(c) Case Analysis

Case Concerning Land and Maritime Boundary (Cameroon *v.* Nigeria): Provisional Measures, Order of 15 March 1996

Keywords: Cameroon; International Court of Justice; Nigeria; provisional measures.

1. BACKGROUND

By an application filed on 29 March 1994, Cameroon instituted proceedings against Nigeria, relying on the declarations under Article 36(2) of the Statute of the Court,[1] made by both states without reservations. The dispute, according to the Application, related "essentially to the question of sovereignty over the Bakassi Peninsula", where, "since the end of 1993", the Nigerian troops were "occupying several Cameroonian localities". Cameroon also requested the Court "to determine the course of the maritime boundary between the two states beyond the line fixed in 1975".[2] In an 'Additional Application', filed on 6 June 1994, Cameroon extended the subject of the dispute "essentially to the question of sovereignty over a part of the territory of Cameroon in the area of Lake Chad", which had become the object of "the official [...] claim [...] by [...] Nigeria quite recently, for the first time"; and also requested the Court "to specify definitely" the whole frontier line from Lake Chad to the sea, and to examine the two Applications as a single case.[3] In its counter-memorial, filed within the prescribed time-limit (18 December 1995), Nigeria raised objections to the jurisdiction of the Court and the admissibility of the Cameroonian claims, whereupon the proceedings on the merits were suspended and the Presi-

1. ICJ Acts and Documents, No. 5, at 60-89.
2. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon *v.* Nigeria), Application Instituting Proceedings, 1996 ICJ Rep. 5, paras. 1-3.
3. *Id.*, at 77, paras. 1-2. For more details relating to this stage of the dispute *see* 48 Yearbook of the United Nations 370-371 (1994); and more particulary UN Docs. S/1994/228 (1994), S/1994/258 (1994), S/1994/351 (1994), S/1994/472 (1994), and S/1994/519 (1994).

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dent of the Court fixed 15 May 1996 as the time-limit within which Cameroon might present its observations on the Nigerian objections.[4] In the meantime, following armed clashes between the Cameroonian and Nigerian troops in the Bakassi Peninsula on 3 February 1996, which caused casualties and material damage (and which recurred on 16-17 February), the Registry of the Court received, on 12 February, the request of Cameroon for provisional measures (Article 41 of the Statute of the Court - hereinafter Article 41). On 19 February, the Registry received a communication from the Nigerian Government (dated 16 February), protesting against the municipal elections held by Cameroon in the disputed areas on 21 January 1996, in which "Cameroon forced Nigerians resident in those areas to register and vote";[5] but there is no allusion whatsoever to any causal link between those elections and the February incidents. On 17 February, as a result of an initiative of the President of Togo, the Foreign Ministers of Cameroon and Nigeria agreed on a cease-fire. On 22 and 27 February respectively, Cameroon and Nigeria also addressed letters of complaint to the President of the UN Security Council, who, on 29 February, called upon the parties "to respect the cease-fire they agreed to", "to turn their forces to the positions they occupied before the dispute was referred to the International Court [of Justice]", and "to cooperate fully with [the] fact-finding mission" which the UN Secretary-General intended to dispatch to the Bakassi Peninsula.[6]

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4. *See* Land and Maritime Boundary (Cameroon *v.* Nigeria), Order, 1996 ICJ. Rep. 3-4. The observations of Cameroon were filed within the prescribed time-limit; but as per 15 August 1997 the oral hearings on the Nigerian preliminary objections were neither held nor scheduled.
5. *See* Land and Maritime Boundary (Cameroon *v.* Nigeria) (Provisional Measures), Order, 1996 ICJ Rep. 17-18, 19, paras. 17-20 and 23, respectively.
6. *See* UN Docs. S/1996/125 (1996), S/1996/140 (1996), and S/1996/150 (1996). The UN Secretary-General first dispatched (9-16 May 1996) his special envoy to the capitals of both states (*see* UN Doc. S/1996/390 (1996)). The fact-finding mission left New York for the disputed area on 14 September 1996, and on 9 October 1996 the Secretary-General transmitted to the President of the Security Council a progress report (*see* UN Doc. S/1996/891 (1996)). No further information was available to the author. *See also* UN Docs. S/1996/184 (1996), S/1996/287 (1996), and S/1996/391 (1996).

2. REQUEST OF CAMEROON AND HEARINGS THEREON

Cameroon asked the Court to indicate the following provisional measures to be taken:

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; and
3. the Parties shall abstain from any act or action which might hamper the gathering of evidence in the present case.[7]

The hearings on the request were held on 5, 6, and 8 March 1996. Their most striking feature was the totally different versions of the relevant facts, on every single point, presented by the parties - to start with the Cameroonian assertions that it was Nigeria who on 3 February 1996 attacked Cameroonian localities in the Bakassi Peninsula, while Nigeria claimed that it was Cameroon who attacked the peninsula from outside, since there was no permanent Cameroonian presence there.[8] Cameroon, for its part, maintained that eight localities in the peninsula, enumerated by names, were administered by Cameroon prior to 3 February 1996.[9] Nigeria claimed that Cameroon had never before organized elections in the Bakassi Peninsula; Cameroon asserted that elections had been held there at least three times since 1961.[10] Nigeria produced a photograph of a public building displaying a Nigerian plaque and flag as evidence of long-standing Nigerian presence in the area; Cameroon produced documents and a photograph intended to show that the building in question had been earlier erected by Cameroon.[11] And so on ...

Nigeria opposed the indication of provisional measures to be taken, having argued, *inter alia* - besides claiming a manifest lack of jurisdiction

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7. Land and Maritime Boundary, *supra* note 5, at 18, para. 20.
8. *Id.*, at 17-18, paras. 18-19 - on the one side; and ICJ Public Sitting on 6 March 1996, Verbatim record, CR 96/3 [Uncorrected], at 11-13 and 27 - on the other side.
9. *See* ICJ Public sitting on 8 March 1996, Verbatim record, CR 96/4 [Uncorrected], at 21-22.
10. *See* ICJ Public Sitting on 6 March 1996, *supra* note 8, at 18 - on the one side; ICJ Public sitting on 5 March 1996, Verbatim record CR 96/2 [Uncorrected], at 74 - on the other side.
11. *See id.*, at 19 and 78, respectively.

and the manifest inadmissibility of the main claim - that

1. there is no clear demarcation line on the Bakassi Peninsula and the Nigerian troops did not advance during the armed incident in question;
2. that Cameroon's second request, as formulated, prohibits military activities within one's own territory and amounts to the establishment of a demilitarized zone;
3. there are no Cameroonian archives in the area, which might require protection, and Nigeria itself has an interest in protecting archives because they support its claim to sovereignty over the peninsula; and, finally,
4. as a consequence of the cease-fire agreement of 17 February, the whole request of Cameroon had become a moot point.[12]

3. THE COURT'S ORDER AND ITS CONTROVERSIAL OPERATIVE PARAGRAPH 3

In closing the hearings, the President thanked the Parties "for the valuable assistance they have given to the Court by their oral statements";[13] but the 'valuable assistance' apparently did not lead very far since the Court, in its Order of 15 March 1996, had to admit that:

> the contradictory versions given by the Parties of the events that took place on 3 February 1996 [...] have not enabled the Court, at this stage, to form any clear and precise idea of those events.[14]

Still, having no doubt that there were military incidents which caused victims among both military and civilians, as well as material damage, the Court issued an order indicating the following provisional measures:

> (1) [...] Both Parties should ensure that no action of any kind, and particularly no action by their armed forces, is taken which might prejudice the rights of the other in respect of whatever judgment the Court might render in this case, or which might aggravate or extend the dispute

12. *See inter alia* ICJ Public Sitting on 6 March 1996, *supra* note 8, at 13, 16, 22, 36, 38, 51, and 56; *ditto* on 8 March 1996, *supra* note 9, at 92, 98-100, and 103.
13. *Id.*, at 111.
14. Land and Maritime Boundary, *supra* note 5, at 22, para. 38.

before it [...];
(2) [...] Both Parties should observe the agreement reached between the Ministers for Foreign Affairs in Kara, Tongo, on 17 February 1996, for the cessation of all hostilities in the Bakassi Peninsula [...];
(3) [...] Both Parties should ensure that the presence of any armed forces in the Bakassi Peninsula does not extend beyond the positions in which they were situated prior to 3 February 1996 [...];
(4) [...] Both Parties should take all necessary steps to conserve evidence relevant to the present case within the disputed area [...]; and
(5) [...] Both Parties should lend every assistance to the fact-finding mission which the Secretary-General of the United Nations has proposed to send to the Bakassi Peninsula.[15]

Only the first operative paragraph of the Order was adopted unanimously. Judge *ad hoc* Ajibola, appointed by Nigeria, voted against all the remaining paragraphs and appended a separate opinion to the Order; but in the vote on paragraph 3 he was joined by four titular judges who appended declarations. So did also three other judges who otherwise voted with the majority. There was thus a considerable division of opinion among the judges, partly related to reasons behind the Order but mostly to paragraph 3, with its reference to the positions of 3 February 1996, on which the parties presented contradicting versions. Some of the dissenting judges argued that the reference to those positions "[might] provide basis for a fresh dispute",[16] as it left "to each Party to determine what that position was and to act upon that determination".[17] Judge Oda observed in his declaration - in conformity with the traditional concept of *status quo ante litem motam* - that the reference should have been to March 1994, the date of filing the application.[18] Indeed, this was the point of reference in the above-mentioned call by the President of the Security Council; and also in the statement by the Presidency on behalf of the European Union.[19] But students of the Court's practice in the matter of provisional measures will recall that the Court has also on several earlier occasions (*Electricity Company, AIOC,*

15. *Id.*, at 24-25, para. 49. According to a letter of the Permanent Mission of Cameroon to the UN, addressed to the President of the Security Council, "new attacks launched by Nigerian troops against Cameroonian positions" took place on 21-24 April 1996 (UN Doc. S/1996/330 (1996)). Unofficial sources reported clashes on 3-6 May 1996 (*see* 1996 Keesing's Record of World Events 41081). For another complaint by Cameroon, *see* UN Doc. S/1996/1052 (1996).
16. Land and Maritime Boundary, *supra* note 5, at 28 (Judge Shahabuddeen, Declaration).
17. *Id.*, at 31 (Judges Weeramantry, Shi and Vereshchetin, Joint Declaration).
18. *Id.*, at 26 (Judge Oda, Declaration).
19. *See* UN Doc. S/1996/125 (1996), Annex II.

Fisheries Jurisdiction, Nuclear Tests)[20] applied the rather flexible concept of *status quo*. And more recently, in a similarly contradictory situation in the case of *Frontier Dispute* (*Burkina Faso/Mali*) the Chamber unanimously indicated withdrawal "behind such lines, as may, within twenty days [...] be determined by agreement" between the parties. Failing such agreement, the Chamber would itself indicate the terms of withdrawal.[21]

4. SOME POINTS OF INTEREST

4.1. Provisional measures and admissibility of the main claim

While the existence of *prima facie* jurisdiction on the merits as a precondition for the indication of provisional measures to be taken has been consistently reiterated *in its present form* in the Court's orders on provisional measures at least since the 1970s, the question of *prima facie* admissibility of the main claim has not hitherto attracted much attention, although inadmissibility is equivalent to the lack of jurisdiction as an obstacle to proceedings on the merits. In the context of requests for provisional measures the question of the admissibility of the main claim already arose earlier, in the *Nuclear Tests* cases, but the term 'admissibility' was not used in the motives of the Court's orders and appeared only in their final clauses in which the Court decided that "the written proceedings [should] first be addressed to the question of the jurisdiction [...] and of the admissibility of the Application".[22] In the present case, the Court approached the question more directly. Nigeria argued, that the application of Cameroon is inadmissible *inter alia* because "as concerning the whole of the frontier, [...] no such

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20. *See* Electricity Company of Sofia and Bulgaria (Belgium *v.* Bulgaria) (Provisional Measures), Order, 1939 PCIJ (Ser. A/B) No. 79, at 196-199; Anglo-Iranian Co. (United Kingdom *v.* Iran) (Provisional Measures), Order, 1951 ICJ Rep., at 89-90, 94; Fisheries Jurisdiction (United Kingdom *v.* Iceland) (Provisional Measures), Order, 1971 ICJ Rep., at 12-13, 16; Nuclear Tests (Austrialia *v.* France) (Provisional Measures), Order, 1973 ICJ Rep., at 100, 101.

21. Frontier Dispute (Burkina Faso/Mali) (Provisional Measures), Order, 1986 ICJ Rep. 12, para. 32. One notes here a rather 'unconventional' ingredient in an order on provisional measures, namely that the mode of implementation of one of the measures indicated (withdrawal of troops) was left, in the first place, to a possible future agreement between the parties.

22. Nuclear Tests (Australia *v.* France; New Zealand *v.* France), Provisional Measures, Orders, 1973 ICJ Rep. 106 and 142, respectively. *Cf. id.*, at 103, para. 23, and at 140, para. 24 respectively.

dispute exists".[23] Now, the Court - as it consistently does with respect to jurisdiction - stated that it "must, before deciding whether or not to indicate such measures [i.e., provisional], ensure that the Application [...] is admissible prima facie." But in contrast to the usual 'positive' determination that *there is* in a given case a prima facie basis upon which the Court's jurisdiction might be founded, the Court - with respect to the question of admissibility - was satisfied with a 'negative' determination that the application did "not appear prima facie to be inadmissible in the light of the preliminary objections".[24] The same difference, in substance, could be noted also in the *Nuclear Tests* cases.[25] No explanation of this difference in approach to the two apparently equivalent questions can be traced in the Court's texts. But it can be recalled that individual judges on several occasions expressed the view that the questions of jurisdiction and of admissibility are to be treated on the same footing, or even that the latter should be given priority over the former.[26]

4.2. Some aspects of litispendence

4.2.1. Generally on litispendence in a broad sense

In so far as 'litispendence' in a broad sense (i.e., parallel reliance on *whatever* other methods - be it informal - of the pacific settlement of a dispute) is concerned, one notes the position of Nigeria opposing judicial proceedings in general, and the indication of provisional measures in particular, with reference to negotiations and other informal procedures which were under way and allegedly would have been rendered more difficult by judicial action.[27] Reliance on the persuasive force of this argument is rather surprising, since the Court, at least since the 1970s, consistently emphasized

23. ICJ Public Sitting on 8 March 1996, *supra* note 8, at 92; also Land and Maritime Boundary *supra* note 5, at 21, para. 32.
24. *Id.*, para. 33. *Cf. also* para. 31.
25. *See* Nuclear Tests, *supra* note 22, at 102 and 103, paras. 17 and 23; and at 138 and 140, paras. 18 and 24, respectively.
26. *See, e.g.*, South-West Africa (Ethiopia *v.* South Africa) (Preliminary Objections), Judgment, 1962 ICJ Rep. 449 (Judge Winiarski, Dissenting Opinion); Northern Cameroons (Cameroon *v.* United Kingdom), Judgment, 1963 ICJ Rep. 105 (Judge Fitzmaurice, Separate Opinion); Nuclear Tests, *supra* note 22, at 121 and 156 resp. (Judge Gros, Dissenting Opinion).
27. *See* ICJ Public Sitting on 6 March 1996, *supra* note 8, at 11 and 32-33.

complementarity of judicial and other means of pacific settlement of disputes, which does not prevent the Court from exercising its judicial functions.[28] But it is conspicuous that the Nigerian perception is not uncommon among the parties before the Court, including applicants themselves when they, for instance, explain the reasons behind the withdrawal of a request for provisional measures.[29]

4.2.2. Particularly on litispendence between the Court and the UN Security Council

In the past, the position of the Court on the complementary but separate character of political and judicial functions was reflected in its *passivity* when faced with an action by the Security Council. The Court neither interfered with, or in any way participated in, the action of the Council. Thus, in the *Aegean Sea* case the Court regarded the satisfaction of the parties with Security Council resolution 395 (1976), unanimously adopted, as one of the factors which 'relieved' it from the need to indicate provisional measures.[30] In the *Hostages* case provisional measures were not explicitly related to Security Council Resolution 457 (1979) on the same subject, otherwise noted in the Court's Order.[31] In the *Lockerbie* case, which is somewhat blurred by the timing of the Court's order and Security Council Resolution 748 (1992) (sanctions against Lybia) respectively, the Court did not indicate the provisional measures requested because that would conflict with the obligation of states under the said resolution, which had a binding character.[32] In the case of *Application of the Genocide Convention* the Court declined the grant of provisional measures related to the interpreta-

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28. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States) (Provisional Measures), Order, 1984 ICJ Rep. 183-186, paras. 33-38; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia (Serbia and Montenegro)) (Provisional Measures), Order, 1993 ICJ Rep. 19, para. 33.
29. *See, e.g.*, Trial of Pakistani Prisoners of War (Pakistan *v.* India), ICJ Pleadings, 1973 ICJ Rep. 160; *see also* Provisional Measures, Order, 1973 ICJ Rep. 330, para. 10.
30. *See* Aegean Sea Continental Shelf (Greece *v.* Turkey), Provisional Measures, Order, 1976 ICJ Rep. 12-13, paras. 40-41.
31. *See* United States Diplomatic and Consular Staff in Teheran (Unites States *v.* Iran) (Provisional Measures), Order, 1979 ICJ Rep. 20-21 and 15, paras. 47 and 23, respectively.
32. *See* Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Lybia *v.* United Kingdom; Lybia *v.* United States) (Interim Measures), Order, 1992 ICJ Rep. 13-15, paras. 32-41; and 124-127, paras. 34-44, respectively.

tion of Security Council Resolution 713 (1991) (arms embargo), as falling outside the scope of the question of the application of the Genocide Convention which alone could be the subject of the Court's jurisdiction in that case.[33] However, in the case under consideration, the Court for the first time *actively* joined the Security Council, more specifically its President, by endorsing, in operative paragraphs 3 and 5 of its order (see above), his action on behalf of the Council. One recalls in this context the individual opinion of Judge Lachs in the *Lockerbie* case, where he argued that "the intention of the founders [of the UN] was not to encourage a blinkered parallelism of functions [of UN organs] but a fruitful interaction".[34] Have we here an example thereof? Has the appeal of the President of the UN Security Council been enhanced by the Court's order, or has the Court's order become more effective by the reference to the action by the President of the Council?

4.3. Must provisional measures be balanced with respect to both parties?

Nigeria opposed the indication of provisional measures requested *inter alia* on the ground that they were allegedly addressed to one party only.[35] An observer must indeed be surprised by an objection on this ground, for two reasons. One is that the argument was not to the point *in this particular case*. Not only were the measures addressed to 'both parties'; but they were applicable to both parties in substance as well (see above). But more important is that the argument was ill-conceived as a matter of principle. For, there is no requirement in Article 41 that in every single case provisional measures *must* be addressed to both parties. In the *Hostages* case in which all the provisional measures were, indeed, addressed to the respondent only, the Court clearly stated that "a request for provisional measures is by its nature unilateral". The Court recognized that, while it

> must at all times be alert to protect the rights of both the parties, this does not, and cannot, mean that the Court is precluded from entertaining a request

33. *See* Application of the Genocide Convention, *supra* note 28, at 18-19, and 20, paras. 33, and 38.
34. Lockerbie case, *supra* note 32, at 138 (Judge Lachs, Separate Opinion).
35. *See* ICJ Public sitting on 8 March 1996, *supra* note 9, at 91.

> from a party merely by reason of the fact that measures which it requests are unilateral.[36]

The Court did not revert to these arguments in the present case, and indicated provisional measures to be taken, having passed over the Nigerian objection in silence.

4.4. Object of provisional measures revisited

The object of provisional measures is, of course, the preservation of "the respective rights of either party", as provided for in Article 41. But the object so defined has many aspects and gives rise to a number of questions as to its interpretation and as to the conformity of specific measures with that object, depending on its interpretation. These questions recur throughout the Court's jurisprudence, including the present case. One such question, that of the preservation of the *status quo*, has already been touched upon earlier. Another is that of the conservation of relevant evidence (para. 4 of the Court's order). Leaving aside the order of the President in the *Sino-Belgian Treaty* case (1927), in which the question is touched upon very indirectly,[37] this is only the second time that the Court has ordered that particular provisional measure, the first one being the *Frontier Dispute* case.[38] The point appears to be worth noting, since if the avowed object of provisional measures is the preservation of the respective rights of either party, the preservation of evidence which might support those rights appears to be, if the issue arises, the most uncontroversial specimen of provisional measures.

4.4.1 Prevention of aggravation or extension of a dispute

One of the aspects which are not so simple is the indication of provisional measures to be taken so as to prevent any extension or aggravation of a dispute. The question is not new, but the recent developments, including the present case, are. In the *South-Eastern Greenland* case the Court referred to the argument that, *under Article 41*, it might grant provisional measures

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36. Hostages case, *supra* note 31, at 17, para. 29.
37. *See* Denunciation of the Treaty of November 2, 1865, Between China and Belgium (Belgium *v.* China), 1927 PCIJ (Ser. A) No. 8, at 8.
38. *See* Frontier Dispute case, *supra* note 21, at 9 and 12, paras. 20 and 32, respectively.

solely for the above-mentioned purpose. The Permanent Court of International Justice (PCIJ) qualified this question as one of *interpretation* of its powers under the said article, but left the question open.[39] In the *Aegean Sea* case the question was whether the Court - again, *under Article 41* - has an *independent* power to grant such measures; but the Court left this question open as well.[40] As a matter of practice, the Court invariably, beginning with the *Electricity Company* case, indicated, whenever a request was granted, non-aggravation and non-extension of the dispute - true, always together with other indications, be it sometimes also of a general character; but regardless of whether the aggravation or extension of a dispute might irreparably affect a specific right in dispute, or not. Thus, while the question raised in the case of *South-Eastern Greenland* ('exclusivity') still remains open, the other one ('independence'), in spite of the formal restraint of the Court in the case of *Aegean Sea*, appears to have been positively answered in practice, new is that this *bold* interpretation of Article 41 ('under Article 41') is now formally and explicitly asserted. Already in the *Frontier Dispute* case the Chamber pronounced that:

> independently of the requests submitted by the Parties for the indication of provisional measures, the Court [...] 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 [...].[41]

In the present order the corresponding phrase reads: independently of the requests for the indication of provisional measures submitted by the Parties to preserve specific rights, the Court possesses [...] etcetera.[42] While the former quotation could suggest that the Chamber had in mind only the 'independence of requests' (an 'innocuous' reference to Article 75(2) of the Rules of Court), the plenary Court, in the present case, has left no doubt that what it had in mind is 'independence of the *preservation of specific rights*'. In substance *both* pronouncements were made as a justification for the indication of provisional measures, in spite of the immediately preceding quotations from the *South-Eastern Greenland* case to the effect that

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39. *See* Legal Status of the South-Eastern Territory of Greenland (Norway *v.* Denmark; Denmark *v.* Norway), 1932 PCIJ (Ser. A/B) No. 48, at 285.
40. *See* Aegean Sea Continental Shelf, *supra* note 30, at 12 and 13, paras. 36 and 42, respectively.
41. Frontier Dispute, *supra* note 21, at 9 (emphasis added).
42. Land and Maritime Boundary, *supra* note 5, at 22, para. 41 (emphasis added).

incidents in a disputed area are *per se not* prejudicial to the sovereign rights over a territory in dispute.[43] The question whether that 'independent' power may *alone* be used is still open.

4.4.2 Prevention of 'irreparable prejudice'

As long as the question is about irreparable prejudice to the rights *sub judice* (and to the possibility of full implementation of the impending judgment), the concept is strictly equivalent to that expressed by the language of Article 41; and the Court consistently - also in the present case - refers to that concept so interpreted.[44] But it appears that in practice it is inclined to interpret and apply the meaning of 'irreparability' extensively. The initial approach of the Court (PCIJ) to this question was rather strict. For President Huber, in the *Sino-Belgian Treaty* case, an irreparable prejudice was one which "could not be made good simply by the payment of indemnity or by compensation or restitution".[45] What can, or cannot "be made good simply by the payment of indemnity", etcetera, is, in its turn, a matter of appreciation. In *Aegean Sea* the Court argued that the breach of the right claimed by Greece "might be capable of reparation by appropriate means".[46] But earlier, in the *Fisheries Jurisdiction* cases, the Court recognized the 'irreparability' of prejudice to the rights of the applicants;[47] although it could be argued that the loss of income from catch could be compensated (the Court did not argue that this could exceed the possibilities of the respondent); and the very right of free fishing in the disputed maritime zone was not - in the light of the *South-East Greenland* case - exposed to 'irreparable prejudice'. In the *Frontier Dispute* case the Chamber went so far as to refer explicitly to the exposure of "*property* in the disputed area [...] to serious risk of irreparable damage" among the circumstances warranting the indication of provisional measures,[48] although loss of property can certainly be compensated. In the present case the plenary

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43. *See* notes 41 and 42, *supra*.
44. *See* Land and Maritime Boundary, *supra* note 5, at 21-22, paras. 34-35.
45. Sino-Belgian Treaty, *supra* note 37, at 7.
46. Aegean Sea Continental Shelf, *supra* note 30, at 11, paras. 31-33.
47. *See* Fisheries Jurisdiction (United Kingdom *v.* Iceland; Federal Republic of Germany *v.* Iceland) (Provisional Measures), Order, 1972 ICJ Rep. 16, paras. 21-22; and 34, paras. 22-23 respectively.
48. Frontier Dispute, *supra* note 21, at 10, para. 21 (emphasis added).

Court seems to have retreated from that extreme position. While a 'major material damage' is also noted in this case, it is not explicitly mentioned as *ratio decidendi* on provisional measures.[49]

The most sensitive aspect of the problem is that related to human life and personal injuries. Is loss of life or bodily injury, tragic as they are and certainly calling for some measures to be taken, 'irreparable *in law*'? It is commonplace, both at the national and international level, that victims of violence or their families are compensated. But in the cases before the Court the situation appears to be somewhat confused in this respect and self-contradictory. In the *Hostages* case the United States submitted in its application, *inter alia*:

> (c) [t]hat the Government of Iran shall pay to the United States, in its own right and in exercise of its rights of diplomatic protection of its nationals, reparation for the foregoing violations [...].[50]

Likewise, in the *Nicaragua* case, Nicaragua submitted in its application, *inter alia*:

> (h) [t]hat the United States has an obligation to pay to Nicaragua, in its own right and as *parens patriae* for the citizens of Nicaragua, reparations for damages to person [...] caused by the foregoing violations.[51]

This formula is repeated almost verbatim - *mutatis mutandis* - in paragraph (r) of the application of Bosnia-Herzegovina in the case of *Application of the Genocide Convention*.[52] Thus, the applicants themselves consistently recognized that personal losses and damages are 'reparable'. Still, they equally consistently requested provisional measures to prevent such further losses and damages (not specifically mentioned in the *Nicaragua* case); and the Court indicated provisional measures for that purpose (again, except for the *Nicaragua* case) with reference to the requirement of 'irreparability'.[53] The same reference was also made in the Court's order in the present case, like in the earlier case of *Frontier Dispute* before a Chamber.[54] Of course,

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49. *See* Land and Maritime Boundary, *supra* note 5, at 22, and 23, paras. 38, and 42, respectively.
50. Hostages case, *supra* note 31, at 8, para. 1.
51. Nicaragua case, *supra* note 28, at 171, para. 1.
52. *See* Application of the Genocide Convention, *supra* note 33, at 7, para. 2.
53. *See* Hostages case, *supra* note 31, at 9, and 19, paras. 36 and 37, respectively, and Application of the Genocide Convention, *supra* note 28, at 8, 19, and 24, paras. 3, 32, and 52, respectively.
54. *See* Land and Maritime Boundary, *supra* note 5, at 21 and 23, paras. 35 and 42, respective-

it is better to try to prevent casualties than to be compensated for them, but this is not a question of 'irreparability in law'.

The two latter cases give rise to a further question - whether or to what extent personal losses are prejudicial to the rights in dispute, which is one of the preconditions for, or of 'circumstances' requiring the indication of provisional measures. In the previously mentioned cases the life and physical integrity of persons were *the* issues on which a judgment was sought; for, also in the *Nicaragua* case this was one of the issues *sub iudice* (see above), although Nicaragua did not request (and the Court did not indicate either) any provisional measure related specifically to individuals. Anyway, the relationship between the provisional measures - when requested and indicated - and the main claims was manifest. But here, like earlier in the *Frontier Dispute* case, the losses of human lives and physical injuries were only incidences of the main disputes - about sovereignty over certain territories; and no claims related to the protection of individuals were raised in the respective applications. True enough, personal losses or injuries are not mentioned in the operative paragraphs of the respective orders either; but are invoked in both cases as circumstances requiring the indication of provisional measures - to preserve what rights in dispute is the question. The Court tried to create the link between personal losses and the rights in dispute by rather strained reasoning that "especially the killing of persons, caused irreparable damage *to the rights that the Parties may have over the Peninsula*"; and that "persons in the disputed area, and, as a consequence, the rights of the Parties within that area are exposed to serious risk of further irreparable damage".[55] No wonder that Judge Oda questioned this reasoning in the present case in his declaration.[56]

5. TWO PROCEDURAL PETITESSES

5.1. Counter-Claims

The Statute of the Court is silent on the question of counter-claims. According to Article 80(2) of the Rules of Court, "[a] counter-claim shall be

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ly; and Frontier Dispute, *supra* note 21, at 10, para. 21.

55. Land and Maritime Boundary, *supra* note 5, at 23, para. 42 (emphasis added).

56. *See id.*, at 26-27 (Judge Oda, Declaration).

made in the Counter-Memorial of the party presenting it, and shall appear as part of the submissions of that party".[57] The inference at first glance is that counter-claims belong exclusively to proceedings on the merits. No question of a 'counter-claim' was raised in the *Frontier Dispute* case when Burkina Faso and Mali submitted parallel requests for provisional measures; nor in the case of *Application of the Genocide Convention*, in which the respondent, in its written observations on the applicant's request for provisional measures, 'recommended' certain measures addressed to the applicant.[58] But in the present case, in the above-mentioned protest of 19 February 1996, Nigeria also "invite[d] the International Court of Justice to note this protest and call the Government of Cameroon to order". And further:

> [t]he 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.[59]

Cameroon argued during the hearings that this was a counter-claim, and that Nigeria thereby implicitly - and contrary to its own arguments - did recognize the *prima facie* jurisdiction of the Court.[60] To the direct question by Judge Guillaume whether Nigeria, by its communication "intend[s] to present to the Court a counter-claim for provisional measures", the representatives of Nigeria replied with a simple 'no'.[61] This was noted in the Court's order and the Nigerian protest was not acted upon, yet without any reference to the inapplicability of the notion of counter-claims to proceedings on provisional measures. Nor was any allusion implied in the very question put by Judge Guillaume. One can, therefore, conclude that the Court might be inclined to admit 'counter-claims' by analogy in proceedings on provisional measures; and this appears to be in full conformity with common logic. But another question is that the whole issue, raised by Cameroon - with the question of *jurisdiction* in mind - seems to be quite irrelevant in the context of provisional measures. For, it is difficult to see

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57. 1989 ICJ Acts and Documents No. 5, at 145 (emphasis added).
58. *See* Frontier Dispute, *supra* note 21, at 4-5, paras. 4-5; and Application of the Genocide Convention, *supra* note 33, at 9-10, para. 9.
59. Land and Maritime Boundary, *supra* note 5, at 19, para. 23.
60. *See* ICJ Public Sitting on 5 March 1996, *supra* note 10, at 53.
61. *Ditto* on 6 March 1996, *supra* note 8, at 42; and *ditto* on 8 March 1996, *supra* note 9, at 109, respectively.

any practical difference between dealing with a request presented as a 'counter-claim' and dealing with parallel requests without recourse to that notion.

5.2. Action *proprio motu* or *ultra petita*

References to the appropriateness of the Court's action *proprio motu*[62] reveal somewhat surprising confusion between two paragraphs of Article 75 of the Rules of Court. Article 75(2) provides that "*[w]hen a request for provisional measures has been made*, the Court may indicate measures that are in whole or in part other than those requested", i.e., to act *ultra petita*. According to Article 75(1), "[t]he Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures [...]",[63] the condition italicized above *not* being present. Since in the present case a request has been made, the issue of the Court's action *proprio motu* should not have arisen at all. It is almost amusing that, while a representative of Nigeria indicated that the next speaker would address the question of 'irreparable damage' "in the context of [...] whether it would be appropriate for the Court to indicate *proprio motu* its own provisional measures", the 'next speaker' deemed it proper not to utter a word on this point.[64] Mali's conduct in the *Frontier Dispute* case was more correct in this respect. While having initially suggested "that the procedure enabling the Chamber to pronounce *proprio motu*, would be more satisfactory than that consisting in a formal seisin", Mali withdrew that suggestion as 'inoperative', when it was informed of a formal request filed by Burkina Faso.[65] Another question is what in that case was the status of the initial suggestion of Mali. Would it have been an action *proprio motu* if the Chamber acted upon a suggestion by a party? Would it still have to be regarded as a request, if no specific measures were requested?

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62. *See id.*, *supra* note 9, at 35-36 and 97. *See also* Land and Maritime Boundary, *supra* note 5, at 54 (Judge *ad hoc* Ajibola, Separate Opinion).
63. ICJ Acts and Documents, *supra* note 57, at 141.
64. ICJ Public Sitting on 8 March 1996, *supra* note 9, at 97 and 102 *et seq.*
65. *See* Frontier Dispute, *supra* note 21, at 6, para. 6.

6. BY WAY OF CONCLUSION

The only clear novelty in the present order is the 'active' explicit support for the action of the President of the Security Council on behalf of its members (see Section 4.2.2. above). Otherwise, the order is interesting as a reaffirmation of certain tendencies in the Court's practice in the matter of provisional measures, which can be observed at least since the 1970s. These tendencies can be summarized as an ever more extensive and flexible interpretation and application of Article 41. Gone is the time when provisional measures had to be strictly related to the preservation of the rights *sub iudice*. Gone is the time when the 'irreparability' of possible prejudice to those rights was strictly interpreted and applied. Readers will recall that in the *Aegean Sea* case - in which the Court, at least in the latter respect, adopted a more traditional position than in the earlier *Fisheries Jurisdiction* cases - Judge Jiménez de Arechaga saw fit to declare that

> [t]he 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.[66]

It appears that in the recent decades in general, and in the present case in particular, the Court, using Article 41, is embarking on exercising just these powers - powers of *general prevention*. It is not possible in this place to attempt a detailed analysis of the reasons for this development. But briefly it can be perhaps said that it reflects the modern approach to international disputes as objects of *'management'* rather than of *'settlement'*. This approach comprises an integrated role of the Court in this process of 'management' rather than the 'blinkered parallelism' of its action - to use the words of Judge Lachs. But the realities of the 1980s has led the Court still further, because states now bring before the Court disputes involving use of force and casualties. It is symptomatic that in the *Frontier Dispute* case the Chamber linked its order on provisional measures to Articles 2(3) and 33 of the UN Charter and argued that in view of "resort to force which is irreconcilable with the principle of the peaceful settlement of international disputes, there can be no doubt of the Chamber's power and duty to indi-

66. Aegean Sea Continental Shelf, *supra* note 28, at 16 (Judge Jiménez de Arechaga, Separate Opinion).

cate, if need be, [...] provisional measures" and further - that "eliminating the risk of any future action likely to aggravate or extend the dispute, must necessarily include the withdrawal of the troops of both parties", etcetera.[67] There is no corresponding reasoning of the plenary Court in the present case, but the fact is that in both cases the provisional measures indicated included the withdrawal of troops. As Judge Ranjeva observed in his declaration appended to the order in the present case,

> [a] new 'given' [...] is thus confirmed, that is incidental proceedings consisting of a request for provisional measures owing to the occurrence of an armed conflict, grafted on to a legal dispute.

In his opinion, which seems to deserve a longer quotation,

> the indication of measures that may have a military character does not form part of a general regulatory function, which neither the Charter nor the Statute has conferred upon the Court. Such decisions represent [...] a contribution of the Court to ensuring the observance of one of the principal obligations of the United Nations and of all its organs in relation to the maintenance of international peace and security.[68]

Now, probably no human being - not even a jurist - can reproach the Court for not neglecting the use of force and for not being indifferent to losses of human lives. But the fact remains that the provisional measures of the Court have not only left the harbour of Article 41 and set off for the 'high seas' of Chapter VI of the UN Charter but are now calling on even its Chapter VII and Article 40.

Jerzy Sztucki[*]

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67. Frontier Dispute, *supra* note 21, at 9, and 10-11, paras. 19 and 27, respectively (emphasis added).
68. Land and Maritime Boundary, *supra* note 5, at 29 (Judge Ranjeva, Declaration).

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