after independence. In my view, this fact is indisputable. Subsequently, Cameroon, relying on conventional title, has tried to claim those areas. The problem started when Cameroon attempted to dislodge the Nigerians and replace them with Cameroonians.

190. One may visualize this situation from what happened in 1972-1973, when Cameroon started to change the names of places in the Bakassi Peninsula. Cameroon does not deny this.

191. Where people are already settled in any given place, an incursion comes as a surprise attack. It is the attacker who invariably has the upper hand because the settlers are overwhelmed by such a surprise. Nigeria supports this view with an overall figure of casualties resulting from these incidents:

> "*(a) Attributed to Cameroon in the Nigerian documents*: *30 killed (of whom 27 were civilians); 117 wounded (of whom 106 were civilians)*; eight houses and four boats destroyed or damaged, together with a substantial amount of other damage.
>
> *(b) Attributed to Nigeria in the Cameroon documents*: three killed, 13 wounded (all military). Thus there were small numbers of military casualties on both sides; fewer dead on each side in

> fact than in the incident of May 1981. But there were substantial civilian casualties on the Nigerian side. *And there is no evidence whatever of Nigerian troops killing or wounding their own people.*" (CR 2002/20 (Crawford), p. 37, para. 10; emphasis added.)

192. Perhaps this overall figure demonstrates two points: on the one hand, if the places where the incidents occurred were inhabited by Cameroonians, then at least some Cameroonians (civilians) would have been killed. In this report not a single Cameroonian (civilian) was killed. It shows that the inhabitants of those places are not Cameroonians. On the other hand, more Nigerian civilians were killed because they were the inhabitants.

193. What was the reaction of Cameroon to this report and the incidents? Cameroon's response was to offer some words of apology. Cameroon reacted to the matter of the dead civilians thus:

> "In the part of his speech, in the eight minutes devoted to counterclaims this week, Professor Tomuschat did not comment on those figures. All he said was that 'il peut y avoir eu des victimes civiles, ce que le Cameroun regrette profondément'. Faced with a balance of casualties such as that I have given, for counsel to say *'il peut y avoir eu des victimes civiles'* is not very helpful. To be told belatedly that Cameroon 'profoundly regrets' does little to mitigate the damage caused, and still being caused, by Cameroon. For it is not the case that there 'may have been' victims: 'il peut y avoir eu des victimes civiles'. There *were* such victims. There continue to be civilian victims. If there had been none, Cameroon would have been the first to tell you." (*Ibid.*, pp. 37-38, para. 11; emphasis added.)

In view of all this destruction of Nigerian lives and property, it is incredible that Nigeria is still being accused of State responsibility. What Cameroon was in effect saying is: I am sorry for killing your people but you must still pay me for killing them.

194. Reverting to the issue of the burden of proof, after all the pleadings (oral and written), of Cameroon, it has neither established nor proved a case of State responsibility against Nigeria. Most of the allegations are mere allegations of acts not involving State responsibility against Nigeria. The presence of civilians and even of soldiers in any of the locations where these disputes occurred, proved nothing. Cameroon's allegation of the very serious offence of State responsibility must be proved beyond reasonable doubt. This proof is missing.

195. The evidence presented is very scanty, and, in some cases, incon-

sistent, inaccurate and uncertain. Most of the allegations are not supported by any documentary evidence and are time-barred and consequently acquiesced to by Cameroon, and many are only vaguely described.

196. Many of the reports concerning these allegations are contradictory, unsubstantiated and lack probative value; some are misleading and incorrectly translated; some are incomplete; and many are unprotested and appears to be afterthoughts.

197. Many of the documents in support of the incidents are mere internal memos; some of the incidents are undated and no time is specified; many of the incidents have nothing to do with the State of Nigeria as such, but are incidents involving civilians, without the knowledge and consent of the Government of Nigeria. Therefore, these are acts not involving State responsibility attributable to Nigeria.

198. In many of these incidents Cameroon did not protest to Nigeria. In one of the reports of the incidents, it seems the report has been imagined, because, for example, the incident at Akwayafe was alleged by Cameroon to have taken place in April 1993 and was reported on 23 March 1993 in the message of the Governor of South-West. There is another predated incident at Kofia. Here again the report precedes the incident. Another clear example of the unreliability of evidence presented by Cameroon related to the incident in Mberogo. Cameroon claims that the incident occurred on 26 January 1994, yet it was reported in a message of the Bab-Prefect of Force Awa dated 21 January 1994. This is another example of a predated incident. This is curious, if not ridiculous.

199. In some of the reports it was clearly stated that the incidents involved Nigerian citizens but not the Nigerian Government. Cameroon even considers clashes between citizens and citizens as incidents: private land disputes are considered incidents; squabbles of fishermen and farmers are considered to be acts involving Nigeria's State responsibility: otherwise what would land disputes between Nigerians in Nubi Local Government and the traditional Chief of Barha, or the case of the Nigerian poachers, have to do with State responsibility? In addition, some of the incidents relate purely to clashes between the Nigerian and Cameroonian inhabitants over the location of the boundary. Some reports, such as the one on the Lenelowa incident predates the incident as far back as two years before the incident occurred. In some of these incidents, there are cases of Cameroonians clashing with Cameroonians on Nigerian territory, yet Cameroon reported them as incidents invoking Nigerian State responsibility. To sum up, reading through the list of incidents catalogued by Cameroon, one is inclined to believe that the issue of State responsibility is being trivialized.

200. Cameroon in fact admits carrying out acts involving State responsibility against Nigeria. Examples are the incidents in Mberogo and Tosso, which are shown in the Atlas maps presented by Nigeria.

201. In conclusion, the claim of Cameroon as regards State responsibility against Nigeria is, in my view, part and parcel of its litigation strategy to fortify its claim based on conventional title over the Bakassi Peninsula and Lake Chad.

202. It is for the reasons enumerated above that I support the decision of the Court that the claim of Cameroon be dismissed along with the counter-claim of Nigeria. This decision is desirable in order to promote and encourage peace, harmony and good neighbourliness between the Parties.

CONCLUSION

203. To conclude my dissenting opinion, I am of the view that the Court ought not to dismiss the claim of Nigeria based on *effectivité*. There is no doubt that for a considerable length of time, there have been Nigerians living in the area of the Bakassi Peninsula and in some parts of Lake Chad. The Court accepts the fact that Nigeria has administrative and social establishments in these areas. History lends credence to the fact that the Kings and Chiefs of Old Calabar have been exercising territorial rights over the Bakassi Peninsula since the seventeenth century.

204. Similarly the Court should not have rejected Nigeria's claim based on historical consolidation. Nigeria presents overwhelming evidence in support of this claim. Jurisprudentially, there are a series of the Court's decisions based on historical consolidation. I have referred to these already in this opinion.

205. In my view, nothing vitiates the evidential value of the Treaty of 10 September 1884 between Great Britain and the Kings and Chiefs of Old Calabar. This Treaty, being an international instrument, makes it clear that at no time was Great Britain conferred with the territorial sovereignty over the Bakassi Peninsula. Great Britain acted in breach of its obligations when it entered into the Agreement of 11 March 1913 with Germany, which purportedly transferred Bakassi to Cameroon.

206. Furthermore, as regards the Anglo-German Agreement of 11 March 1913, the Court ought to have preliminarily rejected it as invalid, because the Agreement is inconsistent with the concern of the Great Powers not to transfer "native populations from one administration to another without their consent and even without having informed them or consulted them" (Counter-Memorial of Nigeria, Vol. 1, paras. 8.50-8.51). This Agreement is contrary to the General Act of the Berlin Conference and in particular its Article 6. The European Powers were enjoined "to watch out over the preservation of the native tribes and not to take over or effect transfer of their territory".

207. In addition, I am also of the view that the Anglo-German Agree-

ment had lapsed as a result of World War I. It was for Great Britain to revive the Agreement, which it did not do. Thus, the Agreement was abrogated by virtue of Article 289, and Cameroon could not have succeeded to an agreement that was already spent.

208. The Anglo-German Agreement was not approved by the German Parliament as regards the Bakassi Peninsula. Contrary to the Court's decision, this Agreement ought to remain invalid.

209. The claim of Cameroon to the Bakassi Peninsula based on the Anglo-German Agreement is defective for the foregoing reasons and ought not to have been relied upon by the Court.

210. However, because the Court relies on it substantially and regards the instrument as conferring legal title on Cameroon, the Court is bound to relate Nigeria's *effectivités* with Cameroon's legal title. Unfortunately, the Court has been persuaded by the one-sided argument of Cameroon as to the text and meaning of paragraph 63 of the Judgment in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, because Cameroon based its arguments and justification of having legal title solely on the sentence "[w]here the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title" (*I.C.J. Reports 1986*, pp. 586-587).

211. However, in Cameroon's interpretation of this same paragraph 63, it points to a situation which it considers similar to Nigeria's position: "Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title." (*Ibid,* p. 587.) However, what Cameroon omitted, perhaps purposefully, to explain to the Court are the subsequent sentences of the same paragraph 63, stating that:

> "*In the event that the* effectivité *does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The* effectivités *can then play an essential role in showing how the title is interpreted in practice.*" (*Ibid,* p. 587; emphasis added.)

Unfortunately the Court itself fails to give serious consideration to this vital part of the text of its previous Judgment.

212. Finally, perhaps, the decision of the Court would have been otherwise had consideration been given to these three sentences, which Cameroon failed to argue and which were not considered by the Court.

(Signed) Bola AJIBOLA.