DECLARATION OF JUDGE MBAYE

[Translation]

It rarely happens that two cases are exactly alike. However, the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures* (*I.C.J. Reports 1986*, pp. 3 *et seq.*) and the present proceedings do display some striking similarities. In both cases, there is a dispute between two neighbouring African States. It relates to the delimitation of their boundary and has been referred to the Court. Further to certain armed actions, the Court has been asked to indicate provisional measures.

To be sure, in the case concerning the *Frontier Dispute*, the two Parties, who had both signed a special agreement to refer their case to the Court, had both ultimately requested the indication of provisional measures on the basis of Articles 41 of the Statute and 73 of the Rules of Court, whereas in the present proceedings, Nigeria — which asserts that the Court does not have even "prima facie jurisdiction over the substantive issues", has argued and submitted that the Court should refrain from indicating the measures requested by Cameroon, further contending that those measures were neither admissible nor appropriate. One should moreover bear in mind that Nigeria, with regard to the merits of the case, has raised eight preliminary objections with a view to having the Court find that it lacks jurisdiction or, having it, dismiss the Application as inadmissible. However, that in no way detracts from the similarity between the two cases.

Among the provisional measures requested by Cameroon, it will be noted that the Court is asked "without prejudice to the merits of the dispute", to indicate that: "(1) the armed forces of the Parties shall withdraw to the position they were occupying before the Nigerian armed attack of 3 February 1996".

In the *Frontier Dispute* case, the Chamber took the view that its "power and duty to indicate . . . such provisional measures as may conduce to the due administration of justice" were not in doubt (*I.C.J. Reports 1986*, p. 9, para. 19) when it was confronted by incidents "which not merely are likely to extend or aggravate the dispute but comprise a resort to force which is irreconcilable with the principle of the peaceful settlement of international disputes" *(ibid.)*. Consequently, the Chamber not only asked Burkina Faso and Mali to "ensure that no action of any kind is taken which might aggravate or extend the dispute . . . or prejudice the right of the other Party to compliance with whatever judgment the Chamber may render in the case" (*I.C.J. Reports 1986*, pp. 11-12, para. 32 (1) (A)) but also requested the two Governments to withdraw their armed forces to positions behind lines which were to be determined

within 20 days by agreement and, failing that, by itself. More precisely, it indicated that:

> "Both Governments should withdraw their armed forces to such positions, or behind such lines, as may, within twenty days of the date of the present Order, be determined by an agreement between those Governments, it being understood that the terms of the troop withdrawal will be laid down by the agreement in question and that, failing such agreement, the Chamber will itself indicate them by means of an Order." (*I.C.J. Reports 1986*, p. 12, para. 32 (1) (D).)

It is true that, in its statement of reasoning, the Chamber had specified that

> "the selection of these positions would require a knowledge of the geographical and strategic context of the conflict which the Chamber does not possess, and which in all probability it could not obtain without undertaking an expert survey" (*ibid.*, p. 11, para. 27).

However it had previously declared, and quite rightly, that the measures whose indication it was contemplating "for the purpose of eliminating the risk of any future action likely to aggravate or extend the dispute, must *necessarily* include the withdrawal of . . . troops" (*ibid.*, pp. 10-11, para. 27; emphasis added). That had quite naturally led the Chamber to adopt the solution I have mentioned.

The Court was under the same obligation in the present proceedings. Just like the Chamber in 1986 it had to find, in the light of the circumstances, a way of applying the principle that had been highlighted by the Chamber and according to which, when a case is pending before the Court and an armed conflict breaks out between the parties, the measures that the Court is required to indicate must necessarily include the withdrawal of troops.

The Court, concerned to contribute "to the attainment of one of the principal obligations of the United Nations . . . in relation to the maintenance of . . . peace" (see the declaration of Judge Ranjeva) has indicated that "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" (an appropriate form of words, under the circumstances, to indicate the withdrawal of troops), taking due account of the circumstances of the case.

I am delighted by this, as I consider that three of the measures indicated by the Chamber in the case concerning the *Frontier Dispute* (see paragraph 32 (1) (A), (B) and (D) of the operative part of its Order), namely the halting of any action which might aggravate or extend the dispute, abstention from any act likely to impede the gathering of evidence and the withdrawal of troops, form an aggregate that is indispensable in each instance of a conflict of the kind that has occurred between Cameroon and Nigeria, at a time when their dispute is pending before the Court. These three measures should, in such a case, be indicated so as to

maintain the peace that is necessary to such negotiations as the Parties have contemplated or might be contemplating, and the execution of the judgment that the Court might hand down in the case. The Court has consolidated its jurisprudence.

(Signed) Kéba MBAYE.