

DECLARATION OF JUDGE ODA

In this declaration I would like to make clear two reservations that I have to the text of the Order.

1. I voted in favour of paragraph 3 of the operative part, albeit with some hesitation. In my view, the date given in the passage reading

“the presence of any armed forces in the Bakassi Peninsula does not extend beyond the position in which they were situated prior to 3 February 1996”

should have been 29 March 1994, that is, the date on which Cameroon filed the Application instituting proceedings in this case and the date which seems to be indicated in the mediation proposed by the President of Togo (see para. 45).

2. I am a little concerned by the passage in paragraph 42 in which the concept of “irreparable damage” is mentioned. The purpose of provisional measures is to preserve the rights of either party, and it is established in the jurisprudence that the rights in question are those which are to be considered at the merits stage of the case and which constitute, or are directly engaged by, the subject of the application. The urgency of the relevant action or inhibition is a prerequisite. The anticipated or actual breach of the rights to be preserved ought to be one which could not be erased by the payment of reparation or compensation to be ordered in a later judgment on the merits, and this irreparable prejudice must be imminent. These conditions have been regarded by the Court as the criteria according to which it has determined its position when indicating or refusing to indicate provisional measures as requested by the applicant in each case.

In the present case, when the Court states in the first part of paragraph 42 that

“the events that have given rise to the request, and more especially the killing of persons, have caused irreparable damage to the rights that the Parties may have over the [Bakassi] Peninsula”,

this is simply a statement of facts that already exist. In the latter part of paragraph 42, the Court talks about

“persons in the disputed area and, as a consequence, the rights of the Parties within that area [that] are exposed to serious risk of further irreparable damage”.

I believe, however, that loss of life in the disputed area, distressing as it undoubtedly is, does not constitute the real subject matter of the present case.

In addition, the Court admits that it has not been able to form any clear and precise idea of the events that took place on 3 February 1996 as well as those which recurred on 16 and 17 February 1996 in the Bakassi Peninsula, and has been unable to make definitive findings of fact or of imputability (para. 43). In such an unclear situation the concept of irreparable damage cannot be used to justify the indication of provisional measures.

(Signed) Shigeru ODA.
