

automatically signify that the Court must accede to such a request. Article 65 of the Statute provides that the Court may give an advisory opinion at the request of any body authorized to make such a request. The Court has interpreted this to mean that it will accede to a duly authorized request, unless there are compelling reasons why it should refuse to deliver an advisory opinion. In this case the Court found no compelling reason why it should refuse to deliver an advisory opinion, notwithstanding the obvious political, military and moral implications of the question of the threat or use of nuclear weapons. The Court pointed out that the existence of extra legal considerations had never been a bar to reaching a decision, so long as there was a legal question involved which it was called upon to answer.

With respect to the substantive aspects of the request, the Court divided evenly, with the ‘casting vote’ of the President necessary for the Court to reach a majority. Although this division did not exactly correspond to a simple vote in favour or against the legality of nuclear weapons, it did reflect the extreme difficulty in reaching a decision upon such a delicate and controversial question, and the profound division in international opinion on this question.

The bulk of the Court’s opinion was understandably devoted to analyzing the legality of nuclear weapons within the context of the humanitarian law of armed conflict. The Court identified a number of the basic principles of that body of law and pointed out the unique character of nuclear weapons in terms of their destructive power and the duration of the effects of their use. On the basis of this, the Court determined that the use of nuclear weapons seemed to be “scarcely reconcilable” with respect for the requirements of humanitarian law which it had identified.

However, it determined that it did not have sufficient facts at its disposal to definitively conclude that any use of nuclear weapons would violate the rules and principles of the law of armed conflict. The Court also pointed to the “fundamental right of a State to survival” and the policy of deterrence practiced by the nuclear weapons States and their allies over a long period and concluded that with regard to the present state of international law and the available facts, it was unable to reach “a definitive conclusion as to the legality or illegality of the use of nuclear weapons in an extreme circumstance of self-defence, in which the survival of a State would be at stake”.

This was in effect a *non-liquet*, a term referring to a refusal by a Court to answer a question on the grounds that the law was not clear, the first in the Court’s history. This, together with various conclusions by the Court, generated a considerable amount of controversy, although since both sides on the question of the legality of nuclear weapons could point to elements in the opinion which supported their position, it probably did little long term damage to the Court. However, whether this is also true in relation to the Court’s rendition of the law of armed conflict is another matter, but one which goes beyond the scope of this book.

THE LAND AND MARITIME BOUNDARY BETWEEN CAMEROON AND NIGERIA

In March 1994, Cameroon instituted proceedings against its neighbour Nigeria concerning sovereignty over the Bakassi Peninsula which lies at the southern end of the long frontier between the two States on the Gulf of Guinea. Cameroon also requested the Court to determine the maritime boundary between the two States, in so far as it had

not been previously established in an agreement dating from 1975. Cameroon filed an Additional Application in June 1994 relating to sovereignty over areas in the vicinity of Lake Chad and further requested the Court to definitively specify the frontier between Lake Chad and the sea. Cameroon based the Court's jurisdiction upon the respective Optional Clause declarations of the two countries.

The Cameroonian-Nigerian boundary, in common with most African States, is based essentially on the pre-independence boundary established by the former colonial powers and the principle of *uti possidetis juris* which had been adopted by the Organization of African Unity and applied by the Court in previous disputes relating to African boundaries, most notably that between Burkina Faso and Mali (see above p. 181). Cameroon referred in fact to the principle of *uti possidetis juris* in its Application and alleged that Nigeria, by calling into question the validity of those treaties and understandings, had breached the principle of *uti possidetis juris*. Cameroon further alleged a number of military incursions on the part of Nigerian forces and the illegal presence of large numbers of Nigerian civilians on Cameroonian territory with the support of the Nigerian authorities, which it claimed had engaged the responsibility of Nigeria. The Court determined in the absence of any objection by Nigeria, that the Additional Application would be treated as an amendment to the original Application and fixed time limits (16 March 1995 for Cameroon and 18 December 1995) for the filing of Memorial and Counter-Memorial respectively.

Following armed incidents between the two States' armed forces in the Bakassi Peninsula, which triggered a request for the indication of Provisional Measures by Cameroon, the Court issued an Order on 15 March 1996, indicating provisional measures directed at both parties aimed at preventing further incidents. After Nigeria raised a number of preliminary objections within the allotted time limits, the proceedings on the merits were suspended in accordance with Article 79, paragraph 3 of the Rules of Court and the Court directed Cameroon to submit written observations and submissions relating to Nigeria's contestation of jurisdiction by 15 May 1996. Subsequently, both parties submitted additional documents relating to the preliminary objections and procedural aspects of the case during the course of the remainder of 1996 and 1997. This resulted in the oral proceedings on the question of preliminary objections being delayed until March 1998, four years after the original Application was filed.

The Court, after hearing argument, issued its Judgment on Preliminary Objections on 11 June 1998. Since neither party was represented by a judge of its nationality, both had exercised their prerogative of appointing a Judge *ad hoc* to the Bench. The Court dismissed seven of Nigeria's eight preliminary objections and determined that the eighth preliminary objection did not possess an exclusively preliminary character, in so far as an extension of the maritime boundary beyond the point agreed in 1975, could potentially impact upon the rights and interests of third States. In this context, the Court made the interesting observation that "[w]hether such third States would choose to exercise their rights to intervene in these proceedings pursuant to the Statute remains to be seen". This was a somewhat novel approach for the Court to take in relation to the possibility of third party intervention and seems to indicate a somewhat more liberal attitude on this question.

In the event, one of those third States, Equatorial Guinea, chose to intervene in order to safeguard its rights and interests in relation to the prolongation of the maritime boundary between Nigeria and Cameroon. It did so as a non-party intervener on the

basis of Article 62 of the Statute and strictly limited its intervention to the question of the maritime areas in question, without wishing to have the Court indicate the maritime boundaries between itself and Cameroon or Nigeria.

Neither of the parties objected to the intervention, which was correspondingly unanimously granted by the Court in an Order dated 21 October 1999.

Nigeria proceeded subsequent to this Order to present counter-claims in relation to Cameroon's amended Application. The Court ruled on 30 June 1999 that Nigeria's counter-claims were admissible which resulted in new rounds of written pleadings enabling Cameroon and Nigeria respectively to present their arguments in relation to Nigeria's counter-claims.

The Court set 4 July 2001 as the time limit for the submission of those additional pleadings. The oral hearings on the merits were held over most of February 2002.

On 10 October 2002 the Court handed down its judgment on the merits. The Court determined the boundary in the area of Lake Chad by fourteen votes to two. The decision on which instruments had delimited the boundary between the area of Lake Chad and the Bakassi peninsula was taken by fifteen votes to one. The decisions concerning the precise course of the boundary in seventeen areas covered by these instruments were taken unanimously. The decisions concerning the Bakassi peninsula and the first part of the maritime boundary were taken by a majority of 13 to 3. The Court decided unanimously on the delimitation of the second part of the maritime boundary and the question of state responsibility. There were declarations appended to the Judgment by Judges Oda, Herczegh and Rezek and separate opinions by Judges Ranjeva, Parra-Aranguren, Al-Khasawneh and Judge *ad hoc* Mbaye. Judge Koroma and Judge *ad hoc* Ajibola appended dissenting opinions.

The Court decided that the delimitation in the Lake Chad region had been established by two declarations of 1919 and 1929-1930 between France and the United Kingdom, the administrative powers of Cameroon and Nigeria. Nigeria argued that the existence of a number of *effectivités* gave it title to the area concerned. The Court considered that, as the boundary had been delimited by the two above mentioned declarations, it necessarily followed that any Nigerian *effectivités* had to be evaluated for their legal consequences as acts *contra legem*. The relevant facts led the Court to conclude that there was no acquiescence by Cameroon in the abandonment of its title in the Lake Chad area in favour of Nigeria.

The second issue the Court addressed concerned the land boundary between the Lake Chad area and the Bakassi peninsula. This part of the boundary had been delimited by four instruments. Both parties recognized the relevance of these instruments, but differed on the precise task of the Court in their respect. Cameroon considered that the uncertainties and ambiguities these documents displayed had to be addressed by the parties in a demarcation of the boundary. Nigeria held that there were a number of difficulties concerning the delimitation which had to be resolved before any eventual demarcation. The Court noted that there was a dispute between the parties concerning the interpretation or application of the four instruments delimiting this part of the land boundary. In addressing these issues of interpretation and application, the Court dealt with 17 separate areas of this part of the land boundary. This concerned areas of limited size if compared to the Bakassi peninsula. In a number of instances the Court accepted the position of one of the parties and in other instances adopted a position diverging from those of the parties.

The sovereignty over the Bakassi peninsula probably raised most controversy. This issue was not only of importance for the land boundary, but depending on the outcome of this part of the case, the maritime boundary between both states would start respectively on the eastern or western side of the Bakassi peninsula. The population of the Bakassi peninsula is Nigerian. Both the Bakassi peninsula and the adjacent sea areas are important for hydrocarbon resources.

Cameroon considered to have title on the basis of a treaty of 1913 between the former colonial powers, the United Kingdom and Germany. Nigeria contended that the United Kingdom at that time did not have a title to the Bakassi peninsula. The United Kingdom had concluded a treaty with the Kings and Chiefs of Old Calabar establishing a protectorate over an area including Bakassi in 1884. According to Nigeria, the title to Bakassi had remained with the Kings and Chiefs of Old Calabar and the United Kingdom could not transfer this title. Upon independence of Nigeria, this title had been transferred to it. The Court rejected the position of Nigeria. In this connection, it noted that certain treaties concerning protectorates had been concluded with entities which as a result retained a previously existing sovereignty under international law. However, in other instances, such treaties were concluded with local rulers, not States. In these cases, sovereignty over the territory concerned passed to the colonial power. This implied the United Kingdom was entitled to cede the Bakassi peninsula to Germany. The Court indicated that developments after 1913, both before and after independence of Cameroon and Nigeria confirmed that the parties had accepted this state of affairs. The Court reached the same conclusions concerning Nigerian *effectivités* as it did for the Lake Chad area.

In the maritime delimitation, the Court first of all took into account the rights of third states. This concerned Equatorial Guinea and Sao Tome and Principe. The former state had been granted permission to intervene in the case to protect its legal rights in the Gulf of Guinea. Sao Tome and Principe had refrained from intervening in the case. The Court in its Judgment found that in establishing the maritime boundary between Cameroon and Nigeria, it had to ensure not to adopt a position which might affect the rights of third states. This case reconfirms the caution with which the Court addresses this issue.

In the delimitation of the maritime boundary, two sectors were distinguished. In respect of the first part of this boundary, there existed a number of bilateral declarations. Nigeria contended that one of these declarations did not constitute a binding instrument and that another declaration lacked legal validity, since it had only been signed by the Nigerian Head of State and not been ratified in accordance with the Nigerian constitution. The Court found in respect of this latter declaration that it provided for immediate entry into force upon signature. Under international law, this is an accepted procedure for the entry into force of treaties. The Court then turned to the significance of the fact that the internal treaty ratification process of Nigeria had not been followed. It considered that this did not concern a manifest violation of a rule of internal law of fundamental importance, in which case the consent of Nigeria would have been invalidated.

The last part of the maritime boundary was established by the Court. This part of the Judgment does not diverge from earlier case law as far as the applicable law is concerned. The Judgment might suggest a somewhat increased importance of equidistance and a more limited role for relevant circumstances in establishing maritime boundaries.

Following the Judgment, a controversy arose over Court's decision, especially as regards the Bakassi peninsula. Nigeria asserted that the Judgment did not consider "fundamental facts" about the Nigerian inhabitants of the Bakassi peninsula. During a meeting with Secretary-General Kofi Annan of the United Nations in November 2002, the presidents of Cameroon and Nigeria agreed to establish a mixed commission, to be chaired by a Special Envoy of the Secretary-General, to consider ways of following up Judgment of the ICJ. The mixed commission is to consider all the implications of the Judgment, including the need to protect the rights of the affected populations in both states. The commission has also been entrusted with the task of demarcating the land boundary between the two states. In view of the complexity of the procedure and the comprehensiveness of the dispute, this is without doubt one of the most important border disputes the Court has had to deal with.⁷⁵

THE *ESTAI* CASE (SPAIN/CANADA)

On 9 March 1995, Canadian authorities boarded and arrested the Spanish-flagged fishing vessel *Estai*, despite the fact that the vessel was engaged in fishing on the high seas, just outside the 200 nautical miles (nm) Canadian exclusive economic zone (EEZ). The legality of the Canadian action was highly controversial as the 1982 United Nations Convention on the Law of the Sea (LOS Convention) stipulates that the high seas is governed by the primacy of flag State jurisdiction (Spain in this case). The recognized exceptions to this primacy-rule were not relevant here. Moreover, while Canada was at that time not a party to the LOS Convention (but Spain was), a rule as fundamental as this primacy-rule would almost certainly be binding upon Canada as customary international law.

The exceptional Canadian action followed the dramatic decline of the fisheries on the Grand Banks off Newfoundland; one of the oldest and most productive in the world. As part of the Grand Banks lie beyond the Canadian EEZ, and most fish stocks move back and forth between (straddle) EEZ and high seas, fishing activity on either side has transboundary effects. In order to deal with these effects, most States fishing in the area cooperate within the Northwest Atlantic Fisheries Organization (NAFO). During the late 1980s and early 1990s, the status of the straddling fish stocks within NAFO's competence continued to worsen despite NAFO measures, including moratoria. The eventual collapse of commercial fisheries led to massive unemployment in Newfoundland and Nova Scotia. Whereas the impact of Canadian fishing activity in the Canadian EEZ was acknowledged as having been one of the contributing factors, foreign fishing in the NAFO Regulatory Area (high seas) was also regarded as responsible, especially by the general public.

On 12 May 1994, the Canadian Coastal Fisheries Protection Act was amended to allow that foreign fishing in the NAFO Regulatory Area be brought under its regulatory scope, specifically including enforcement powers at sea. Attention was at first mainly focused on stateless vessels and vessels flying the flag of non-parties to NAFO. However, in January 1995 the European Community (EC), to which Portugal and Spain as EC Member States had transferred most of their competence in fisheries, formally objected to the Greenland halibut quota adopted by NAFO and set its own (autonomous) quota. Subsequently, Canada amended the implementing Regulations of its Coastal Fisheries Protection Act to ensure that Spanish and Portuguese vessels would