

SEPARATE OPINION OF JUDGE VERESHCHETIN

Argument of Cameroon that a dispute exists concerning the whole of the boundary from the tripoint in Lake Chad to the sea — Objection of Nigeria as to the existence of such a dispute — Non-exclusively preliminary character of this objection.

I voted with the majority of the judges on all the points of the operative part of the Judgment, except point 1 (*e*). I am unable to vote “in favour” of that part of the Judgment because of my belief that the finding on which it is based is not duly supported by the evidence offered by the Applicant and does not stand the test of objective determination.

The *onus probandi* of the contention that the Republic of Nigeria disputes the entire boundary between the two States lies primarily with the Applicant, i.e., the Republic of Cameroon. In the reasoning of the Judgment, relating to the fifth preliminary objection of Nigeria, the Court rejected practically all the main arguments of Cameroon advanced in support of its contention. In particular, the Court stated that it:

“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” (paragraph 89 of the Judgment).

The Court also held that:

“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.” (Paragraph 90 of the Judgment.)

The logical consequence of this assessment of Cameroon’s arguments would have been the upholding of the fifth preliminary objection of Nigeria, or, at the least, a finding that the corresponding objection did not have an exclusively preliminary character and therefore required further consideration by the Court at the merits stage.

Instead, the Court itself shouldered the burden of proof of the Applicant’s claim, and having briefly analysed one single document — the answer of Nigeria to a question put to the Parties by a Member of the Court — reached a conclusion which, in contradistinction to its previous

reasoning, recognizes the existence of a dispute between the two States concerning the boundary as a whole. The geographical parameters of the disputed sectors of the land and lacustrine frontiers have thereby been extended to 1,600 km.

Admittedly, international contentious proceedings do not presuppose the passive reliance by the Court on the evidence produced by the litigating States. The objective determination of the existence or otherwise of a legal dispute and more so the adjudication on the substance of a dispute may require a more active role of the Court *proprio motu*, including questioning the parties, taking of independent evidence, etc. However, I cannot agree with the weight given by the Court to the answer provided by Nigeria. That answer could not be determinative for so important a finding of the Court. Nor can I subscribe to the assessment of the answer made by the Court.

From the reply given by Nigeria or, more generally, from the positions taken by the Parties in the course of the written and oral proceedings, it does not necessarily flow that “the claim of one Party [relating to the entire boundary] is positively opposed by the other”, as is required by the settled jurisprudence of the Court for establishing the existence of a dispute (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328).

For the Court to decide on the existence of a dispute between the two Parties as to the legal bases of the whole of the existing boundary, it must previously have been established that the Republic of Nigeria challenges the validity of the legal title to the whole of the boundary relied on by the Republic of Cameroon, or relies on a different legal title, or places a different interpretation on a given legal instrument relating to the entire boundary. None of those conclusions may be “positively” inferred from the documents or statements presented to the Court.

Indeed, Nigeria’s answer recognizes that the boundary between the two States has been “fix[ed]” by “the relevant instruments (all of which pre-date the independence of Nigeria and Cameroon)”. It also states that “the course of the boundary, which was well established before independence and related United Nations procedures, has continued to be accepted in practice since then by Nigeria and Cameroon” (see the reply of Nigeria reproduced in paragraph 91 of the Judgment). In my view, this position, albeit cautiously and somewhat vaguely expressed, does not conflict with the position of Cameroon, according to which the existing boundary has been delimited by the legal instruments entered into by the former colonial powers and by decisions and acts of the League of Nations and of the United Nations.

The repeated statements of Nigeria to the effect that there is no dispute concerning “boundary delimitation as such” and the reserved and cautious formulations in the above-quoted answer may signify the disinclina-

tion of Nigeria to unfold its legal arguments on the merits. True, they may also be viewed as evidence of the probable emergence of a broader dispute. However, the real scope of such a dispute, if any, its parameters and concrete consequences can be clarified only at the merits stage when the Court has compared the maps produced by both Parties and more fully heard and assessed the substance of interpretation placed by each Party on respective legal instruments.

This prompts the conclusion that the objection in question does not possess an exclusively preliminary character within the meaning of Article 79, paragraph 7, of the Rules of Court. At this stage, the Court cannot easily dismiss the objection of Nigeria, according to which, with the exception of the concretely defined sectors of the common frontier, "there is no dispute concerning boundary delimitation as such throughout the whole length of the boundary from the tripoint in Lake Chad to the sea". Moreover, in its submissions Nigeria has specified long stretches, not to say most, of the boundary, remaining outside the disputed areas (see, for example, the final submissions on behalf of Nigeria in the oral proceedings, paragraph 19 of the Judgment).

Thus, from the factual point of view, the competing claims of Cameroon and Nigeria over territories situated in three sectors of their common boundary, namely in the areas of the Bakassi Peninsula, Darak and adjacent islands and Tipsan, taken together with sporadic incidents in some other sectors of the boundary, do not justify the sweeping conclusion that a dispute has already manifestly arisen concerning the whole length of the boundary between the two States. Therefore, the finding of the Court on the existence of such a dispute is not well founded on the facts of the matter. It is equally ill founded in point of law, for the Court has not objectively determined that the legal basis of the whole of the boundary is challenged by one of the Parties.

(Signed) Vladlen S. VERESHCHETIN.