CR 96/3

Cour internationale
de Justice

LA HAYE

International Court
of Justice

THE HAGUE

ANNEE 1996

Audience publique

tenue le mercredi 6 mars 1996, à 10 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

en l'affaire de la Frontière terrestre et maritime

(Cameroun c. Nigeria)

Demande en indication de mesures conservatoires

COMPTE RENDU

YEAR 1996

Public sitting

held on Wednesday 6 March 1996, at 10 a.m., at the Peace Palace,

President Bedjaoui presiding

in the case concerning the Land and Maritime Boundary

(Cameroon v. Nigeria)

Request for the Indication of Provisional Measures

VERBATIM RECORD

Présents : M. Bedjaoui, Président
M. Schwebel, Vice-Président
MM. Oda
Guillaume
Shahabuddeen
Weeramantry
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Ferrari Bravo
Mme Higgins
M. Parra-Aranguren, juges
MM. Mbaye
Ajibola, juges *ad hoc*

M. Valencia-Ospina, Greffier

Present:	President	Bedjaoui
	Vice-President	Schwebel
	Judges	Oda
		Guillaume
		Shahabuddeen
		Weeramantry
		Ranjeva
		Herczegh
		Shi
		Fleischhauer
		Koroma
		Vereshchetin
		Ferrari Bravo
		Higgins
		Parra-Aranguren
	Judges *ad hoc*	Mbaye
		Ajibola
	Registrar	Valencia-Ospina

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M. Joseph Marie Bipoun Woum, ministre de la jeunesse et des sports,

comme conseillers spéciaux;

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M. Peter Ntarmack, doyen, professeur de droit à la faculté de droit et de science politique de l'Université de Yaoundé II, avocat, membre de l'Inner Temple,

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S. Exc. M. Paul Bamela Engo, avocat, représentant permanent du Cameroun auprès des Nations Unies, ancien Vice-Président de l'Assemblée générale des Nations Unies, ancien président de la Sixième Commission de l'Assemblée générale des Nations Unies, ancien président de la Première Commission de la troisième conférence des Nations Unies sur le droit de la mer,

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M. Marc Sassen, avocat et conseiller juridique, La Haye,

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M. Timothy Daniel, membre du cabinet D. J. Freeman de la *City* de Londres,

M. Alan Perry, membre du cabinet D. J. Freeman de la *City* de Londres,

Mme Caroline Smith, membre du cabinet D. J. Freeman de la City de Londres,

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M. Oye Cukwurah, professeur de droit international et membre de la commission nationale des frontières,

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The PRESIDENT: Please be seated. The Court this morning will resume its public hearings on the Request for the Indication of Provisional Measures in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*. I will now call upon the distinguished Agent of Nigeria, H.E. Chief Agbamuche (SAN), to make his opening statement.

Chief M.A. AGBAMUCHE:

A. Introductory

A.1. Mr.President, Distinguished Members of the Court, I am greatly honoured by this opportunity to address the Court for the first time. I am also very pleased to have the opportunity to emphasize to the Court the great attachment of the Government and people of Nigeria both to the Bakassi Peninsula itself and to the population of the area which is overwhelmingly of Nigerian nationality. Nigeria is convinced that as matter of international law the whole of the Bakassi Peninsula is Nigerian territory. That conviction is founded on substantial legal grounds, upon which counsel will briefly address the Court later this morning.

A.2. Before I go on any further, Mr. President, I should like to make a procedural point. In December 1995 Nigeria lodged its Preliminary Objections in these proceedings. The first Preliminary Objection is quite simply to the jurisdiction of the Court in relation to all the substantive issues in the case. I should therefore like to state that anything said or done either in the course of the present hearings or indeed in any other forum after the lodging of the Preliminary Objections is of course without prejudice to Nigeria's Preliminary Objections.

A.3. Mr. President, the Preliminary Objections are not just a matter of Nigeria standing on its rights. You should be aware that my Government was surprised when Cameroon lodged its first Application in these proceedings, not only because Nigeria had not been informed that Cameroon was a party to the Optional Clause, but also because in our view its was inappropriate for Cameroon to seek to resolve the boundary issues in this forum. It is not that we lack respect for the Court and its Justice. Far from it. We accepted the compulsory jurisdiction many years ago and have never withdrawn that acceptance. The point is that bilateral and regional forums exist for solving these disputes in a less adversarial way that Cameroon has suddenly chosen.

A.4. Mr. President, what happened on 3 February 1996 was that Cameroon launched a surprise attack on Nigerian positions in Bakassi, and I shall deal with this in detail in a few minutes. Before I do so, however, it is important that I set the scene. Relations between Nigeria and Cameroon have always been good. The two countries have maintained diplomatic relations since independence without interruption, in spite of recent events. There is a long history of close co-operation between Nigerian and Cameroon, in many specific areas of activity. This co-operation is evident from the bilateral agreements reached between the two countries covering such matters as telecommunications, visa abolition, aerial services, police and judicial matters. There are agreements and proposed agreements on economic, scientific and technical co-operation, and the Nigeria-Cameroon Joint Commission. There is a substantial Nigerian population in Cameroon, and a significant Cameroonian population in Nigeria. There is also the bilateral machinery

for settling boundary questions, referred to *in extenso* in Chapter 2 of Nigeria's Preliminary Objections.

A.5. In the context of this present hearing, it is significant to note that in the immediate *aftermath* of the violent clash of 3 February 1996, Nigerian troops took part in a joint military exercise called "Mount Cameroon Run", a physical training exercise. These events occurred well within the Cameroonian borders, and other countries also participated. The arrangements had already been made. After the events of 3 February 1996, my Government wondered whether its troops should pull out. The Cameroonians pressed us to participate. We did so as a confidence-building measure.

A.6. The incidents of 3 and 17 February were certainly not the first that Cameroon has staged in recent months. For example, on 25 July 1995 Cameroonian soldiers infiltrated into Nigerian West Atabong, beating up Nigerian civilians and confiscating motor-boats and fishing nets, and this without any legal justification. The infiltrating Cameroonian troops were also reported to have opened fire on a civilian vessel at West Atabong, killing a number of persons. The following month, in August 1995, there was a Cameroonian attack on Nigerian positions in Archibong town. Nigerian casualties included one killed and one wounded, and one Cameroonian was also killed.

A.7. Turning to the events of 3 February itself, numerous reports coincide in presenting the following picture. In presenting these facts to you, Mr. President, I would invite the Court to look at the map on the screen behind me. I will ask Mr. Timothy Daniel to point to the places I refer to. You have copies of this map in the front pocket of Nigeria's documents file.

- First, that attack took the form of an entirely unprovoked surprise Cameroonian artillery barrage which started at 12 noon and lasted 6 hours and 47 minutes. The attack was directed at Atabong West (which is referred to by Cameroon as Idabato One) and other locations. The attack was launched from boats, by water-borne raiders who had stealthily infiltrated through the navigable creeks across the centre of the Peninsula. Probably they came from Cameroonian bases east and north of the Rio del Rey. I should stress, Mr. President, that unlike Nigeria which has a number of military installations in Bakassi, Cameroon has no fixed military positions there. It launched its attack from outside the Peninsula. It is obvious that the attack was designed to take the Nigerian forces by surprise. It could not have occurred without both considerable planning and logistical support.
- Second, Nigeria's response, which took place only after it was properly authorized by the military High Command, was limited in scope and proportionate to the need to defend itself and its population. Nigeria has gained no ground. Its military positions remains where they were prior to 3 February this year.
- Third, according to Cameroon there were only two casualties and one missing in consequence of an allegedly wide-ranging attack by Nigeria. This is untrue. Ten Nigerian civilians were killed and 20 more were wounded. Nigerian *military* losses amounted to two soldiers killed and three wounded. This imbalance in casualties tells the whole story. In addition, the material damage was to Nigerian property, not Cameroonian property. The places referred to by Cameroon did not fall into Nigerian hands. They are villages inhabited by Nigerian nationals. Each village has its distinctive Nigerian name, and these

appear in tab No. 1 of Nigeria's documents file. In the absence of appropriate local hospital facilities, some of the casualties were treated in Nigerian state hospital at Calabar, the relevant administrative centre.

A.8. Three things particularly shocked us about the events of 3 February 1996, and I will not conceal from you that we were seriously angered.

- In the first place, this was one of the worst incidents for which Cameroon has been responsible, involving the shelling of Nigerian villages, substantial loss of civilian life and considerable injury to people and property.
- The second reason why we were so shocked was that Cameroon's action again seems to have been not a matter of trigger-happy border guards behaving badly but a cold-blooded political decision taken at a high level in the Cameroonian capital. The attack was preceded by an artillery barrage lasting over six hours, and that is not something that happens by accident.
- The third reason was that this time around Cameroon was particularly unrepentant and impatient. I should stress that, notwithstanding that Nigeria did eventually respond to the attack, the Nigerian military positions remain where they were prior to 3 February 1996.

A.9. Nevertheless these events were followed by Nigeria's unhesitating acceptance of the mediation of H.E. President Eyadema of Togo. Nigeria takes this opportunity to express its thanks and appreciation to the President of Togo for his efforts in this respect. Sir Arthur Watts will refer in more detail to the subject of mediation later this morning.

A.10. It has always been and still is the profound conviction of my Government that Cameroon must accept, not merely verbally but by its acts, that the dispute over Bakassi, and all other disputes, must be resolved by peaceful means in accordance with international law and the fraternal relationship between neighbouring African States. Nigeria itself has shown both by its words and its actions, which have always been restrained, that it is 100 per cent committed to the peaceful resolution of the Bakassi issue. Nigeria therefore notes with real concern that Cameroon seems less and less interested in dialogue, but instead seeks to manipulate the opinion of the international community and confront Nigeria with this precipitate request to the Court.

B. The Cameroonian attitude and their request that the Court indicate interim measures

B.1. Cameroon has gone to extraordinary lengths, in its request that the Court indicate interim measures, to paint Nigeria as a powerful and aggressive State. Quite apart from the legal difficulties, however, the way they paint that picture is inherently implausible and wholly inaccurate, and the measures they propose are inappropriate.

B.2. Nigeria rejects the assertions made by Cameroon in its request for the indication of interim measures, at paragraphs 3 to 7. These assertions seek to belittle Nigeria's Preliminary Objections. In due course this Court will pronounce on the Preliminary Objections after reasoned argument, not on the basis of emotive statements by Cameroon.

B.3. Nigeria wholly rejects Cameroon's assertion, in paragraph 4 of its request, that the fighting was started by Nigeria. Intelligence reports indicate that Cameroonian forces started the fighting with a heavy artillery barrage directed against Nigerian military positions.

Newspaper and radio reports tell the same story. Cameroon falsely states that *"Nigerian forces . . . attacked . . . along the entire ceasefire line"*. Not only did Nigerian forces not attack, but there is no question of fighting across the whole of the Bakassi peninsula, which is what Cameroon's statement clearly implies.

B.4. The Court will note that Cameroon's story of, and I quote from the Request, an *"attack along the entire ceasefire line"*, is inconsistent with the fact that 80 per cent of the casualties were Nigerian citizens.

B.5. Nigeria's response, by contrast, has ben limited to necessary and proportionate force, utilized in self-defence only. Nigeria has no intention of using military force to and I quote from the Cameroonian request *"continue the conquest of the Bakassi Peninsula"*. Nigeria's position is, as it has always been, to resolve the Bakassi issue by peaceful means. It is Cameroon which continues to use force to further its own ends.

B.6. There is no desire on Nigeria's part to - and again I quote from the Request - *"create a fait accompli on the ground"*. There would be no point. Bakassi is Nigerian territory, inhabited by Nigerians who, in normal times, go about their ordinary business of fishing, farming and trading.

B.7. Cameroon claims to fear the destruction of evidence. But there is absolutely no reason to believe that any evidence is at risk. If there *is* any danger of destruction, it comes from Cameroon's own acts of violence and systematic attempts to create facts stamping the peninsula with its national character. It is Nigeria's wish that the existing evidence be preserved: in Nigeria's view, all of it is favourable to Nigeria's case on Bakassi.

B.8. Nigeria will be taking steps at any appropriate time and in any appropriate forum to make its own request for an apology by Cameroon for its recent actions. Nigeria will also request, in an appropriate forum, that reparation be made for loss of the lives of its citizens and damage to Nigerian property.

B.9. Nigeria does not know why the Cameroonian forces attacked in Bakassi on 3 February. What we do know is that they did so. Certain facts, however, speak for themselves and can easily be demonstrated. In particular

- Cameroon has been systematically building up its military capabilities around Bakassi for many months - I will deal with this more fully in a few moments.
- In January of this year Cameroon illegally held local elections in some areas of Bakassi, in the fact of strong protests by my Government and in circumstances which could only constitute a provocation. Nigerian civilians in those areas were harassed and forced to participate in the election.
- Nigerians reacted with proper proportionality: it has consistently met the provocations of Cameroon with restraint.

B.10. My Government has serious reservations about the good faith with which Cameroon is pursuing its claims. But the resort to military confrontation is on any view inexcusable under international law. It has caused numerous dead and wounded amongst the Nigerian civilian population of Bakassi, who were entirely unprepared and were caught in a bombardment lasting over six hours on 3 February 1996. There is no suggestion of civilian casualties on the Cameroonian side. The claim that Nigeria was an aggressor was not merely false but in the highest degree improbable.

If Nigeria planned to attack the Cameroonian lines it would hardly do so in an area heavily populated with Nigerian civilians.

B.11. In December 1995 Cameroon's Memorial of March 1995 was met by Nigeria's Preliminary Objections. Although the Court is not deciding the Preliminary Objections at these hearings, it is important that the Court appreciates how serious those Objections are, and counsel will address the Court on this subject.

B.12. In all the years that Cameroon claimed to have had an active presence it never held local elections. Then, having completed its military build-up, it did so in January 1996, in the face of Nigerian opposition - Nigeria filed a strong protect in October 1995. Attempts were made to force the Nigerian population to register to vote. In the aftermath of the Nigerian Preliminary Objections, the whole exercise bears a strong flavour of forensic theatre. The Court will observe that there was no question of our resorted to arms. On the contrary, on 3 February it was Cameroon that did so. Nigeria had no way of knowing that it was to be attacked, and indeed was taken by surprise.

C. Nigeria's attitude to Cameroon's request that the Court indicate Interim Measures

C.1. Essentially, Cameroon put its case on Interim Measures in two ways. First, it says the confrontation was caused by Nigerian aggression. Second, it says that irrespective of who started the conflict, this is a proper case for Interim Measures to be indicated.

C.2. The essence of our response consists of three short points:

- First, we say the Court has not even got prima facie jurisdiction over the substantive issues, nor are they presented in an admissible forum.
- Second, we say that this is not a case in which Interim Measures should be indicated at the request of Cameroon, because Cameroon is really using its request in an effort to obtain some premature determination of its merits in relation to the whole boundary.
- The third point is this. What I have said does not mean for one moment that Nigeria is opposed to measures to defuse the tensions in Bakassi. Nigeria is highly interested in peaceful resolution of the dispute and has indeed welcomed and actively participated in mediation efforts initiated by the President of Togo. Nigeria is concerned that following the ministerial meeting in Kara, Togo, during which the Cameroonians agreed to the cessation of hostilities, their troops attacked Nigerian positions on 16 and 17 February 1996. On the night of the 16th the attack was a long-distance one, by helicopter. On 17 the attack was water borne. On these two days, two Nigerian soldiers were killed and six wounded.
- The Court should know that President Eyadema is vigorously pursuing the mediation efforts already started. A further ministerial meeting is now being scheduled for 12 and 13 March. This is to pave the way for a meeting of the Heads of State of Nigeria and Cameroon. Despite the hesitations the Cameroonian Agent appeared to be expressing yesterday (CR 96/2 p. 26), we trust that Cameroon does not really intend to do this.

D. Recent events in relation to Bakassi

D.1. Mr. President, I would like now to turn to a few recent events in the Bakassi region. Information available to Nigeria reveals that in the period since May 1995 Cameroon has been steadily building up its forces in the area around Bakassi. Time does not permit me to tell the Court all the details, but let me give the Court some flavour of Cameroon's activities.

- After May 1995, gun-boats and flying-boats were provocatively stationed and helicopters overflew Nigerian positions
- In the Summer of 1995 Cameroon's armed forces were strengthened by substantial arms supplies from abroad, and in August 1995, 25 foreign military officers were deployed to areas around Bakassi
- Cameroon's troops around Bakassi were reinforced in the Summer of 1995 by 80 cross country military vehicles and assorted weapons, including 500lb. cluster bombs, a container-load of 81MM mortars and a container of communications equipment, a Velment BL-80TR aircraft (1984 model) and 380 rocket launchers. In September 1995 Cameroonian forces at Douala (less than 150 km. from Bakassi) received 3 Alfa jet fighters, 400 rocket launchers, 12 trucks, a container of cluster bombs, and 120 type-86 machines guns. These were not required for fishing!
- The numbers of Cameroonian troops around Bakassi steadily increased over the period from May to August 1995, until they numbered about 1,900, comprising 1,300 ground troops, 400 marines equipped with fast river patrollers, and 200 gendarmes (Cameroonian policemen) equipped with coastal patrollers and four routine patrol boats. In December 1995 Cameroonian forces there acquired an anti-aircraft gun.

D.2. Within two weeks of conducting the illegal elections, Cameroon started shelling Nigerian civilians in Bakassi. Nigeria is in no doubt that the attacks of 3 and 17 February were planned at a high level in the Cameroonian Government. There is equally no doubt that responsibility rests with the central Government in Cameroon.

Thank you, Mr. President, for listening to me. I now invite you to call upon Professor Brownlie to develop the legal issues further on Nigeria's behalf.

The PRESIDENT: I thank you very much, Chief Agbamuche (SAN), for your statement and I now give the floor to Professor Ian Brownlie.

Professor BROWNLIE: Thank you, Mr. President. My first presentation this morning will deal quite briefly with three tasks. First, to outline the Nigerian position generally in these proceedings. Secondly, to emphasize the special features of the competence of the Court to indicate interim measures and thirdly, to examine the specific terms of Cameroon's request.

Nigeria's position in relation to Cameroon's request

Nigeria's position in relation to the request has four main aspects:

1. First, it has not been Nigeria's strategy to utilize the interim measures procedure for tactical purposes.

2. Secondly, after the events of 3 February the situation has, in general terms, stabilized. A cease-fire has been in place instituted under the auspices of H.E. President Eyadema of Togo.

3. And in our view, precisely because of that mediation, and the resulting cease-fire, the Cameroonian request is in truth now without object. It has, in English terms, become moot.

4. And lastly, I would like to say that we, for formal purposes, but it is important to Nigeria, to emphasize that the jurisdiction of the Court to indicate interim measures cannot prejudice the Respondent State's position in any subsequent phases of the case.

The special features of the jurisdiction to indicate interim measures

5. I would like now to emphasize some of the special features of the exercise of this form of incidental procedure by the Court.

6. The jurisdiction does not depend on any direct consent given by the Parties, and thus the competence is "an inherent part of the standing powers of the Court under its Statute" (Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, II, p. 533).

7. In the result, the jurisdiction is functionally specialized and governed by the relevant provisions of the Statute and Rules of Court. It is not a provisional version *either* of the preliminary objections *or* of the merits.

8. It is certainly true that a major purpose of the indication of interim measures is to prevent any prejudice to the respective rights of either party and to avoid anticipating the outcome of the claim on the merits.

9. Article 41, paragraph 1, after all, is drafted in very broad terms. The requirements are left unspecified to a considerable extent, and the power to order measures "which ought to be taken to preserve the respective rights of either party" necessarily leaves the Court with a substantial discretion.

9.1. Above all, the measures are "interim" or "provisional".

9.2. Articles 73 to 76 refer constantly to the indication of "*provisional* measures".

9.3. And the existence of jurisdiction in respect of the merits is not required, except on a prima facie basis.

10. And consonant with this, the measures indicated may be revoked or modified in accordance with Article 76, of the Rules.

11. Mr. President, this sketch of the jurisdiction to indicate interim measures can be rounded out by a reference to the power of the Court to indicate measures *proprio motu*. Article 75, paragraph 2, of the Rules provides that

> "When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request."

12. The authoritative writers regard this power to order *proprio motu* as of particular significance (see Hudson, *The Permanent Court of International Justice, 1920-1942*, 1943, p. 424, para. 433); Rosenne, *The Law and Practice of the International Court*, 2nd rev. ed., 1985, pp. 426-427; Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 256; Fitzmaurice, *The Law and Procedure of the International Court of Justice*, II, 1986, pp. 544-545).

13. And it may be recalled that the Court made constructive use of the power in its Order in the *Anglo-Iranian* case (*I.C.J. Reports 1951*, pp. 93-94).

There are no substantial reasons for an indication of interim measures

14. In the view of Nigeria there are quite simply no substantial reasons for an indication of interim measures and certainly not for an

indication of measures directed exclusively to the Respondent State as requested by Cameroon.

15. In view of the mediation and cease-fire, the request has become essentially moot, as my colleague Sir Arthur Watts will explain further in due course.

16. But, Mr. President, even if the request were not moot, the primary condition for the indication of interim measures, which is the need to preserve the respective rights of the Parties, has not been satisfied.

17. This particular object was affirmed by the Court in its Judgment in the *Anglo-Iranian* case. In the words of the Court there:

18. "Whereas the object of interim measures of protection provided for in the Statute is to preserve the respective rights of the Parties pending the decision of the Court, and whereas from the general terms of Article 41 of the Statute and from the power recognized by Article 61, paragraph 6, of the Rules of Court, to indicate interim measures of protection *proprio motu*, it follows that the Court must be concerned to preserve by such measures the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent ..." (*I.C.J. Reports 1951*, p. 93.)

19. This is the object expressly formulated in Article 41 of the Statute and was regarded by Sir Gerald Fitzmaurice as the primary, if not the only, object of interim measures (Fitzmaurice, *op. cit*, p. 544).

20. In some sources this condition for the grant of interim measures is reformulated so as to refer to the requirements of a risk of irreparable damage to the rights in issue in the proceedings.

21. The essence of the criterion has been neatly described by a former President of the Court, Professor Jiménez de Aréchaga, in this way:

"In all recent cases where interim measures were requested from the International Court of Justice the essential argument of the applicants concerned the impossibility or the extreme difficulty of restoring the existing situation if the judgment went in favour of the applicant and interim measures were refused." *RCADI*, Vol. 159 (1978-I), p. 159).)

23. Professor Jiménez de Aréchaga had placed emphasis on this element in his separate opinion in the *Aegean Sea Continental Shelf* case, *Request for the Indication of Interim Measures of Protection*, *I.C.J. Reports 1976*, pages 15-16. In his words:

"The essential object of provisional measures is to ensure that the execution of a future judgment on the merits shall not be frustrated by the actions of one party *pendente lite*. In cases in which there is no reasonable possibility, prima facie ascertained by the Court, of jurisdiction on the merits, it would be devoid of sense to indicate provisional measures to ensure the execution of a judgment the Court will never render.

But the possibility of jurisdiction over the merits is only one among other relevant circumstances. There are others to be taken into consideration - such as the questions whether provisional measures are necessary to preserve the rights of either party and whether the acts complained of are capable of causing or of threatening irreparable prejudice to the rights invoked. According to general principles of law recognized in municipal systems, and to the well-established jurisprudence of this Court, the essential justification for the impatience of a tribunal in granting relief before it has reached a final decision on its competence and on the merits is that the action of one party '*pendente lite*' causes or threatens a damage to the rights of the other, of such a nature that it would not be possible fully to restore those rights or remedy the infringement thereof, simply by a judgment in its favour. The Court's specific power under Article 41 of the Statute is directed to the preservation of rights 'sub-judice' and does not consist in a police power over the maintenance of international peace nor in a general competence to make recommendations relating to peaceful settlement of disputes."

24. And indeed, Mr. President, it is useful to compare the circumstances of the present case with the *Request for Interim Measures in the Aegean Sea Continental Shelf* case. In that case the Court did not respond positively to the request by Greece.

25. The relevant passages in the Order are as follows:

26. "32. Whereas, on the other hand, the possibility of such a prejudice to rights in issue before the Court does not, by itself, suffice to justify recourse to its exceptional power under Article 41 of the Statute to indicate interim measures of protection; whereas, under the express terms of that Article, this power is conferred on the Court only if it considers that circumstances so require in order to preserve the respective rights of either party; and whereas this condition, as already noted, presupposes that the circumstances of the case disclose the risk of an irreparable prejudice to rights in issue in the proceedings;

And the Court's Order continues:

33. Whereas, in the present instance, the alleged breach by Turkey of the exclusivity of the right claimed by Greece to acquire information concerning the natural resources of areas of continental shelf, if it were established, is one that might be capable of reparation by appropriate means; and whereas it follows that the Court is unable to find in that alleged breach of Greece's rights such a risk of irreparable prejudice to rights in issue before the Court as might require the exercise of its power under Article 41 of the Statute to indicate interim measures for their preservation ..." *(I.C.J. Reports 1976*, p. 11.)

28. The Court will recall that in that case the activities of the Turkish seismic research vessel almost certainly impinged upon the exclusive rights claimed by Greece and yet the Court very clearly states that any violation of Greek rights was "capable of reparation by appropriate means".

29. Mr. President, Members of the Court, the Turkish activity there was by no means comparable with the spontaneous and necessary actions of military units faced with a sudden assault by Cameroonian forces. It is entirely unrealistic to suggest that the localized disturbances in Bakassi have created a risk of irreparable prejudice to the rights of either Party.

30. And, Mr. President, it is clear that, in order to achieve the object to preserving the respective rights of both Parties pending a

final judgment, the object is to do so in the interests of *both* Parties equally. In this connection I draw the attention of the Court to the opinion of Sir Gerald Fitzmaurice on this point. With reference to the preservation of the parties' respective rights, he had this observation:

> "This object is clear from the passage quoted in the previous paragraph above, from which it seems to follow that, apart from the general object of preserving the parties' rights as finally determined by the Court, the object is to do so in the interests of both parties equally; and further that the main purpose of the power to act *proprio motu* is to ensure that the Court can always do this, and is not confined to doing so only if one of the parties so requests." (*The Law and Procedure of the International Court of Justice*, Cambridge, 1986, p. 544.)

31. Finally, Mr. President, I would like to turn to the terms of the Cameroonian request.

The first indication requested is that:

32.

> "(1) the armed forces of the Parties shall withdraw to the position they were occupying before the Nigerian armed attack of 3 February 1996".

33. In the view of the Nigerian Government this request is tendentious and its terms ignore the overriding purpose of Article 41, which is to maintain the respective rights of both parties.

34. Mr. President, there was no armed attack by Nigerian armed forces. Let us be quite clear about that. Nigerian armed forces were, it is true, stationed in Nigerian territory, the Peninsula of Bakassi, inhabited by Nigerians. The Nigerian armed forces were subjected to a surprise attack, mounted we think through the creeks, and eventually responded after considerable patience by taking proportionate measures of self-defence.

35. Now the request calls for withdrawal and on behalf of the Government of Nigeria, I make two points:

36. First there was no advance by the Nigerian armed forces and it follows there can be no question of withdrawal. There was a surprise attack from outside the area on Nigerian possessions. The attack was water-borne and was very probably from outside Bakassi.

37. Secondly, in the context of such calls for withdrawal it is relevant to recall the following passages from the Order of the Chamber in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*. There the Chamber stated:

38.

> "Whereas the measures which the Chamber contemplates indicating, for the purpose of eliminating the risk of any future actions likely to aggravate or extend the dispute, must necessarily include the withdrawal of the troops of both Parties to such positions as to avoid the recrudescence of regrettable incidents; whereas, however, the selection of these positions would require a knowledge of the geographical and strategic context of the conflict which the Chamber does not possess, and which in all probability it could not obtain without undertaking an expert survey; and whereas in these circumstances the Chamber, while remaining seised of the question, notes that the Heads of State, acting in the framework of the ANAD [that's a regional organization] are shortly to define the detailed terms of the troop withdrawal which the Chamber considers it should indicate as a provisional measure ..." (*I.C.J. Reports 1986*, pp. 10-11.)

39. The Chamber here surely recognizes the practical and necessary limitations upon the judicial competence to efficiently orchestrate an appropriate policy of withdrawal.

40. I move on to the second precise indication requested by Cameroon.

41.

"(2) the Parties shall abstain from all military activity", Mr. President, all military activity, "along the entire boundary until the Judgment of the Court is given".

42. In the view of Nigeria, Mr. President, in the circumstances of this case this aspect of the request lacks any reality and any legal foundation.

43. First of all, it refers, quite unnecessarily, to the entire boundary, presumably the entire boundary between Lake Chad and the sea. Secondly, its is clearly unreasonable to ask the Court to indicate measures which would necessarily impinge upon the responsibilities of the State for the maintenance of security on its own territory. The measures requested surely bear no relation to the facts even the version offered to the Court by Cameroon.

44. I move on to the third and final specific indication requested by Cameroon.

"(3) that the Parties shall abstain from any act of action which might hamper the gathering of evidence in the present case".

Mr. President, for us this is strange request, it is perhaps reminiscent of the Burkina Faso request in another case. But no evidence is adduced by Cameroon to show why such an indication should be necessary.

45. Mr. President, by way of conclusion, I request the Court, respectfully, to focus upon four elements in these proceedings. First the perversive lack of specificities concerning the facts on the part of our colleagues in the delegation of Cameroon. And this vagueness is surely the more unfortunate when we recall that Cameroon is the requesting State. It is Cameroon that has got us all here in this Great Hall of Justice. Secondly, even on the facts alleged by Cameroon there

is no evidence of irreparable damage or risk of irreparable damage to the rights in issue in these proceedings. Thirdly, there was no aggression by Nigeria; what occurred was a skilfully prepared surprise attack by Cameroonian forces taking advantage of the unusual geography of the region, and which attack once launched was sustained for more than six hours. This attack as I have said already several times very probably came from outside Bakassi. There had been no provocation and there were civilian casualties among the Nigerian population. Finally in view of the fact that there can be no presumption of any kind in favour of the requesting State, simply because it is the requesting State, the adoption of a tactical posture cannot be an indicator as to where the truth lies.

46. Mr. President, I have completed my presentation. My examination of the eccentricities of the Cameroonian request has left on one side the issue of the mootness of the request. This argument will be presented by my colleague Sir Arthur Watts.

47. Mr. President, I thank you and the Members of the Court for hearing me so patiently and I ask you to give the floor to Sir Arthur Watts.

PRESIDENT : I thank you very much, Professor Brownlie, for your statement and I now give the floor to Sir Arthur Watts.

Sir ARTHUR WATTS: Thank you very much, Mr. President.

Cameroon's Request for an Indication of Provisional Measures is Moot

Mr. President, distinguished Members of the Court, let me say first how greatly honoured I am to be addressing the Court, on behalf of the Federal Republic of Nigeria.

Mr. President, following Professor Brownlie's submissions I should now like to address a further aspect of Cameroon's request and to submit

that it has no further purpose to serve and should, for that reason, be dismissed. This submission is made without prejudice to Nigeria's assertion that Cameroon's request for interim measures never, even at the outset, has any proper foundation or any proper purpose. As already explained by the Agent for Nigeria, the facts of the recent events in Bakassi were quite different from the version which Cameroon chose to put before the Court. But whatever the facts may have been (and without in any way admitting the version of the facts as originally alleged by Cameroon), it is clearly the case *now* that matters have developed in such a way that no possible purpose can now be served by Cameroon's request for interim measures, and that therefore that request should be dismissed.

The Agent for Nigeria has explained in detail the facts surrounding the events which took place in early February: I will not try to add to what he has said. The Court should, however, be aware of certain developments which took place *after* those incidents occurred.

The unprovoked water-borne attacks on Nigerian positions, which broke out at the beginning of February, dismayed the Government of Nigeria every bit as much as Cameroon says they dismayed the Government of Cameroon. They also caused concern to the President of the neighbouring State of Togo. He appealed to the Heads of State of Nigeria and Cameroon to defuse the tension, and to have confidence in his mediation role in this matter; and in that context, he invited the Foreign Ministers of Nigeria and Cameroon to meet in Togo, at Kara, on 16 and 17 February.

That meeting duly took place, and at its conclusion, on 17 February, a communiqué was issued. The communiqué was signed by the two Foreign Ministers, as well as by the Foreign Minister of Togo. It is an important document in the context of the present proceedings and the text

is in the bundle of documents placed before the Court by Nigeria; it is at Tab 12 in that bundle.

As the Court will see, Mr. President, the communiqué recorded that "the two Ministers assessed the prevailing situation in the Bakassi Peninsula and agreed to stop all hostilities". They further "recognized that the dispute is pending at the International Court of Justice", and "They agreed to meet again in the first week of March 1996, to prepare for the summit of the Heads of State of Nigeria and Cameroon under the auspices of President Eyadema of Togo"; and they further "appealed to President Eyadema to continue with the mediation".

Following that meeting in Kara, this very week, while we are here in The Hague, the Foreign Ministers of Nigerian and Cameroon are also preparing to meet again to discuss all these matters, and to prepare for the subsequent meeting of the two Heads of State, to be held under the auspices of a third Head of State - that of a neighbouring State which has been consistently and helpfully concerned to assist Nigeria and Cameroon to reach an amicable settlement of their differences. That summit meeting will take place soon, when the Foreign Ministers have prepared it.

And that, Mr. President, is the proper way in which these immediate matters should be addressed and resolved - in direct discussion between the two States concerned, at the very highest level. Those two States have reached an agreement that such discussions should take place. There is no need to involve the Court. Cameroon has nevertheless chosen to do so - in circumstances in which, as has been demonstrated, no irreparable prejudice to the respective rights of Nigeria or Cameroon has occurred or is likely to occur, and no requirements of the due administration of justice call for any interim measures to be indicated by this Court.

That Cameroon has in these circumstances chosen to seek an indication of interim measures only serves to cast doubt on the genuineness of Cameroon's professed reasons for bringing this matter before the Court by way of its request.

The law

Mr. President, the diplomatic activity of recent weeks, continuing this week and carrying on into the summit meeting to be held soon, is intense. It takes place as part of the mediation by the Head of a third State - a mediation to which Nigeria and Cameroon have agreed and which through their Foreign Ministers they have just three weeks ago appealed to him to continue. It is of the utmost importance that President Eyadema's mediation should be allowed to take its course: as is recorded in the communiqué of 17 February, he appealed to the Heads of State of Nigeria and Cameroon to "resort to dialogue and negotiation in resolving the dispute". That process should not be prejudiced in any way.

It is of course true, Mr. President, that States, at the same time as they pursue a case before the Court, are free to negotiate or resolve particular aspects of the dispute brought before the Court, without thereby precluding the Court from continuing to exercise its proper functions. A Chamber of the Court made this clear in its Order of 10 January 1986 in the *Burkina Faso/Republic of Mali* case *(I.C.J. Reports 1986)*. But that does not necessarily dispose of the matter for our present case.

- In the first place, that case was one in which both States had agreed to the Court's jurisdiction over the principal case, and in relation to the incidental proceedings for interim measures both States had sought such measures: neither of those considerations applies to the present proceedings.

- In the second place, the future meeting of the Heads of the two States involved in the Burkina Faso and Mali case was to be concerned only with one specific matter - that of possible troop withdrawals. No such limitation attends the prospective meeting of the Heads of State of Nigeria and Cameroon.

- Third, the Heads of State of Burkina Faso and Mali were meeting on a purely bilateral basis; in the present situation there is, as I have explained, a mediation by the Head of a third State.

- Fourth, the fact that the Court may have a possibility of acting does not necessarily mean that it would be opportune for it to do so: the Court has a substantial measure of discretion. It is always the case that these matters turn on the particular circumstances, and for the reasons which I shall now go on to explain, Nigeria submits that the Court should decline to take any action on Cameroon's request for interim measures.

The Court, Mr. President, has consistently declined to give judgment where there is no need for it to do so. Thirty-three years ago, in relation to matters closely connected - at least geographically - to the matters now before the Court in these proceedings, the Court considered this issue in the *Northern Cameroons* case (*I.C.J. Reports 1963*, pp. 38-39). There the Court declined to give a judgment in the light of its views as to some very fundamental aspects of the Court's functions. Although, said the Court, it is

> "the act of the Applicant which seises the Court, [and] even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore ... The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (P. 29.)

The Court went on:

> "it always a matter for the determination of the Court whether its judicial functions are involved ... To determine whether the adjudication sought by the Applicant is one which the Court's judicial function permits it to give, the Court must take into account certain facts in the present case." (Pp. 30, 31.)

After considering the facts of the case, the Court, in the light of the essential nature of its judicial function, declined to adjudicate upon issues where, in the circumstances which had arisen, to have done so would have been "devoid of purpose", and again "[a]ny judgment which the Court might pronounce would be without object".

Mr. President, 10 years later, in 1974, the Court followed the same reasoning in the *Nuclear Tests (Australia* v. *France)* case *(I.C.J. Reports 1974)*. In its Judgment in that case, the Court spoke as follows:

> "The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute ... The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the object of the dispute has been achieved by other means." (Pp. 270-271, para. 55.)

And the Court continued that Article 38 of the Statute and

> "other provisions of the Statute and Rules also make it clear that the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties. In refraining from further action in this case the Court is therefore merely acting in accordance with the proper interpretation of its judicial function." (P. 271, para. 57.)

> "The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless ... [T]he needless continuance of litigation is an obstacle to [international] harmony." (P. 271, para. 58.)

> "The object of the claim having clearly disappeared, there is nothing on which to give judgment." (P. 272, para. 59.)

Those observations by this Court were, of course, given during the course of proceedings on the merits. They are, however, no less

applicable in principle to the exercise by the Court of its incidental jurisdiction to indicate interim measures. Accordingly, Mr. President, following the jurisprudence of the Court, there are a number of questions which need to be addressed.

Does the matter in respect of which interim measures are being sought "continue to exist"? No, Mr. President, it does not. It is over. As the Agent for Nigeria has said, there is at the present time no conflict in the region.

Has the object of the "dispute" been achieved by other means? Yes - the matter was dealt with by the Foreign Ministers at their meeting on 16 and 17 February. They reached an agreement - they agreed upon a cessation of hostilities. The matter is again being dealt with by the Foreign Ministers; and will be further dealt with by the Heads of State. Consequently (and here let me reflect the language used by the Court), the Court "must not fail to take cognizance of a situation in which a dispute has disappeared" for those reasons.

Does a dispute genuinely exist between the Parties? - that is, a "dispute" as to the matter raised on this request for an indication of interim measures? Of course, the underlying dispute as to the merits of the parties' positions regarding Bakassi still exists - but the present proceedings are not concerned with those merits, but only with the more limited issue arising from the localized incidents which have taken place, and as regards that limited issue, does it any longer "genuinely exist"? No, it does not. Indeed, it is questionable to what extent any dispute of a kind sufficient to warrant seising this Court with a request for interim measures ever existed: within days of the incidents in the Atabong area, elements of the Nigerian armed forces were, on the insistence of Cameroon, participating with members of the Cameroon armed

forces in joint exercises in Cameroon - very far from the behaviour one would expect if a real and serious dispute had erupted. The localized incident which occurred is being resolved by discussions at the highest levels between the States concerned, under the auspices, also at the highest level, of a friendly third State. It would, as the Court has acknowledged, accordingly be fully in accordance with the proper interpretation of the Court's judicial function for it to refrain from further action on Cameroon's request.

Mr. President, is the continuation of this phase of this litigation needless, and thus an obstacle to international harmony? Yes, Mr. President, it is. It is needless, because other, wholly appropriate, procedures for resolving the issues with which Cameroon seeks to involve the Court are in place, and are being utilized at the highest levels. And it would be an obstacle to international harmony:

(i) the conduct of this contentious phase of the litigation is unlikely to be helpful to the Heads of State and their Foreign Ministers during their political discussions over the coming days and weeks; and

(ii) not only that, but also for the representatives of the two States to be actually engages in this forensic conflict when elsewhere political talks are taking place on the same matter can hardly be helpful to the successful outcome of those talks.

Finally, therefore, can it be said that the object of Cameroon's claim has disappeared? If - as appears to be the case - that object, essentially, is the discontinuance of military skirmishes and the prevention of their recurrence, that object has disappeared: the two States, at the highest political level, are seeing to that. They have reached an agreement "to stop all hostilities": they have agreed to the mediation of the Head of a third State: they have agreed to further

imminent meetings of their Foreign Ministers and their Heads of States. There is accordingly nothing left for the Court, consistently with the integrity of its judicial function, to give judgment on.

And if, as Nigeria submits would be proper, the Court concludes that it would not be appropriate for it to indicate any interim measures, what loss would this involve for Cameroon? Given that current discussions at the highest levels are taking place between the two States, Cameroon has there the proper forum for pursuing whatever goals it seeks, at the political level. Restraint by the Court in indicating interim measures would harm no actual Cameroon interest, and would be more likely than otherwise to enable the respective Heads of States, under the auspices of a third friendly Head of State, to resolve whatever may still need resolving.

For these reasons, Mr. President and Members of the Court, Nigeria submits that Cameroon's request for an indication of interim measures no longer serves any purpose, and that accordingly the proper course for the Court to take is to dismiss Cameroon's request.

The Court is without jurisdiction to adjudicate on Cameroon's Request

I should like now, Mr. President, to turn to the question of the Court's jurisdiction.

As the Court will know, Nigeria has submitted a number of Preliminary Objections to the Application originally submitted in March 1994 by Cameroon. The first is that the Court is without jurisdiction to entertain that Application. At the appropriate time, Mr. President, when the Preliminary Objections as a whole are considered in oral hearings before the Court, Nigeria will have much to say on this question. For the moment it might be sufficient, in the context of these present proceedings, simply to say that Nigeria maintains its objections to the

Court's jurisdiction. Nigeria does, of course, maintain those objections; but Mr. President, it may be more helpful to the Court if I outline, briefly, the main elements in Nigeria's argument that the Court is without jurisdiction. And, indeed, Mr. President, there are certain observations which have to be added to Nigeria's Preliminary Objections in order to show not only that the Court is without jurisdiction over Cameroon's main Application, but also that it is without jurisdiction over the present Request for interim measures.

For immediate purposes, two things are clear. The first is that the Court is not called upon, in the course of adjudicating upon Cameroon's request for interim measures, to make any definitive ruling on Nigeria's First Preliminary Objection, and the second, is that, for purposes of adjudicating upon a request for interim measures, the Court need only be satisfied that it has jurisdiction prima facie.

Mr. President, both Cameroon and Nigeria have made declarations under Article 35, paragraph 2, of the Court's Statute, accepting as compulsory the jurisdiction of the Court. That fact alone, however, is not sufficient to establish the jurisdiction of the Court, either substantively of prima facie. Even a "prima facie" requirement establishes some threshold which must be passed and one which in this case calls for a careful consideration of the declaration made by Nigeria. In Nigeria's submission, when Nigeria's declaration is considered in the light of the facts surrounding Cameroon's Application, reliance on it as the basis for the Court's jurisdiction is so flawed in law, and so tainted with uncertainty, that the Court cannot be said even to have prima facie jurisdiction.

Mr. President, I do not propose to take the Court through Nigeria's First Preliminary Objection paragraph by paragraph. Rather I should just

like to highlight some of the main elements in that Objection, in order to demonstrate that, even in relation to the present proceedings, the Court is without jurisdiction to adjudicate upon Cameroon's request.

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Mr. President, the first point which I should like to address is that of reciprocity. The essentials of Nigeria's submissions on this point are simple. First, Nigeria's declaration under Article 36 was subject to reciprocity; and second, in the circumstances of Cameroon's Application, there was no reciprocity such as to satisfy that condition.

The first of those elements, Mr. President, is clear enough. In the relevant part of its declaration Nigeria stated that it accepted the Court's jurisdiction as compulsory "in relation to any other State accepting the same obligation". Now in saying that, Nigeria was simply repeating the terms of Article 36, paragraph 2. But Nigeria's declaration went on to add, "that is to say, on the sole condition of reciprocity". This addition is crucial.

Mr. President, "reciprocity" involves considerations of mutuality. It requires not only that States A and B have accepted the Court's jurisdiction to the same extent, but *also* that they are each equally able to invoke their respective declarations - in effect, that they are both equally able to make use of the opportunity afforded by their parallel declarations, and are both equally at risk of proceedings being instituted against them. By the terms of its declaration, Nigeria made it clear that it was not accepting the Court's jurisdiction solely on the basis of the language of Article 36, but emphasized and attached importance to the need for "reciprocity" in its full sense.

Here, Mr. President, its necessary to make a point of somewhat wider significance and this is that the Court since the earliest days of the Permanent Court of International Justice has consistently had regard to substance rather than to form. In the second contentious case on which the Permanent Court gave judgment, the *Mavrommatis Palestine Concessions* case, the Court said: "The Court, where jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law." (*P.C.I.J., Series A, No. 2*, p. 34.) Building on that sentiment, Mr. President, the Court has gone on to apply it in many subsequent cases. The Court preferred substance to form when holding, in the *Reparations* case, that the formal requirements of the "nationality of claims" rule did not exclude the United Nations from having the right to bring an international claim; later, in the *Nottebohm* case, the Court similarly declined to apply narrow and formal considerations of "nationality" and preferred to apply that term on the international plane in a substantive, "genuine", manner; and similarly, in the *Aegean Sea Continental Shelf* case, the Court declined to decide whether a communiqué constituted an agreement simply on the basis of its formal characteristics, but instead looked into the substance of the issue in the light of all the circumstances surrounding the issuing of the communiqué. The approach of the Court, Mr. President, has been consistent: at the international level, it is substance, not form, that matters.

And now, let me return to the question of "reciprocity". It is not a term to be understood in the abstract: the Court itself said so in the *Right of Passage* case. It has to be given meaning in the light of its context, and in the light of the circumstances in which it falls to be

applied. And, for the reasons I have just given, it has to be understood as a matter of substance, and not merely of form.

And the substance of the concept lies not in the mere fact that State A and State B have made declarations under Article 36 which cover the same ground; so far as that alone might be regarded as constituting reciprocity, it does so, at most, at a merely formal level. *Substantive* reciprocity requires mutuality in the positions of States A and B, so that each is in the same position vis-à-vis the other as that other is in in relation to itself.

Such substantive reciprocity did not exist when Cameroon submitted its original Application. The Court, in the *Barcelona Traction* case, noted the need for the Court "not to lose touch with reality". At the time when Cameroon submitted its Application, Nigeria had no knowledge of Cameroon's declaration, and no reasonable means of knowing of it - a state of affairs which Cameroon must have known, and which Cameroon did nothing to remedy, even though, as I shall show, Cameroon had plenty of opportunity to do so.

In those circumstances, Mr. President, no genuine reciprocity in substance existed. There was no mutuality between the positions of Cameroon and Nigeria. As a matter of practical reality, Nigeria was unaware of any possibility of being able to institute proceedings against Cameroon while Cameroon, of course, was fully aware of its possibility of bringing proceedings against Nigeria; and conversely, Nigeria was at risk of having Cameroon bringing proceedings, while Cameroon was free from any equivalent risk. Such an unbalanced situation as between Cameroon and Nigeria can in no way be regarded as constituting that kind of substantive reciprocity which Nigeria's declaration under Article 36

stipulated as a condition for its acceptance of the Court's compulsory jurisdiction.

And, Mr. President, that lack of reciprocity is manifest from the circumstances; no obscure research, and no complex arguments, are needed to demonstrate it. And just as manifest is Nigeria's condition that reciprocity is essential if the Court is to have jurisdiction under Article 36. It is the manifest character of these facts which justifies Nigeria's submission that not only is the Court without substantive jurisdiction over Cameroon's Application, but Cameroon cannot even establish that the Court has a prima facie basis for jurisdiction.

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Mr. President, let me now turn to the second element in Nigeria's submission that the Court is without jurisdiction, to which I should like to draw the Court's attention. It concerns the behaviour of Cameroon.

I need to remind the Court of certain facts. Cameroon's declaration under Article 36 was deposited with the Secretary-General on 3 March 1994. Cameroon's Application instituting proceedings against Nigeria was lodged with the Court on 29 March 1994. So far, so straightforward.

But now we come to the curious bit. The facts are these. It is a fair assumption that Cameroon did not just begin to think about depositing a declaration under Article 36 a day or two before actually doing so: the normal governmental processes of consultation and drafting will have taken some weeks - let us say, therefore, four weeks; that is, going back to early February 1994. Mr. President, in the course of various contacts in the weeks before 29 March 1994 Cameroon carried on

discussions with Nigeria in a normal manner, with no suggestion that Cameroon was contemplating, let alone about to take, such a significant step in its bilateral relations with a friendly State as the institution of proceedings before the Court.

Relations between two States, which have many close common ties, naturally involve a network of regular meetings and less formal contacts between their representatives. There were many such meetings - Nigeria has given details of the pattern of them in its Preliminary Objections, and I will not repeat those details here. Yet at *none* of these meetings - not even at the meeting of the Lake Chad Basin Commission Heads of States on 21 to 23 March 1994 (and that is just *days* before Cameroon submitted its Application) - not even then did Cameroon so much as hint that it was actively taking steps to prepare to bring Nigeria before this Court.

Mr. President, that is not the conduct of a State conducting itself with the degree of good faith which Nigeria is entitled to expect. It is not just that Cameroon did not inform Nigeria of matters which - as Cameroon well knew - were of direct and substantial importance to Nigeria, but also that Cameroon, by its silence when it could have been expected to speak, knowingly misled Nigeria as to the true nature of Cameroon's view of its relations with Nigeria. In the very context with which we are at present concerned (namely, the network of relationships to which declarations under Article 36 give rise) this Court (in the *Military and Paramilitary Activities* case) "has emphasized the need in international relations for respect for good faith and confidence in particularly unambiguous terms". No evidence of that respect is to be found in Cameroon's conduct in this matter.

Further, and perhaps just a different aspect of the same behaviour, if we assume - and at the present time this is only an assumption for purposes of argument - that by virtue of its declaration Cameroon thereby acquired a right to institute proceedings against Nigeria, then the surreptitious way in which Cameroon set about making its declaration and subsequently acting on it against Nigeria amounted to an abusive exercise of that right. Again, the secrecy surrounding Cameroon's behaviour on this matter, at least as regards Nigeria, is manifest from the publicly known timing of Cameroon's declaration and Application, taken together with the equally publicly known calendar of meetings at which representatives of the two States were present. That behaviour is accordingly such as to deny to Cameroon's invocation of the optional clause declarations even a prima facie basis for the Court's jurisdiction.

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Mr. President, the final brief element to which I should like to draw attention, concerns some observations about the very limited relevance which the *Right of Passage* case *(I.C.J. Reports 1957)* has for the question of jurisdiction in relation to Cameroon's Application of 1994. In that case the Second and Fourth Preliminary Objections raised by India had certain apparent similarities with the First Preliminary Objection raised by Nigeria.

Mr. President, a first point can be made very briefly. Nowhere in its Judgment on those Indian Objections did the Court address questions of good faith or abuse of rights; those terms do not appear in the relevant paragraphs of the Judgment. This is not surprising: the facts

in that case did not reveal the same pattern of dealings between the parties as is evident in respect of Nigeria and Cameroon in February and March 1994.

A second point can be equally briefly made. India's declaration made a point of expressly stating that it took effect "as from today's date" (that is, of course, as from the date of the Indian declaration): this was a feature of the declaration to which the Court drew attention (p. 146). Nigeria's declaration contains no such statement.

There is a third point, also to be mentioned briefly. The Court did, albeit very briefly, deal with reciprocity issues. Nowhere, however, in its brief treatment of the issue, did the Court look closely at those aspects of the notion of substantive reciprocity which are central to Nigeria's objections to the Court's jurisdiction: nothing the Court said in that Judgment runs counter to the submissions being made in this context by Nigeria.

My fourth and final point draws attention to the limited basis of the Court's decision in finding against India's contentions that Portugal had acted prematurely. The Court asked itself only two questions - had Portugal acted in a manner contrary to the Statute, and had any right of India been violated by Portugal having acted in the way it had? On the first question the Court found that Portugal had not acted contrary to the Statute; and on the second it simply noted that India had not specified what actual right had been adversely affected, and that the Court was itself unable to discover what Indian right had been violated. In this context, Mr. President, Nigeria has a number of rights which it can identify as being adversely affected by the way in which Cameroon acted in filing its Application - for example, let me just mention Nigeria's right that other States, in their relations with Nigeria, act

in good faith, and that they exercise such rights as they might have without doing so in an abusive manner.

Mr. President, at the appropriate time Nigeria will deploy its arguments more fully on these various points, but for the Court's immediate purposes, however, I have, I hope, said enough to indicate that Nigeria's arguments raise serious issues. Nigeria submits that those arguments are sufficient to demonstrate that, even on the prima facie basis which is relevant for the present proceedings, the Court, lacks jurisdiction to adjudicate upon Cameroon's request for an indication of interim measures.

Thank you Mr. President. It would be, if I may suggest, for you to invite Professor Crawford to address the Court. But perhaps that would be best done after a break.

The PRESIDENT: I thank you very much, Sir Arthur, for your statement and the hearing is suspended for a break of 15 minutes. The sitting will resume at 12 o'clock.

The Court adjourned from 11.50 a.m. to 12.10 p.m.

The PRESIDENT: Please be seated. I now give the floor to Professor James Crawford.

Mr. CRAWFORD: Thank you Mr. President. Mr. President, distinguished Members of the Court, it is again an honour to appear before you.

In this short presentation, I will address some of the considerations relating to the admissibility of the Cameroons request and of the underlying amended Application.

I need initially to make a point about the applicable law. Under Article 41 of the Statute of the Court, the Court has a discretion

whether or not to indicate provisional measures. It is well-established that the Court will not do so unless the indication is really justified. I hope I may refer here to an observation - I have to say it is an extrajudicial observation - of Judge Oda. Requests for provisional measures are intended to be "*incidental to, not coincidental with*, the proceedings on the merits of such contentious disputes as fall within the jurisdiction of the Court" (S. Oda, "Provisional Measures. The Practice of the International Court of Justice" in V. Lowe & M. Fitzmaurice (eds.) *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings* (Grotius, Cambridge University Press, Cambridge 1996) p. 554 (emphasis in original).)

Now in the present case and in relation to the present request, this raises two distinct issues so far as admissibility is concerned. The first concerns the requirement that the dispute should "fall within the jurisdiction of the Court". The second concerns the requirement of incidentality. Let me deal with these in turn.

The Requirement that the Underlying Claim should be Prima Facie Admissible

First, as to jurisdiction, my colleague, Sir Arthur Watts, has already outlined the established requirement for an indication of provisional measures, that there should exist instruments emanating from the two parties which "appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded". I would simply wish to observe that this test must be applied to considerations of admissibility equally with those of jurisdiction in the strict sense. If, on a preliminary consideration, there is no appearance that the case is prima facie admissible, then the Court ought not to indicate provisional

measures, any more than it should do so if there is no appearance that the Court possesses jurisdiction.

The Court implicitly accepted this in the Interim Measures phase of the *Nuclear Tests* cases in 1973. There were issues in that case both as to jurisdiction and as to admissibility. For example, there was a question whether Australia and New Zealand, directly on the same side in that case, had title to sue in relation to the rights on which they relied, and this is more properly classified as an issue of admissibility rather than of jurisdiction. In indicating provisional measures in the two cases, the Court noted that it could not

> "be assumed *a priori* that such claims fall completely outside the purview of the Court's jurisdiction, or that the [Applicant] may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application" (*I.C.J. Reports 1973*, p. 103, para. 23; *ibid.*, p. 140, para. 24).

The Court thus distinguished between issues of jurisdiction and issues of admissibility, and applied the same test to both in the context of provisional measures. And this is surely right in principle. An indication of provisional measures is a formal order of the Court, and the Court should not issue such an order if it is most unlikely that it will be able to reach the merits of the case. It may not be able to do so equally for reasons of lack of jurisdiction or inadmissibility.

One may even speculate that the reason Portugal did not seek provisional measures in the *East Timor* case *(I.C.J. Reports 1995, p. 90)* was a concern lest its Application was not appear prima facie admissible. In short, the same threshold requirement exists in relation to admissibility as in relation to jurisdiction. And that proposition is affirmed in leading texts on provisional measures (J. Sztuck, *Interim Measures in the Hague Court* (Kluwer, Deventer, 1982) pp. 244-245). It

was not denied yesterday by Professor Pellet, as far as one could tell amidst his torrent of dismissive propositions.

Mr. President, Members of the Court, Nigeria has in its Preliminary Objections set out at some length and with reference to the various documents the reasons why it believes that the Parties were under a duty to settle all boundary disputes by means of the existing bilateral machinery, as distinct from by unilateral and unpremeditated recourse to the Court. The Parties were under an obligation to resort to existing mechanisms for the resolution of bilateral disputes. Those mechanisms did not at the relevant time include this Court. Indeed, there was no mention of the Court, both because Cameroon was not at any time prior to March 1994 a party to the Optional Clause, and also because there was a mutual recognition that judicial machinery was not appropriate to the resolution of practical problems associated with the boundary.

This can be seen, for example, in the exchanges that followed the Yaoundé meeting of August 1991. The *Procès-Verbal* of the Discussion of Experts emanating from that meeting (NPO Ann. 52; Vol. II, p. 408) had this to say on the land boundary:

> "Les deux parties ont constaté avec satisfaction que cette frontière est bien définie et qu'il n'y a pas des problèmes majeurs à ce niveau. Elles ont accepté le principe de l'identification et de la densification des bornes frontalières."

That statements did not mean there was no boundary problems at all. The *Procès-Verbal* went on to refer to the dispute arising from the Maroua Declaration. And the contemporaneous Joint Communiqué of the two Foreign Ministers, after agreeing

> "to examine in detail all aspects of the matter [that is to say, the matter of border issues] by the Experts of the National Boundary Commission of Nigeria and the Experts of the Republic of Cameroon ... with a view to making appropriate recommendations for a peaceful resolution of outstanding border issues" (NPO, Ann. 53; Vol. II, p. 417).

There were outstanding border issues, especially in the area affected by the Maroua Declaration, but these did not mean that the boundary as a whole was in issue. The issues that were in dispute could be resolved by the Parties on a case-by-case basis, not by converting outstanding border problems into a single massive dispute. Subsequently the Experts did meet, and the Nigerian side recorded the kinds of problems that existed. The Nigerian Party noted that:

> "there were more serious problems than envisaged. The boundary had never been properly defined on the ground. Demarcation by the European powers ... followed natural features such as mountain peaks, hill tops and rivers where these existed. In some cases, the boundary alignment relied on vague directions, names of villages or guest houses which no longer exist. In view of the inability to define the boundary on the ground, there have been many border disputes amongst the corresponding population settling along the boundary. After giving several examples of these disputes, the Nigerian side proposed the need to demarcate and survey the boundary and that this should be undertaken by a joint team of Nigerian and Cameroonian Experts." (NPO, Ann. 54; Vol. II, pp. 427-428.)

In response the Cameroonian Experts noted that earlier work to that effect had been interrupted by the Nigerian civil war, and "expressed the wish to continue the work more so as they were in possession of all the necessary legal instruments (NPO, Ann. 54; Vol. II, p. 428).

To summarize, the consistent position of the Parties was that for the most part the boundary was established in principle, that there were local difficulties in various areas which could only be resolved on the bilateral plane and by focusing on the particular dispute.

Mr. President, this is to be contrasted with Cameroon's present position, which is that there is a giant dispute affecting the whole border from Lake Chad to the sea and beyond which can only be resolved by the Court.

It is worthwhile to recall here as it were by analogy the way in which Cameroon had treated the express obligation under the 1982 Law of the Sea Convention to resolve disputes as to the delimitation of the

maritime boundary beyond 12 miles. Articles 72 (2) and 83 (2) of the 1982 Convention are perfectly clear: the delimitation of exclusive maritime zone and continental shelf are to be effected "by agreement on the basis of international law". And yet there was no attempt whatever at reaching agreement on these maritime zones on the part of Cameroon before it commenced the proceedings before this Court. As Nigeria has shown in its Preliminary Objections, there has been no discussion whatever (NPO, paras 7.6-7.17). Nigeria first learned of Cameroon's position as to the maritime zones beyond 12 miles when it received Cameroon's Memorial. Mr. President, the lodging of a Memorial before this Court is an odd way to begin a negotiation!

Yet this clear failure by Cameroon to meet the requirements of Article 74, paragraph 1, and Article 83, paragraph 1, of the 1982 Convention is paralleled by its failure to meet the requirements of good faith in negotiation in relation to the various sectors of the land boundary, as is demonstrated in Nigeria's Preliminary Objections (see NPO, Chap. 2, paras. 2.6-2.36).

There is a second and related element of the admissibility of Cameroon's claim, looked at globally and as presented by the amended Cameroon Application. Under Article 36, paragraph 2, of the Court's Statute, the Court has jurisdiction over "legal disputes"; under Article 38, it applies the rules of international law to "such disputes as are submitted to it". An application must indicate "the subject of the dispute" (Art. 40; cf. Art. 38, para. 1, of the Rules), and the applicant is not permitted to go beyond the dispute delineated in the application - as those of us who were counsel for Nauru discovered when the Court decided *Certain Phosphate Lands in Nauru* (*I.C.J. Reports 1992*, pp. 262-267).

Now it follows from these provisions, and from the basic principle of consent, that the applicant State must be bound by its characterization of a dispute. The indication of the dispute which is required by the Statute and the Rules is not simply an indication of a set of facts, of a state of affairs. Pleading before the Court is not merely fact pleading, in the common law sense. The notion of a dispute is a legal notion, and it both depends upon and requires a process of legal characterization. A dispute of one character as indicated in an application cannot be transformed into a dispute of another character; conversely, if the factual situation existing as between the parties discloses a dispute which is of a quite different character from that indicated in the application, then the application is inadmissible so far as that dispute is concerned.

Now in the present case, how does Cameroon characterize the dispute, or to use the language of Article 40 of the Statute, what does it indicate the subject of the dispute to be? For this purpose it is necessary to look at Cameroon's amended Application. When it lodged its amendment, Cameroon claimed - and Nigeria subsequently agreed - that the amendment was to be treated as integral to and as part of the initial Application. There is a single amended Application, albeit that it is formed by two documents lodged on different days. There is in consequence only a "single case"; I am using the language Cameroon chose to use in paragraph 10 of its amended Application. The dispute so presented in this "single case" covers "the course of the boundary between the Republic of Cameroon and the Federal Republic of Nigeria, from Lake Chad to the sea" (this is paragraph 1 of the amended Application, which is evidently the indication of the dispute). It also, of course, extends out to sea to the extent of the mutual maritime zones.

It is true that the dispute in addition covers certain consequential matters of responsibility, but these the Court can only decide once it has determined the course of the boundary. If the indication as to the dispute between the Parties as to the whole course of the boundary is inadmissible, the whole Application is inadmissible.

In short, Mr. President, Cameroon claims that there is a dispute as to the whole land boundary, that this is challenged in principle by Nigeria, that Nigerian revanchism extends over 1,680 km, that is, about 1,000 miles in the old system. That, Members of the Court, would be revanchism indeed.

But the fact is, as demonstrated in Nigeria's Preliminary Objections (NPO, Chap. 5), that there is simply no evidence of such a dispute. Cameroon should be held to its description or indication of the dispute, and its description or indication bears no relationship at all to the realities. There is, quite simply, no such dispute as that indicated in paragraph 1 of Cameroon's amended Application, and for that reason alone the Cameroon Application as amended is inadmissible.

Mr. President, Nigeria does not deny the existence of a more specific territorial dispute over the Bakassi Peninsula. But it says that that dispute is not the dispute indicated, as the subject of a single case, in the amended Application. The point can be illustrated in a number of ways.

I take first of all the letter of the Cameroon Minister of External Relations to the Court, dated 5 February 1996, that is to say, after the incident of 3 February 1996. Minister Oyono referred in the first paragraph to "the dispute between Cameroon and Nigeria, a dispute currently before the International Court of Justice". He went on to refer to discussions between the Parties in attempt to restore peace

"pending the decision of the International Court of Justice to which the two parties have had recourse for the peaceful resolution of this dispute according to law". I note in passing, Mr. President, that the two Parties have done no such thing; the Cameroon Application as amended is unilateral, and was initially made without any notice having been given to Nigeria that Cameroon was a party to the Optional Clause. But the point I want to make here is quite simply that the dispute before the Court as a result of the amended Application is not the dispute over Bakassi. It is a dispute over the whole land boundary. And there is no such dispute, at the level of principle, and there is no single dispute at the level of detail. What there is a lengthy boundary, criss-crossed by rivers and mountains, and populations. Part of the boundary has been delimited by treaty. Some parts of the boundary have been demarcated, some have not. There are numerous problems along the boundary, some of which taken alone may constitute "legal disputes" within the sense of Article 36 of the Statute, others of which may not. To describe the delimitation of the whole boundary as in dispute is not even prima facie plausible. And since such a description is central to what Cameroon now presents as its "single case", it follows that the amended Application is not even prima facie admissible.

It is useful, Mr. President, to indicate the sorts of real issues which the boundary presents by referring to one of the early boundary survey documents, the Report of the First Stage of the Nigerian-Cameroon Boundary Survey of May 1966 (NPO, Ann. 12; Vol. II, p. 93). That document concerns a "little bit of boundary" which was the subject of a particular dispute; the dispute concerned a 2½ mile sector, and the overall stretch under consideration at that time was about 20 miles (about 2 per cent of the boundary).

Mr. President, I do not want needlessly to exacerbate the Court's financial and staffing problems. But the nature of the real issues between the Parties, and the obvious fact that there is no single dispute before the Court relating to "the course of the boundary ... from Lake Chad to the sea", can be brought out by reference to the 1966 Report. There the parties had agreed that an actual dispute should be resolved by the demarcation of a section where there had been some pillars, but not enough pillars, and those that were there had not been maintained. The Report records that there were no motorable roads; for most of the boundary this is still the case. It refers to the need for all the equipment to be carried by porters. It adds:

> "Owing to the nature of the almost virgin forest a lot of cutting and felling had to be done. The labour gang was grossly under strength and it will be necessary to have axemen as well as cutlassmen. Machine saws in addition to the axemen will be necessary." (NPO, Ann. 12, p. 2; Vol. II, p. 96.)

Mr. President, there is no single dispute before the Court which responds *in any way* to Cameroon's "single case". There is a vast, judicially unmanageable boundary, through some of the least tractable country in Africa. Where there are disputes, they are particular and various. Most of them relate to demarcation, or re-demarcation, or the maintenance of a boundary locally recognized, or rights relating to the régime of the boundary, or access or transit or floods. The Court's problems with translators will pale into insignificance - and Mr. President I would be the last to suggest that they are not significant - alongside its need for axemen and cutlassmen and surveyors and valuers, and so on. The parties have always treated the boundary areas as requiring to be demarcated in order to avoid disputes (*cf.* the Joint Communiqué of 14 Jan. 1982, NPO, Ann, 27; Vol. II, p. 281; *Procès-Verbal* of Discussion of Experts, Yaoundé, 27-30 Aug. 1991, NPO,

Ann. 52; Vol. II, p. 405 at p. 408; Minutes of the Joint Meeting of Experts on Boundary Matters, Abuja, Nigeria, 15-19 Dec. 1991, NPO, Ann. 54; Vol. II, p. 421 at p. 427). Demarcation is not the task of the Court but of joint machinery established by the parties.

I turn to the second point made by Judge Oda in the passage I quoted.

Cameroon's request is not incidental but coincidental

Mr. President, Members of the Court, for the reasons I have given there is not even prima facie admissibility of "the dispute" presented by Cameroon as a "single case" in its amended Application. But the point can be taken further, and here I refer, as I have said, to the second element of the passage quoted from Judge Oda with which I started. Provisional measures proceedings are intended to be "incidental to, not coincidental with" the substantive proceedings over which the Court has jurisdiction. But Cameroon's request is coincidental, not incidental. It sets out (presumably not just *per memoriam*) all that Cameroon asks the Court to do in its amended Application. It comments (presumably not gratuitously) on *all* of Nigeria's Preliminary Objections, most of which are unrelated to Bakassi. It asserts an attempt by Nigeria aimed at the "conquest" of the Bakassi Peninsula, thus implicitly calling on the Court to decide the case in Cameroon's favour at this stage; one does not conquer one's *own* territory. It suggests that the Court should take into account at this stage that the preliminary objections are "without any sound basis in law" (Request, para. 6). It calls on the Court to determine, in a situation in which the facts are in dispute and the Court has no means of conducting its own examination, that Nigeria engaged in an "armed attack" on 3 February 1996 - this is apparently "without prejudice to the merits of the dispute" (Request, para. 8)! Above all it

calls on the Court to indicate that "the Parties shall abstain from all military activity along the *entire* boundary" - along *all* the boundary from Lake Chad to the sea. Professor Cot was quite clear about this yesterday - and one should note that neither Cameroon nor Nigeria argues that there is a boundary within the Bakassi Peninsula. No one says there is a boundary within the Bakassi Peninsula. On the information available, there is not even a ceasefire line. The Request mirrors the amended Application, inflated and unresponsive to the actual dispute.

Mr. President, there was a hint in Professor Pellet's presentation yesterday that although this may be true, Nigeria, by its behaviour at the meeting held with you as President on 14 June 1994 (*I.C.J. Reports 1994*, p. 105), may have waived any objection. Professor Pellet referred on several occasions to Nigeria's "accommodating" attitude at that meeting. It was the only word of praise Professor Pellet had. But all that happened at the meeting, as you Mr. President would be able to testify, was that Nigeria accepted the Cameroon position that it was amending its initial Application and continuing a single case now extended to the whole land boundary. The question of the Court's jurisdiction over, or the admissibility of, that amended Application was quite obviously a separate issue. Neither question was resolved by the "accommodating" attitude of Nigerian representatives. Indeed, one might say that since the dispute as now presented by the amended Application bears no relationship to the realities of the boundary or to any disagreements between the parties as to particular sections of the boundary, Nigeria had every reason to be accommodating! For the reasons I have given the single case brought by the amended Application is not even arguably admissible, since it refers to a single and not even arguably existent dispute over a whole boundary.

Mr. President, Members of the Court, I thank you for your attention. Mr. President, may I ask you now to call upon Professor Brownlie to continue this presentation on behalf of Nigeria.

The PRESIDENT: Thank you very much, Professor Crawford. I give the floor to Professor Ian Brownlie once again.

Professor BROWNLIE: Thank you, Mr. President.

1. Mr. President, Members of the Court, my second task this morning is to address certain aspects of Nigeria's title to the Bakassi Peninsula.

2. It is of course Nigeria's position that the issues at large between the two parties should be settled in appropriate bilateral fora, and in any event, as has been pointed out, Nigeria considers that there is an absence of jurisdiction.

3. It cannot be acceptable that an applicant State can, by a request for interim measures, precipitate a trial - even a mini-trial - of the merits. In any event, as a consequence of Nigeria's preliminary objections, the merits phase of the case has been suspended.

4. In such circumstances, and in view of the constraints of time, Nigeria would be justified in reserving its position on the issue of title and, in formal terms, Nigeria chooses that course.

5. However, in view of the Cameroonian assertions relating to title it is surely helpful if the respondent State provides at least provisional indications sufficient to raise serious questions concerning the complacent assertions which were offered yesterday on behalf of Cameroon.

6. Before I proceed further I would like to remind the Court of the useful background information contained in the Introduction to the Preliminary Objections, paragraphs 17 to 19.

7. Three points stand out. *First*, at least 90 per cent of the population of the Bakassi Peninsula consists of Efik and Efut people of Nigeria. This population does not consist of migrants but of long established communities. As explained in Nigeria's preliminary objections in paragraph 8, the Bakassi Peninsula is a low-lying region bordered on the west by the estuary of the Cross River, on the north by the Akwayafe River, on the east by the Rio del Rey estuary, and on the south by the Gulf of Guinea. The Peninsula is perhaps not really a peninsula in strict geographical terms, since it is surrounded by waterways and itself consists of a series of islands lying within those surrounding waterways. The overall picture is one of many small islands in an area criss-crossed by waterways. Some are relatively major, but many are just small creeks and streams. In many places the land is so low-lying as virtually to constitute a swamp. It is remote and inaccessible. The vegetation is tropical, mainly low-growing, dense, and in many places waterlogged. In order to assist the Court, Nigeria has placed before the Court a small booklet of photographs in order to give some general idea of the particular physical nature of the area presently under discussion. These were taken by a Professor of Geography assisting the Nigerian team, in November of last year.

8. *Secondly*, the Bakassi Peninsula formed a part of the dominions of the Kings and Chiefs of Old Calabar, that is the long-established traditional kingdoms of pre-colonial Nigeria.

9. *Thirdly*, the villages of the Bakassi Peninsula were administered by the Eket Division of the former Calabar Province of Nigeria. These

villages include the following long-established Efik villages on Bakassi, and if I could name them and my colleague will point them on the map:

10. Atabong East; Atabong West; Abana; Edem Abasi; Ine Odieng; Ine Akpak; Ine Atayo.

11. Mr. President my main purpose is to develop certain legal aspects of the Nigerian title and my main proposition is as follows.

12. Without prejudice to other legal bases of title, there is substantial evidence that, both before independence and after, the Bakassi Peninsula was administered as part of Nigeria, that is to say, as part of the Eket Division of the former Calabar Province of Nigeria.

13. Furthermore, the territory like the rest of Eket Division formed part of the Calabar Judicial District: under the customary court institution, it was divided into two units, Atabong was administered as part of the Okobo Customary Court area while the rest of the villages fell under the Efiat Mbo Customary Court which was at James Town. The people of the Bakassi Peninsula registered for and voted in the federal election of 1959. In that election, Mr. O. J. Eminue was elected member for Eket East Constituency (which included Bakassi villages) in the Federal parliament. In 1964, a barrister, Mr. E. I. Nkereuwem, who is now a retired judge in the Akwa Ibom State, was also elected in the same constituency.

14. Polling booths for the election were located at Atabong, Abana and Ine Odiong. Messrs. Etim Efiong Bassey and Ebi Umoh represented the area as ward 5 in the then Okobo-Oron County Council of Eket Division, and this for the years 1960-1963 and 1964-1966, respectively.

15. Following the creation of new Nigerian States in 1967 the administration continued under the South Eastern State, later called the Cross River State.

16. Akwa Ibom State was created in 1978 out of the former Cross River State and, soon after that, the Mbo Local Government Authority of Akwa Ibom State, located within the territory of the former Eket Division and the Akpabuyo Local Government Authority of Cross River State. These two authorities have been engaged in an intra-Nigerian dispute about title to Bakassi.

And, Mr. President, the existence of such a dispute of itself constitutes cogent evidence of Nigerian sovereignty in respect of Bakassi.

17. In such circumstances the title of Nigeria rests upon a continuous and undisturbed exercise of sovereignty, in the form of the practical exercise of acts of jurisdiction and administration, *à titre de souverain*.

18. Such continuous and peaceful display of state sovereignty does not, of course, involve reliance upon prescription. The source of title is essentially the process of the historical consolidation of title which was the well-known formulation adopted by the distinguished Belgian authority, and Judge of this Court, Charles De Visscher.

19. This form of analysis was adumbrated in 1953 in his classic work *Théories et réalités en droit international public*, pages 244-245.

20. If I could read the English version of the relevant passages from this work of Charles De Visscher.

21. The heading is "Consolidation by Historic Titles", and he says

"The fundamental interest of the stability of territorial situations from the point of view of order and peace explains the place that consolidation by historic titles holds in international law and the suppleness with which the principle is applied. It is for these situations, especially, that arbitral decisions have sanctioned the principle *quieta non movere*, as much out of consideration for the importance of these situations in themselves in the relations of States as for the political gravity of disputes concerning them. This consolidation, which may have practical importance for territories not yet finally organized under a State régime as well as for certain stretches of sea-like bays, is not subject to the conditions specifically required in other modes of acquiring territory."

And he continues,

"proven long use, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given State. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the judge to decide *in concreto* on the existence or non-existence of a consolidation by historic titles."

22. And the passage continues

"In this respect such consolidation differs from acquisitive prescription properly so called, as also in the fact that it can apply to territories that could not be proved to have belonged formerly to another State. It differs from occupation in that it can be admitted in relation to certain parts of the sea as well as on land. Finally, it is distinguished from international recognition – and this is the point of most practical importance - by the fact that it can be held to be accomplished not only by acquiescence properly so called, acquiescence in which the time factor can have no part, but more easily by a sufficiently prolonged absence of opposition either in the case of land, on the part of States interested in disputing possession or, in maritime waters, on the part of the generality of States."

That is from the Corbett translation of 1957, pages 200-203.

23. Mr. President, this lack of opposition on the part of other states is a common element in the process of historical consolidation of title, providing not a *source* of legitimacy (as in the case of prescription) but a super-added confirmation or guarantee of a pre-existing legitimacy. Hence the evidential value of acquiescence on

the part of other states, and especially those states which *ex post facto* claim a legal interest.

24. And the significance of these elements of silence, acquiescence and general toleration was also given prominence in another influential work by Charles De Visscher: *Problèmes d'interprétation judiciaire en droit international public*, published in 1963, pages 168-181.

25. Mr. President, if I can return to the circumstances of the present case, it was Cameroon which, some 13 years after the independence of Nigeria, took the decision to challenge the territorial status quo in the Bakassi Peninsula.

26. And it is Cameroon which is in the disadvantaged procedural posture of having to challenge a legal status quo based upon the historical consolidation of title reinforced and confirmed by Cameroonian silence and acquiescence.

27. The present difficulties have their origins in the attempts by Cameroon in the mid-seventies to give administrative reality to recently conceived ambitions in Bakassi. Such ambitions were fuelled not by fishing or farming but by interests in offshore oil.

28. The various elements of weakness in the claims of Cameroon need not be subjected at this stage to exhaustive examination. It will suffice to point to the serious deficiencies in the evidence of *effectivités* which is included in the Memorial of Cameroon.

Inadequate and unreliable evidence of Cameroonian *effectivités*

29. The evidence presented in the Memorial of alleged Cameroonian *effectivités* is both inadequate in substance and unreliable otherwise. Pages 179 to 184 are apparently devoted to *effectivités* but no detail is given, and no documentary or other evidence is supplied. Pages 486 to

489 also relate in principle to this subject but in fact only six pages in that part of the Memorial are actually devoted to the subject.

30. The material is to a great extent unsupported by documentary or other evidence. The presentation is also massively self-serving, ignoring the history of the area completely.

31. Of particular significance is the fact that what is presented as evidence is not of Cameroonian title but of the efforts made by Cameroon to change the status quo. These efforts include in particular a Decree of 1973 which purported to change the traditional names of villages in the region. And thus, for example, Atabong West was alleged to become Idabato I and so forth.

32. The fact is, Mr. President, that the evidence offered to prove the existence of Cameroonian *effectivités* is deeply flawed. Moreover, not only is it flawed, but it confirms that it was only in 1973 that Cameroon had decided to prepare the beginnings of attempts to infiltrate the Bakassi Peninsula.

The role of *uti possidetis*

33. Mr. President, I shall end this brief exposition by recalling that the principle *uti possidetis* was intended to avoid disturbance of the territorial status quo as a result of decolonization. This principle does not, of course, rule out disputes after independence precisely in those cases in which there is a serious doubt as to the character of the status quo at the time of independence. And, as Judge Ajibola pointed out in his separate opinion in the *Libya/Chad* case, elements of effective occupation could still be taken into consideration (*I.C.J. Reports 1994*, p. 89, para. 128).

Mr. President that terminates the excursion into some of the issues of title and I now ask you to give the floor to the Co-Agent of Nigeria, to present the final speech this morning.

The PRESIDENT: Thank you, Professor Ian Brownlie and I now give the floor to H.E. Chief Richard Akinjide, Co-Agent.

H.E. Chief Richard AKINJIDE: Mr. President, distinguished Members of the Court, it is a very great honour for me to address this Court. I should now like to close the first round on behalf of the Government of the Federal Republic of Nigeria by making a few comments on specific subjects.

A. The Cameroonian map

A1. The first point relates to the map which Cameroon presented to the Court at yesterday's hearing, a copy of which is to be found in the Cameroonian file at page 8.

A2. Mr. President and distinguished Members of the Court, that map is defective on two counts. First, as we have already told the Court, Cameroon had no military positions in Bakassi prior to 3 February 1996 and has none now. The Cameroonian map claims that the eight sites towards the western edge of Bakassi shown on it by the red circles were Cameroonian positions since occupied by the Nigerian troops. This is simply untrue. I repeat, Mr. President, that prior to 3 February 1966 Cameroon had no military positions in Bakassi. That is a fact.

A3. My second point is this. Those representing Cameroon yesterday described their map as a sketch-map. So indeed it is. The simplifications it makes include the fact that it represents the Bakassi Peninsula as a solid landmass. If, Mr. President, you will look at the map behind me, a copy of which is contained in the pocket at the front of

the Nigerian file, you will see at once that the Peninsula is riddled with creeks and waterways. In particular, there are the waterways through the centre of the Peninsula. These are creeks which are passable by boat. Mr. Daniel is pointing them out now on the map behind me. These creeks are important, because they are the means by which Cameroonian water-borne raiders burst unawares upon the Nigerian positions at noon on 3 February 1996 and bombarded our positions from their vessels.

A4. The Court should understand that although the Rio del Rey might seem like an alternative route, it suffers from two drawbacks. First, the Cameroonian raiders would have been readily visible to Nigerian vessels in the sea and would thus have lost the advantage of surprise. Second, the Rio del Rey, despite its width, is difficult to navigate because of strong currents and submerged boulders.

B. Nigeria's contribution to international peace-keeping efforts

B1. Mr. President and distinguished Members of the Court, in these proceedings Cameroon is trying to depict Nigeria as a powerful bully. Some very strong words have been bandied about. The facts must not be distorted. The first and foremost fact in this regard is that throughout the 35 years of its existence Nigeria has always had, and continues to have, excellent diplomatic relations not merely with Cameroon but with every one of the six neighbouring States. Nigeria has *never* harboured irredentist claims against any of them and harbours no irredentist claim against Cameroon. Bakassi is part of Nigeria, and as you will have seen from the remarks of learned counsel, Sir Arthur Watts, Professor Crawford and Ian Brownlie, Nigeria makes that assertion for excellent reasons of international law.

B2. I hope it will not really be necessary for me to remind the Court, Mr. President, that contrary to the misleading impression Cameroon labours to create, Nigeria also has one of the strongest records of any African State for its support of international peace-keeping efforts. In Africa itself, Nigeria has provided (and in some cases continues to provide) peace-keeping contingents in Liberia, Sierra Leone, Zaire, Tanzania, Rwanda, Somalia, Mozambique and Angola. Nigeria was a key supporter for the Front Line States against the former apartheid South African régime. Further afield, Nigerian peace-keepers have been active in countries such as Lebanon, Kashmir and Bosnia. Nigeria has provided distinguished judges to this Court, whose jurisdiction, duly invoked, Nigeria continues to accept. Nigeria has served as President of the Security Council. In summary, Mr. President, Nigeria has since independence been a respected member of the international community, has played its part in preserving peace internationally, and continues to do so untill today. Nigeria takes pride in this record, which Cameroon itself through Ambassador Engo has acknowledged. It is Cameroon's suggestion that what Nigeria has gained on the swing it will now try to lose on the roundabout. Paul Engo and I, representated our respective countries on the Law of the Sea for many years and in December 1982 he had the honour of signing the Convention and the Final Act on behalf of Cameroon and I also had the honour of signing that Convention and the Final Act on behalf of my country. I refer to this because Professor Crawford has made references to the Law of the Sea in 1982.

C. Administration of Bakassi from Calabar

A further example of Cameroon's lack of frankness with the Court is to be found in the fact, to which Professor Brownlie has alluded, that there is a considerable body of evidence to prove that for a very long time Bakassi has been administered from Calabar, as an integral part of the Federation of Nigeria. I can only regret the fact that the representatives of Cameroon have not considered it part of their duty to the Court to make at least a passing mention to this very substantial body of evidence.

D. Nigeria's letter to the Court of 16 February last

Mr. President, distinguished Members of the Court, at yesterday's hearing a considerable amount of time was devoted to the letter Nigeria wrote to the Court on 16 February 1996, and to the subject of the elections they have considered it appropriate to stage in Bakassi. I do not wish to take up much of your time, Mr. President, with such issues which are totally peripheral to the questions you are now called upon to decide. I confine myself to observing that on this subject, as on many others, the Cameroonian attitude is wholly lacking in realism. In the event, according to the figures Cameroon supplied yesterday under Tab H of their dossier which was supplied to the Court, Cameroon managed to fill some 75 seats with the votes of 163 persons, making each councillor the representative of slightly more than two voters - this in a peninsula inhabited by more than 87,000 persons! What a great homage to democratic norms.

E. Conclusion

E1. Mr. President, we have demonstrated that our Preliminary Objections are to be taken very seriously indeed. We have explained that the Cameroonian claims about Nigerian aggression are the reverse of

reality. We have shown that our relations with Cameroon nevertheless remain good and fraternal, despite particular difficulties. The ceasefire is holding and will continue to hold if Cameroon conforms its behaviour to the requirements of good neighbourliness.

E2. Mr. President and distinguished Members of the Court, the position of Nigeria has not changed down the years. It wishes for and has excellent relations with all its neighbours. It is at peace with all of them and provokes none of them. Nigeria believes that the best way to make progress and to preserve peace is to avoid adversarial conduct and pursue dialogue in the bilateral and regional forums which are the only ones that can defuse this situation. Mr. President, given the strong feelings that exist in both countries, the way forward will be slow and it will be difficult. Proceedings in this Court, however, are neither appropriate nor constructive, with great respect to the Court. The only way forward is down the difficult but essential path of dialogue, dialogue between neighbours and indeed dialogue between brothers.

E4. Mr. President, Nigeria entrusts the issues in this Application for interim measures to the decision of the Court in the knowledge that its case has been heard with courtesy, with fairmindedness and with comprehension. It remains only to thank the Court most sincerely for affording me and my colleagues this opportunity to present Nigeria's case.

E5. Mr. President, distinguished Members of the Court, this completes Nigeria's presentation on the first round. Thank you, Mr. President.

The PRESIDENT: Thank you, Mr. Chief Justice. Now I would like to give the floor to Judge Oda who would like to ask a question.

Judge ODA: Thank you, Mr. President. I would like to ask the following question to the Agent of Nigeria:

"Did Nigeria not think of the possibility that, if the Declaration of acceptance of the compulsory jurisdiction of the Court which it made in 1965 had not been withdrawn, some specific provisions excluding certain boundary problems might have been added to that declaration when the difference of views between Cameroon and Nigeria on the situation of the Bakassi Peninsula became clear prior to or around 1994?"

"Question adressée à l'Agent du Nigéria par M. Oda

Le Nigéria a-t-il envisagé l'hypothèse selon laquelle, au cas où sa déclaration d'acceptation de la juridiction obligatoire de la Cour de 1965 n'aurait pas été retirée, certaines dispositions spécifiques relatives à l'exclusion de certains problèmes frontaliers eussent pu être ajoutées à ladite déclaration lorsque les divergences de vues entre le Cameroun et le Nigéria sur le statut de la péninsule de Bakassi sont apparues, vers 1994 ou avant cette date?"

Thank you, Mr. President.

The PRESIDENT: Thank you. Now I give the floor to the Vice-President for the same purpose.

The VICE-PRESIDENT: Thank you, Mr. President. This is the question for both Parties:

"Are armed forces of Nigeria currently occupying portions of the territory of the Bakassi Peninsula - territory which both Cameroon and Nigeria claim as legally theirs - that they were not occupying before 3 February 1996?"

"Question adressée aux deux Parties par le Vice-Président

Les forces armées nigérianes occupent-elles actuellement des parties de la péninsule de Bakassi - laquelle est revendiquée comme sienne juridiquement par le Cameroun et le Nigéria à la fois - que ces forces n'occupaient pas avant le 3 février 1996?"

The PRESIDENT: Thank you. I now give the floor to Judge Guillaume.

M. GUILLAUME: Merci Monsieur le Président. La question est la suivante : Dans sa lettre au Greffier de la Cour du 16 février 1996,

S. Exc. le ministre de la justice et procureur général du Nigéria a précisé :

> "The Nigerian Government hereby invites the International Court of Justice to note these protests and call the Government of Cameroon to order ... Finally, the Government of Cameroon should be warned to desist from further harassment of Nigerian citizens in the Bakassi Peninsula until the final determination of the case pending at the International Court of Justice."

En s'exprimant ainsi, le Gouvernement du Nigéria entend-il ou non présenter à la Cour une demande reconventionnelle de mesures conservatoires ?

> **"Question by Judge Guillaume to the Agent of Nigeria**
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> In his letter to the Registrar of the Court of 16 February 1996, H.E. the Minister of Justice and Attorney-General of Nigeria stated:
>
> «Le Gouvernement du Nigéria invite par les présentes la Cour internationale de Justice à prendre acte de cette protestation et à rappeler à l'ordre le Gouvernement du Cameroun... Enfin, le Gouvernement du Cameroun devrait être mis en demeure de cesser de harceler les citoyens nigérians dans la péninsule de Bakassi jusqu'à ce que l'affaire en instance soit tranchée définitivement par la Cour internationale de Justice.»
>
> In expressing itself in this way, does the Government of Nigeria intend to present to the Court a counter-claim for provisional measures?"
>
> Je vous remercie, Monsieur le Président.

The PRESIDENT: Thank you. I would be really grateful to the Party or Parties concerned if they would answer the questions on Friday, during the second phase. If this is not possible you can also submit written answers to the questions.

That concludes the first round of the oral arguments of Nigeria. The Court will now adjourn and will resume its sitting on Friday morning 8 March at 9 o'clock for the reply of Cameroon. The sitting is closed.

The Court rose at 1.15 p.m.