SEPARATE OPINION OF JUDGE AJIBOLA

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I. Introduction

After careful consideration of the present situation in the Bakassi Peninsula which forms part of the area in dispute between Cameroon and Nigeria, I agree to vote in favour of the first operative part of the Court's Order indicating provisional measures in this case. I am convinced that it is the proper thing to do in the circumstances, in accordance with the relevant Articles of the Statute and Rules of Court, as well as its jurisprudence. This Order is made irrespective of the request of Cameroon, the Court, in its judicial wisdom, having based the indication on Article 75 (2) of its Rules.

However, I regret to state that I am unable to support or vote with the Court on the other four operative parts, and I wish to say why in this opinion. A situation has arisen on the Bakassi Peninsula through the use of armed force. Cameroon says Nigeria attacked; Nigeria says Cameroon attacked; Cameroon gives details; Nigeria gives details. In the circumstances and at this stage, it is not possible for the Court to determine definitively who was responsible, but it is the cardinal duty of the Court to preserve peace. Nonetheless, it is agreed by both Parties that there were armed incidents on 3 February and 16 and 17 February 1996. The Court is apparently obliged, therefore, in accordance with international law, to show its concern until the matter is decided, and order that both Parties

> "should ensure that no action of any kind, and particularly no action by their armed forces, is taken which might . . . aggravate or extend the dispute before it".

On the other hand, I have voted against the other four operative parts of the Order for the following reasons:

1. These other four operative parts, to my mind, one way or the other, touch on some of the facts about which the Court cannot pronounce at the moment, and the verification of which is in doubt because of insufficient and conflicting evidence from each Party.

2. Some of these other operative parts have been adequately dealt with in the preceding paragraphs of the Order, and therefore need no further repetition in the operative paragraph.

3. While it is clear that Article 33 of the United Nations Charter provides for various machinery to effect peaceful resolution of disputes, it is my humble belief that the Court should concern itself solely with a purely "legal" order and refrain from orders with diplomatic or political content or matters concerning mediation or negotiation, since strictly speaking these issues are apparently outside the legal assignment of the Court. While it is true that the Court is one of the main organs of the United

Nations and is, in fact, its principal judicial organ, matters involving political and diplomatic decisions are better left with the Security Council, the General Assembly, and the Secretary-General of the United Nations. The Court should singularly concern itself with legal and judicial matters. This statement is not without my understanding and recognition that in matters of peace and security all these organs are not uncomplementary and that the role of the Court is not mutually exclusive. I still hold, however, that in the present case before it, the Court should restrict itself to the application of the law under Article 41 of the Statute of the Court and Articles 73, 74 and 75 of its Rules.

4. In fact, it appears to me that some of the operative parts are not only unnecessary, having been adequately covered by the first one, but that they may, contrary to the intentions of the Court, do more harm or damage than good. For example, the third operative part is negative in nature and even in effect. My fear is that it may create more problems than it intends to resolve. There were no "positions in which they were situated prior to 3 February 1996" agreed to by the armed forces and Governments of both Parties at the moment.

5. Above all, I strongly believe that the Court should not issue an order in vain, that is, an order that is difficult or impossible to implement.

I shall now proceed to express my views on the request of Cameroon, and some of my observations on the important issues raised in this request coupled with some of the reasoning behind my decision to support the Court regarding the first operative part of the Order indicated in this matter.

II. Facts-in-Issue

Based on its original Application filed in the Registry of the Court on 29 March 1994 and supplemented by an additional Application of 6 June 1994, the Republic of Cameroon next filed a request for the indication of provisional measures under Article 41 of the Statute of the Court. The request is dated 10 February 1996, seven days after the alleged incidents in the Bakassi Peninsula of 3 February 1996, described by Cameroon as "the grave incidents which have taken place between the Cameroonian forces and the Nigerian forces of aggression in the Bakassi Peninsula".

Consequently, Cameroon is requesting the Court to indicate the following provisional measures:

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

(2) the Parties shall *abstain from all military activity along the entire boundary* until the judgment of the Court takes place;
(3) the Parties shall abstain from any *act or action which might hamper the gathering of evidence* in the present case" (emphasis added).

In support of its request, Cameroon submitted the following documents:

(a) Diplomatic initiatives of Cameroon and the mediation efforts of President Eyadema of Togo which involved the Foreign Ministers of both Parties and the final communiqué of the Foreign Ministers of Nigeria and Cameroon.

Documents concerning the intervention of the United Nations which include the appeals made by the Secretary-General of the United Nations, Boutros Boutros-Ghali, for withdrawal of troops and recourse to peaceful settlement of disputes; statements of the United Nations Secretary-General with regard to the message of President Biya of Cameroon and made after the visit of Ambassador Gambari of Nigeria to the United Nations Secretary-General; letter by the Foreign Minister of Nigeria stating the Nigerian position.

(b) Appeal by Salim Ahmed Salim, the Secretary-General of the Organization of African Unity (OAU), to both Parties to seek a peaceful settlement of their conflict and statements from ambassadors of the European Union calling on both Parties to abstain from any military activities and to withdraw troops to their respective positions prior to the time when this matter was filed in this Court.

(c) Documentary evidence on local elections in the Bakassi Peninsula by Cameroon in 1996.

(d) Documents indicating new military activities in the Bakassi Peninsula after the Piya communiqué, that is, 17 February 1996.

(e) Ministerial letters particularly from the Ministry of Defence and Cameroon Chief of Staff detailing a preliminary assessment of the damage done as a result of the alleged offensive action of Nigeria. The Minister of Defence in his letter of 26 February indicated therein that 2 people had been killed, 6 wounded, more than 100 had disappeared (probably killed or taken prisoner). It was further alleged that Nigeria occupied Idabato I, Idabato II, Komma a Janea, Uzama and Guidi Guidi. This report was somehow slightly at variance with the report of the Cameroon Chief of Staff who claimed that 3 people had been killed, 6 wounded, 123 disappeared and that Idabato I, Idabato II, Kombo a Janea, Uzama and Kombo a Wase were occupied.

Similarly, Nigeria also submitted a bundle of documents in support of its defence to Cameroon's request. In effect many of the documents contained therein negate the documentary assertions and averments contained in the documents of Cameroon. But some facts, like those relating to the presentation of the dispute before many international organizations like the OAU, the Security Council and the European Union, seem not to be in dispute. Subsequently Cameroon submitted, though belatedly, another bundle of documents much of the contents of which was not referred to in the hearings but which contained more detailed maps of the area in dispute. Nigeria also submitted on 7 March 1996 an addendum to its original document of telegrams pertaining to the incident of 3 February 1996.

The relevant question now is whether these facts, documentary and oral, placed before the Court and as responded to by Nigeria are sufficient for the Court to indicate the requests for the three provisional measures at the instance of Cameroon. My answer to this question unfortunately is in the negative. From the evidence placed before the Court, there is no doubt that there were certain incidents recently in the Bakassi Peninsula — the area of dispute between Cameroon and Nigeria. Cameroon, from all the available documents placed before the Court in its Memorial and all the documents presented in support of this request for an indication of provisional measures, claims unequivocally the Bakassi Peninsula as forming part of its territory. Nigeria, as can be observed from all of its documents in defence of this request coupled with its oral presentation, also claims that the Bakassi Peninsula forms part of Nigeria's territory. The question now is who is to be believed? This question, as I have said earlier, cannot be treated fully at this stage of the proceedings. This question, provided the case proceeds eventually to be heard on the merits (in view of the fact that Nigeria on 18 December 1995 filed its preliminary objection challenging the Court's jurisdiction and admissibility of Cameroon's Application), may then be settled one way or the other. No conclusive or convincing evidence was, to my mind, placed before the Court to determine the issue of who was where and when. There is no doubt that this is difficult to decide at this stage of the proceedings. What has been presented before the Court are claims and counterclaims, allegations and counter-allegations, by both Parties. The picture painted of Nigeria by Cameroon was that of a belligerent neighbour bent on expanding its territory by sheer force and who therefore attacked Cameroon in its territory many times in the recent past. Cameroon also tried to persuade the Court to "view Nigeria as the party unwilling to honour bilateral agreements and treaties with regard to the dispute concerning the boundary between them". On the other hand Nigeria equally accused Cameroon as the warmonger who had in the recent past tried to drive away Nigeria from its land in the Bakassi Peninsula and it claimed that 90 per cent of all the people in the Bakassi Peninsula are Nigerians.

It also claimed that most of the civilians killed during the recent incidents are Nigerians and not Cameroonians. Nigeria even went to the extent (CR 96/4, pp. 82-90) of giving a graphic description of how Nigeria was tactically attacked on 3 February 1996 and on 16 and 17 February 1996 through the creeks of the Bakassi Peninsula. Cameroon claimed that Nigeria now occupies some part of the Bakassi Peninsula by force of arms while it drove the Cameroonian forces out of the area before it was occupied mostly between 1994 and 1996 and that it has never laid any claim to the Bakassi Peninsula before 1993.

On the other hand, Nigeria claimed that up till the present time Cameroon had never stationed or had any of its forces in the Bakassi Peninsula. For example, Nigeria remarked and stressed

> "that unlike Nigeria, which has a number of military installations in Bakassi, Cameroon has no fixed military position there. It launched its attack outside the Peninsula" (CR 96/3, p. 13).

It again emphasized the same fact: "I repeat, Mr. President, that prior to 3 February 1996 Cameroon had no military position in Bakassi" (CR 96/3, p. 66). But this point was not specifically replied to by Cameroon, even though it claimed to have an administration set up in many places in Bakassi, including Idabato I and Idabato II. Even many of the maps submitted by Cameroon only indicate the military positions of Nigeria since 3 February 1996 and 16 and 17 February 1996, with nothing shown about the military positions of Cameroon (Map A, Cameroon dossier). On the issue of elections, Nigeria accused Cameroon of recently holding elections within its territory. To counter this claim Cameroon put in documents to show that the election was held within its territory (unfortunately the date of the election was not indicated on this document) (Exhibit H of Cameroon dossier).

The first question that comes to mind, in my opinion, concerning such a request of this nature is the issue of facts and evidence that the Court could rely upon in order to exercise its discretion regarding this incidental jurisdiction under Article 41 of the Statute. But before this issue is examined reference should be made to the question of what is legally required of the Applicant regarding this kind of request. Article 73 (2) of the Rules of Court provides that the requesting party must "specify the reasons therefor, the possible consequences if it is not granted, and the measures requested". In addition to the request filed, the Applicant has also presented a dossier of documents in support of the request. The question is whether all of the documents presented by the Applicant is sufficient for the Court to exercise its discretion based on those facts. It should be added here that Nigeria also presented its own bundle of documents in

reply to that of the Applicant and in support of its own argument that the Court should not grant the request for an indication of provisional measures at the instance of Cameroon.

What is the duty of the Court with regard to all the documents now presented for this incidental jurisdiction? Can the Court rely on these documents and thereby grant the request of Cameroon? Has Cameroon discharged its obligation to give enough "reason" why such request should be granted? Cameroon's dossier in support of its request contains the following:

(i) A sketch-map of the incidents showing the alleged territory of Cameroon which had been occupied by Nigeria since 3 February 1996 and the area which had been occupied by Nigeria since 18 February 1996.

(ii) Reports by the Cameroon authorities on the alleged clash of 3 February 1996 which include, *inter alia*, radio messages, telegram and telex messages; they catalogued alleged attacks by the Nigerian forces, places captured by them, as well as the intensity of the alleged attacks.

(iii) Press reports by Agence France-Presse on 5 and 6 February 1996.

However, judging from the material placed by both Parties before the Court certain facts appear to be undisputed which constitute, in effect, the common ground in these proceedings. These facts are of a purely provisional nature and do not involve any definitive finding of full facts in this case and neither do they affect the ultimate decision on the merits in the future. There are two categories of facts: first, those of the two major incidents and, second, the international mediation and negotiation efforts concerning the dispute.

With reference to the first category, both Parties, as can be gleaned from the material presented in this case and the oral evidence in support, agreed that there was an incident on 3 February 1996 involving loss of lives on both the military and civilian side. Similarly, there were incidents on 16 and 17 February 1996 involving loss of lives on both sides. Both of these incidents occurred in the Bakassi Peninsula. Both incidents were referred to as "skirmishes" in the communiqué of 17 February 1996.

The material supplied by both Parties refers to the mediation efforts of President Eyadema of Togo which resulted in the signing of a communiqué by the Foreign Ministers of Nigeria and Cameroon on 17 February

1996. This communiqué, which recognized the "skirmishes" that erupted between the Parties on 3 February 1996 "between the Nigerian forces and Cameroonian forces, stationed on the Bakassi Peninsula, resulted in several casualties on both sides" (Exhibit E of the Cameroon dossier), contains some important facts, as follows:

> "This unfortunate incident which occurred after several months of relative peace on the Peninsula, led President Gnassingbe Eyadema of the Republic of Togo to appeal to the Heads of State of the two brotherly countries to demonstrate their confidence in his mediatory role in this matter, and to stop hostilities and resort to dialogue and negotiation in solving the dispute." (Exhibit E of the Cameroon dossier.)

The communiqué also referred to the earlier efforts to maintain peace between both Parties by recalling the Tunis Communiqué of 13 June 1994 and the Kara Meeting of 4 to 6 July 1994.

On 5 February 1996, the United Nations Secretary-General issued a press release in which he expressed deep concern about the "border clash" between the Parties which resulted in several casualties; he urged that both Parties should "show restraint and to withdraw their troops from the border area to create the necessary conditions for the peaceful settlement of their dispute", but most importantly the Secretary-General called on both Parties to: *"await the deliberation of the International Court of Justice which is presently seized with the case"* (Cameroon dossier; emphasis added).

In response to letters received by the President of the Security Council (S/1994/228, S/1994/258, S/1994/351 and S/1994/472) from the Permanent Representatives of Cameroon and Nigeria, he forwarded on 29 April 1994 identical letters to both Parties concerning the "border dispute between Cameroon and Nigeria in relation to the Bakassi Peninsula". It is important to refer comprehensively to the decision of the Security Council as stated in the President's letter in the following manner:

> "The members of the Council have taken note of the communiqué issued by the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution of the Organization of African Unity (OAU) (S/1994/351, annex). The members of the Council also welcome the fact that the dispute has been referred to the International Court of Justice.
>
> The members of the Council commend the initiative taken by the Chairman of OAU and other mediation efforts aimed at assisting the parties in reaching a political settlement. They urge the parties to exercise restraint and to take appropriate steps, including continuation of their dialogue and the development of confidence-building measures, to restore confidence between them.

> Council members encourage the parties to continue to pursue their efforts for a peaceful resolution of the dispute in accordance with the principles of the Charter of the United Nations and the Charter of the Organization of African Unity.
>
> The members of the Council request the Secretary-General, in consultation with the Secretary-General of OAU, to follow developments and to use his good offices to help promote the ongoing dialogue aimed at resolving peacefully the dispute between the two countries over the peninsula, and to keep Council members appropriately informed." (S/1994/519.) (Cameroon dossier.)

Other diplomatic appeals were made by the Secretary-General of the Organization of African Unity, Mr. Salim Ahmed Salim, urging the peaceful resolution of the dispute and the ambassadors of the European Union also called on both Parties to abstain from armed conflict and to withdraw to positions occupied before the Court was seised of the matter.

III. Legal Conditions and Grounds for the Indication of Provisional Measures

A. Prima Facie Jurisdiction

In all cases in which the Court is called upon to exercise its power to indicate provisional measures, it must satisfy itself, as one of the "circumstances" referred to in its Statute, that it has prima facie jurisdiction. However, a clear distinction has always been drawn between the jurisdiction of the Court to determine the case on its merits (which is not to be considered at this stage of the proceedings) and its jurisdiction to indicate provisional measures. However the two issues are not unconnected, since both are based on the consent of the Respondent State. A clear distinction has been drawn between "consent to Statute" and "consent to case".

Is the prima facie jurisdiction of the Court in doubt in this matter? This question may need to be examined with great care before any answer can be given one way or the other. Nigeria accepted the compulsory jurisdiction of the Court when, on 3 September 1965, it made its declaration in accordance with Article 36, paragraph 2, of the Statute, on the sole condition of reciprocity. Cameroon made its own declaration of acceptance of the compulsory jurisdiction of the Court on 3 March 1994. Neither State includes any reservation in its declaration. One would have presumed that this fact might be sufficient to enable the Court to satisfy itself that it has prima facie jurisdiction. Unfortunately, an element of doubt — sufficient to justify judicial caution on this issue — was introduced by the Respondent when Nigeria argued the absence of substantial

reciprocity and an absence of good faith on the part of Cameroon (CR 96/3, pp. 40-45). Nigeria contended that

> "if we assume . . . 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" (CR 96/3, p. 45).

Nigeria also said, on the issue of lack of good faith by Cameroon, that "that is not the conduct of a State conducting itself with the degree of good faith which Nigeria is entitled to expect" (CR 96/3, p. 44). On this argument Nigeria concluded that:

> "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." (CR 96/3, p. 43.)

Nigeria's objection on this ground also includes an assertion that the Application of Cameroon is inadmissible.

It was argued by Cameroon that, on the basis of the decision in the case concerning *Right of Passage over Indian Territory* (*Preliminary Objections, I.C.J. Reports 1957*, p. 125), the contention of Nigeria cannot be a valid one in law. However, while I do not wish to go into the details of that decision, I would point out that that case dealt with the issue of substantive jurisdiction on the merits and not prima facie jurisdiction for the purpose of an indication of provisional measures, and that most of the objections raised in that case with regard to the declarations of both India and Portugal under Article 36, paragraph 2, of the Statute, dealt with the issue of *ratione temporis* and were not based on the issue of lack of good faith and admissibility.

Perhaps I should echo the observation of Judge M. C. Chagla in his dissenting opinion in the *Right of Passage over Indian Territory* case:

> "I should like to make one general observation with regard to the question of the jurisdiction of the Court. It has been said that a good judge extends his jurisdiction. This dictum may be true of a judge in a municipal court; it is certainly not true of the International Court. The very basis of the jurisdiction of this Court is the will of the State, and that will must clearly demonstrate that it has accepted the jurisdiction of the Court with regard to any dispute or category of disputes. Therefore, whereas a municipal court may liberally construe provisions of the law which confer jurisdiction upon it, the International Court on the other hand must strictly construe the provisions of the Statute and the Rules and the instruments executed by the

States in order to determine whether the State objecting to its jurisdiction has in fact accepted it." (*I.C.J. Reports 1957*, p. 180.)

Perhaps it is premature to go too deeply into the issue of jurisdiction at this stage, other than to examine the objection put forward by Nigeria that there is not even prima facie jurisdiction justifying the Court in the indication of provisional measures. In view of the serious doubts now cast on this matter by Nigeria together with its argument of the absence of substantial reciprocity based on a lack of good faith by Cameroon, which may need to be further developed and explained at the next stage of this case, I would rather be inclined to take an attitude of judicial caution and decline to indicate provisional measures as requested by Cameroon. Some of us are perhaps mindful of the dilemma implied by this view, which I shall deal with later. It was well expressed by Sir Hersch Lauterpacht as follows:

"However, when the defendant State declines to recognise the competence of the Court on the ground that the dispute is not covered by the terms of its submission to the Court's jurisdiction, a dilemma arises which, on the face of it, is not easy of solution. From the defendant State's point of view it seems improper that the Court should indicate interim measures of protection so long as it has not ascertained that it possesses jurisdiction. For compliance with the Order may prevent the defendant State — conceivably for a prolonged period — from exercising its legitimate rights in a matter with regard to which the Court may eventually find it has no jurisdiction. On the other hand, from the point of view of the plaintiff State, an Order 'indicating' interim measures may be of such urgency that to postpone it until the Court has finally decided, in proceedings which may take a long time, upon the question of its jurisdiction on the merits may well render the remedy illusory as the result of the destruction of the object of the dispute or for other reasons." (Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, pp. 110-111.)

However, in view of the fact that negotiations are continuing on a bilateral basis between the Parties, it may not be out of place to take this present situation into account, in order to ensure that nothing is done to jeopardize such an amicable solution to a border dispute between two neighbouring countries who are both members of the OAU. This is one of the reasons why I supported the first operative part of the Court's Order. It may not, therefore, be out of place to note again the view of Sir Hersch Lauterpacht in his separate opinion in the *Interhandel* case:

"However, it is one thing to say that action of the Court under Article 41 of the Statute does not in any way prejudge the question of its competence on the merits and that the Court need not at that stage satisfy itself that it has jurisdiction on the merits or even that its jurisdiction is probable; it is another thing to affirm that the Court can act under Article 41 without any regard to the prospects of its jurisdiction on the merits and that the latter question does not arise at all in connection with a request for interim measures of protection. Governments which are Parties to the Statute or which have undertaken in some form or other commitments relating to the obligatory jurisdiction of the Court have the right to expect that the Court will not act under Article 41 in cases in which absence of jurisdiction on the merits is manifest. Governments ought not to be discouraged from undertaking, or continuing to undertake, the obligations of judicial settlement as the result of any justifiable apprehension that by accepting them they may become exposed to the embarrassment, vexation and loss, possibly following upon interim measures, in cases in which there is no reasonable possibility, *prima facie* ascertained by the Court, of jurisdiction on the merits. Accordingly, the Court cannot, in relation to a request for indication of interim measures, disregard altogether the question of its competence on the merits." (*I.C.J. Reports 1957*, p. 118.)

B. Urgency

Invariably, an element of urgency is one of the "circumstances" that may lead a party to ask the Court for the indication of provisional measures. Article 74 of the Rules of Court, which provides that such request shall have priority over all other cases, also states in paragraph 2 that:

"The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency."

A clear definition of urgency was given in the case concerning *Passage through the Great Belt* as follows:

"Whereas provisional measures under Article 41 of the Statute are indicated 'pending the final decision' of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given" (*I.C.J. Reports 1991*, p. 17, para. 23).

In its request, Cameroon argues that there is urgency in this case. Nigeria denies it. In support of its argument, Cameroon refers to all the incidents that occurred in the recent past, especially before and after the filing of its Application in the Court on 29 March 1994. It refers in par-

ticular to the incidents of 3 February 1996, and 16 and 17 February 1996, apart from all the diplomatic attempts to settle the dispute which proved futile. Nigeria, for its part, considers the entire request of Cameroon to have become "moot" because there was no need for it, as hostilities have ceased while moves to settle the dispute are at the moment progressing and will ultimately involve the Heads of State of both countries on a bilateral basis.

Considering all the intermittent incidents in the recent past involving sporadic clashes that have degenerated into serious skirmishes and which could possibly explode into a full-scale war, can it be denied that this request is urgent? I take the view that this is a serious and very urgent situation which urgently requires attention of the Court. The Court took such speedy action recently in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, when an Order was promptly made on 8 April 1993 (*I.C.J. Reports 1993*, p. 3). It is therefore difficult for me to accept Nigeria's view that there is nothing urgent in this matter. In my view, it is extremely urgent.

IV. The Requests of Cameroon and the Legal Basis for an Indication of Provisional Measures

It may now be as well for me to consider the three requests for the indication of provisional measures as requested by Cameroon against the background of conflicting accounts of the facts — a problem referred to in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* in the following terms:

> "Whereas the Court, in the context of the present proceedings on a request for provisional measures, has in accordance with Article 41 of the Statute to consider the circumstances drawn to its attention [as requiring the indication of provisional measures, *but*] *cannot* make definitive findings of fact or of imputability, and the right of each Party to dispute the facts alleged against it, to challenge the attribution to it of responsibility for those facts, and to submit arguments in respect of the merits, must remain unaffected by the Court's decision" (*I.C.J. Reports 1993*, p. 347, para. 48; emphasis added).

Again before considering the three requests of Cameroon the Court was bound to examine the essential objects or factors that form the legal bases for the indication of provisional measures, in accordance with Article 41 of the Statute:

(i) *The Court's discretion*

The indication of provisional measures by the Court is a matter for the exclusive discretion of the Court which it may or may not exercise, depending on the circumstances of any particular case. Some schools of thought in international law consider this discretionary power to be a part of the inherent power of international tribunals. However, since the Court is by Article 30 of the Statute empowered to make its own rules, provision is made for this unfettered discretion to take action *proprio motu* under Article 75 of the Rules. I shall return again to this important discretionary power later on.

(ii) *Prejudging the issue*

The Court should also avoid prejudging the merits of the case. This seems, in my view, to have been the Court's dilemma when indicating provisional measures in the *Anglo-Iranian Oil Co.* case. The Court pointed out that

> "the indication of [provisional] measures in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction" (*I.C.J. Reports 1951*, p. 93),

but ultimately decided that it had no jurisdiction.

If we stop here for a moment and consider one of the requests of Cameroon with regard to this essential factor or object, there is no doubt that the Court would be prejudging the issue if it were to grant that request. The first measure requested by Cameroon is that "the armed forces of the Parties *shall withdraw to the position they were occupying before the Nigerian armed attack of 3 February 1996*" (emphasis added). This must lead one to wonder where the armed forces of *the Parties* were positioned prior to 3 February 1996? Although this was denied by Cameroon (CR 96/4, p. 67) there was no indication of the specific place that the Cameroonian armed forces were occupying. An indication was given in one of Cameroon's maps as to the location of the Nigerian armed forces since 3 February 1996 and since 16 and 17 February 1996, and no location of Cameroon's forces was indicated. However Nigeria claimed that its forces were all the time positioned at those locations. If, *arguendo*, these locations were occupied by the Nigerian armed forces before 3 February 1996, to indicate a provisional measure that Nigeria should withdraw from such places which it claims to be its territory would clearly be prejudging the issue. Nigeria has persistently claimed that

> "the Bakassi Peninsula has been part of Nigeria and from time immemorial has been administered as such. In this context, the

armed forces of Nigeria as and when required maintain units stationed at various points within the region, and have likewise patrolled the region. There has been no change in this respect since 3 February 1996." (CR 96/4, p. 109.)

At this stage of the proceedings, I would find it difficult, therefore, to support the decision of the Court that Nigeria should withdraw "from its territory". Apart from the controversial aspect of the binding or non-binding nature of the indication of provisional measures, it is my humble view that the Court should be cautious and refrain from making an Order which is impossible to comply with. The Court does not do anything in vain, *judicium non debet esse illusorium; suum effectum habere debet.*

(iii) *Preservation of the respective rights of the parties pending final judgment in the case*

This is a very important factor to be considered by the Court in a matter of this kind. Sir Gerald Fitzmaurice explained it by saying 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*" (Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, p. 544; second emphasis added).

This can be seen as the glaring difficulty in the second request of Cameroon when the Court is asked to request that "the parties shall *abstain from all military activity along the entire boundary until the judgment of the Court takes place*" (emphasis added). There are four obvious difficulties here, which constitute reasons why the Court cannot possibly grant this request:

(a) The request of Cameroon as presented to the Court virtually deals with the area of the Bakassi Peninsula and any material with regard to other parts of the boundary is either absent, or very scanty and not such as to be relied upon.

(b) Secondly, evidence was only given about some rather vague military activities in the Bakassi Peninsula area, not in the region of Lake Chad.

(c) How could the Court possibly stop either Cameroon or Nigeria from carrying on military activities within their respective boundaries?

(d) Where is the evidence clearly indicating the boundary between the

two disputants along which the Court could order abstention from military activities? Is there any cease-fire line?

Consequently, it is very doubtful whether the Court can indicate provisional measures along the lines suggested by Cameroon in its second request, and this should also be rejected.

(iv) *Preservation of rights/non-aggravation of disputes*

The need for the preservation of rights is the legal basis that entitles the Court to indicate provisional measures under Article 41 of the Statute, that is, in order "to preserve the respective rights of either party". In the past this provision was interpreted strictly. Although some other conventions such as the 1907 Washington Convention for the Central American Court give the "non-aggravation of the dispute" as the legal basis for granting such provisional measures, the Court has until recently been most reluctant to import this idea of non-aggravation or expansion of the dispute or conflict into its jurisprudence. In fact it was difficult to define what would amount to a preservation of rights. This difficulty can be appreciated if one refers to the Order of the Permanent Court of International Justice in the case concerning the *Legal Status of the South-Eastern Territory of Greenland*, where the Court remarked:

> "Whereas, having regard to the character of the alleged rights in question, considered in relation to the natural characteristics of the territory in issue, even 'measures calculated to change the legal status of the territory' could not, according to the information now at the Court's disposal, affect the value of such alleged rights, once the Court in its judgment on the merits had recognized them as appertaining to one or other of the Parties . . ." (*P.C.I.J., Series A/B, No. 48*, p. 288).

Thus, in the past, Article 41 of the Statute was very strictly interpreted and some positivists are still of the view that this should be so. For example, of the six applications that came before the Permanent Court, only two led to the indication of interim measures. In the case concerning the *Denunciation of the Treaty of 2 November 1865 between China and Belgium* of 1926, President Huber issued an Order indicating provisional measures pending the decision of the Court which eventually decided that it had no jurisdiction to deal with the merits of the case. Subsequently the Parties agreed on a provisional measure of their own. In the *Factory at Chorzów* case of 1927, the *Legal Status of the South-Eastern Territory of Greenland* case of 1932, and the *Polish Agrarian Reform and German Minority* case of 1933, the Court declined all the requests for the indication of provisional measures of protection. In the case concerning the *Prince von Pless Administration* it was President Adatci who urged the Polish Minister of Foreign Affairs to exercise some measure of restraint

until the Court could meet. Subsequently the Government of Poland rectified what it deemed to be an error, to the satisfaction of the German Government, and the Court made an Order taking note of the declarations made by the two Governments.

The present Court has dealt with 18 requests for the indication of provisional measures[1]. Of these requests, one was discontinued (*Trial of Pakistani Prisoners of War* case), one was withdrawn (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* case), the Court indicated provisional measures in nine instances and declined to do so in seven. Again in the recent past the Court has been more inclined to indicate provisional measures in matters involving armed conflicts or violent incidents. The examples are the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the *Frontier Dispute* case and the case concerning *Military and Paramilitary Activities in and against Nicaragua.*

Recent decisions of the Court and its Chambers have given a more liberal interpretation to this issue of the preservation of rights. However it must first be noted that in 1939 in the *Electricity Company of Sofia and Bulgaria* case the Permanent Court of International Justice issued an Order indicating provisional measures and stated that during the period in which the case was pending

> "Bulgaria should ensure that no step of any kind is taken capable of prejudicing *the rights* claimed by the Belgian Government or of aggravating or extending the dispute submitted to the Court" (*P.C.I.J., Series A/B, No. 79*, p. 199; emphasis added).

This was an early indication of extending the concept of the rights of the parties to include the avoidance of incidents, which was apparently rejected in the *South-Eastern Territory of Greenland* case (although this

[1] Such provisional measures have been requested in the following 17 cases: *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran)*; *Interhandel (Switzerland* v. *United States of America)*; *Fisheries Jurisdiction (United Kingdom* v. *Iceland) (Federal Republic of Germany* v. *Iceland)*; *Nuclear Tests (Australia* v. *France) (New Zealand* v. *France)*; *Trial of Pakistani Prisoners of War (Pakistan* v. *India)*; *Aegean Sea Continental Shelf (Greece* v. *Turkey)*; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*; *Frontier Dispute (Burkina Faso/Republic of Mali)* (case referred to a Chamber); *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* (in this case the request was withdrawn); *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal)*; *Passage through the Great Belt (Finland* v. *Denmark)*; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Libyan Arab Jamahiriya* v. *United States of America)*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))* (in this case two requests were made by Bosnia and Herzegovina and one by Yugoslavia (Serbia and Montenegro).

decision was explained in other terms, that is, by saying that the Parties could no longer be affected by the legal positions one way or the other).

In the *Aegean Sea Continental Shelf* case of 1976 the Court refused to decide this issue of the protection of rights:

> "Whereas, accordingly, it is not necessary for the Court to decide the question whether Article 41 of the Statute confers upon it the power to indicate interim measures of protection for the sole purpose of preventing the aggravation or extension of dispute" (*I.C.J. Reports 1976*, p. 13, para. 42).

In 1984, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court unanimously indicated a provisional measure providing that

> "[t]he Governments of the United States of America and the Republic of Nicaragua should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court" (*I.C.J. Reports 1984*, p. 187, para. 41 B (3)).

One may therefore reasonably assume that international law and the jurisprudence of the Court have been further developed along this line. In all cases involving questions of armed conflicts involving the loss of lives and properties, the protection of the respective rights of the parties includes the need for the avoidance, by the parties, of any aggravation or extension of the dispute or hostile incidents.

In fact the Chamber of the Court *boldly* pronounced on this particular issue in 1986 in the *Frontier Dispute* case between Burkina Faso and the Republic of Mali. There the Chamber observed as follows:

> "Considering that, independently of the requests submitted by the Parties for the indication of provisional measures, *the Court or, accordingly, the chamber possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require*" (*I.C.J. Reports 1986*, p. 9, para. 18; emphasis added).

This "power" which the Court or the Chamber of the Court now justifiably, as I believe, claimed to "possess" was recently confirmed in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. In the Order of the Court of 8 April 1993, both Parties were directed

> "not [to] take any action and [to] ensure that no action is taken which may aggravate or extend the existing dispute over the preven-

tion or punishment of the crime of genocide, or render it more difficult of solution" (*I.C.J. Reports 1993*, p. 24, para. 52 B).

In view of what I have said above, the purpose and content of Article 41 of the Statute is not and cannot be restricted only to the preservation of the prospective rights of the parties in a matter like the one before the Court. The situation calls for an order *proprio motu* under Article 75 of the Rules of Court, hence my reason for voting with the majority of the Court on the first operative part of the Order. Inherently, the issue of non-aggravation and non-extension is not only linked with the protection of the prospective rights of litigants, but it is an integral part of that protection, and provides a basis upon which an indication can be given.

(v) *Irreparable harm or prejudice*

Another object of consideration for the indication of provisional measures is whether irreparable harm or prejudice might occur within the framework of a dispute if that dispute is not prevented. This factor is not unconnected with the need to preserve the rights of the parties because irreparable harm or prejudice to any of the parties would in most cases amount to a deprivation of rights. Although an indication of provisional measures to this end may prevent future occurrences of the same kind of threat, most past incidents cannot now be remedied. In the *Fisheries Jurisdiction* case the Court noted that, according to the Government of Iceland, to "freeze the present dangerous situation might cause irreparable harm to the interests of the Icelandic nation" (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Order of 12 July 1973, I.C.J. Reports 1973*, p. 303). The human life element was considered as "irreparable" in the case concerning the *United States Diplomatic and Consular Staff in Tehran* where the United States sought to protect

"the rights of its nationals to life, liberty, protection and security; the rights of inviolability, immunity and protection for its diplomatic and consular officials; and the rights of inviolability and protection for its diplomatic and consular premises" (*I.C.J. Reports 1979*, p. 19, para. 37).

Evidently those indications of provisional measures whether simply for the preservation of rights, the avoidance of an aggravation or extension of the dispute or an act such as might cause irreparable harm or prejudice to the parties have always had an element of protection and preservation of human life and/or property. In the *United States Diplomatic and Consular Staff in Tehran* case the Court remarked that a

> "continuance of the situation the subject of the present request exposes the *human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm*" (*I.C.J. Reports 1979*, p. 20, para. 42; emphasis added).

Similarly, in the matter before this Court, indisputable facts have been adduced to show that there has been human suffering, death, injury and even some people missing on both sides. It is also clear that the majority of the inhabitants of this area of the Bakassi Peninsula are fishermen who ought not to be deprived of their livelihood. On its own the indication *proprio motu* by the Court that the Parties should cease from acts of aggression and from any extension of the dispute should definitely alleviate the sufferings and loss of life and property caused to the people living in the Bakassi Peninsula.

(vi) *Preservation of evidence*

The Court has seldom indicated provisional measures for the preservation of evidence. Although this aspect was mentioned in the case concerning the *Denunciation of the Treaty of 2 November 1865 between China and Belgium* of 1926, the Court declined to indicate provisional measures to this effect in the *Aegean Sea Continental Shelf* case in its Order of 11 September 1976. In one case where such a request was granted there was agreement between the Parties, that is, in the case concerning the *Frontier Dispute* between Burkina Faso and the Republic of Mali where a clear cease-fire line had previously been defined by agreement.

Having regard to the jurisprudence and the position of the Court with regard to Cameroon's request for an indication of provisional measures, it is difficult for the Court to exercise its discretion to grant the third request of Cameroon. The third request of Cameroon is that *"the Parties shall abstain from any act or action which might hamper the gathering of evidence in the present case"* (emphasis added) — although no such measure can, in my view, be indicated by the Court for the following reasons:

(a) As mentioned earlier, it has not been shown clearly where the armed forces of Cameroon and Nigeria are stationed at the moment. The evidence put in by the two Parties is conflicting and there is no agreement between them. The maps are not of much help either.

(b) The nature of the evidence to be gathered has not been made clear to the Court. Evidence was adduced that the Cameroonian Prefect hurriedly left Idabato without collecting his documents there, but Nigeria presented facts and documents including pictures to show that Idabato or Achibong is a part of Nigeria in Cross River State.

(c) There was no agreement between Nigeria and Cameroon about the cease-fire line which might have made it easier to indicate a provisional measure in this regard, unlike the case concerning the *Frontier Dispute* where such an agreement was reached.

(d) Part of Nigeria's case is that since Cameroon has already filed its Memorial, all the required evidence (which, I think, mostly consists of treaties, agreements and conventions) has already been filed in the Court.

(e) Nigeria is not making any request of this kind and the position of the law is that both Parties should be treated equally. In other words, though the content of the request is that "the Parties" should abstain from acts which might hamper the gathering of evidence in this case, this can only refer to Cameroon.

It is for all these reasons that I have come to the conclusion that this request made by Cameroon cannot be granted by the Court. It follows that the three measures requested by Cameroon on 10 February 1996 cannot be indicated.

V. The Court's Exercise of Its Power under Article 75 of the Rules of Court

There are many reasons why the Court should indicate only the provisional measure which I have voted for in paragraph 1 of the *dispositif.*

1. Admittedly, the Court is not in a position to verify and therefore rely upon all the conflicting facts placed before it, although there are some that are uncontroverted as I have stated above. They provide compelling reasons why the Court cannot ignore this apparently explosive situation in the Bakassi Peninsula and fail to indicate provisional measures.

2. The judicial intervention of the Court in this matter is not exclusive of but rather complementary to the other efforts of the Security Council, the Secretary-General of the United Nations, President Eyadema of Togo, and the Organization of African Unity through its Secretary-General, Mr. Salim A. Salim, but the Court should concern itself only with its legal and judicial assignment and nothing more.

3. Both Parties recognize the inherent danger threatening the Bakassi Peninsula at this time and would prefer a peaceful resolution of the dispute. Evidence of this from the Nigerian side is provided by the letter of the Agent of Nigeria dated 16 February 1996. In a statement made on 6 March 1996 before the Court, Nigeria said:

"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*" (CR 96/3, p. 16; emphasis added).

4. Both Parties have been involved in various attempts to resolve the dispute peacefully and amicably. These are reflected in the communiqués issued in Tunis and in Togo.

5. In the recent past, the Court has indicated provisional measures in matters of this nature. It did so in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*I.C.J. Reports 1984*, p. 167), the Chamber's case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* (*I.C.J. Reports 1986*, p. 3) and the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))* (*I.C.J. Reports 1993*, p. 3) and there is therefore no reason why it should not indicate provisional measures in similar circumstances, when incidents of armed hostilities are being alleged and recognized.

6. Furthermore, the Court, on a wider legal basis, is obliged to ensure that all Member States of the United Nations (which include Cameroon and Nigeria) are reminded and enjoined to carry out their avowed and sacred duty under the Charter of the United Nations, which provides that:

"3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." (Art. 2.)

VI. CONCLUSION

It is for all the aforementioned reasons that I have been prompted to vote in favour of the first operative part of the Order but to decline to vote for the indication of the remaining four provisional measures by the Court.

(Signed) Bola A. AJIBOLA.