DISSENTING OPINION OF VICE-PRESIDENT WEERAMANTRY

Judgment on preliminary objections — Applicability of Article 60 — Interpretation may not be sought to seek revision or reopen matter which is res judicata, *or for gaining time — Substantial nature of Nigeria's request — Need to differentiate between additional facts and additional incidents — Need to differentiate between facts confirmatory of border disputes and facts giving rise to international responsibility — Critical date for ascertaining substance of Application — Obligation of Court to construe "additional facts".*

Though rarely invoked[1], and subject to strict limitations, the right of a party to seek clarification of a judgment, in the event of a dispute as to its meaning and scope, is an important part of the scheme of rights conferred on litigants by the Statute of the Court. In a sense, it carries to its logical completion the process of adjudication of the matters that come before the Court. Since I am in disagreement with some parts of the Court's Judgment, I feel obliged, in view of the importance of the principles involved, to set out the reasons for my disagreement in some detail.

I agree with the Court's conclusion that the Application of Nigeria meets the conditions laid down in Article 60 of the Statute of the Court for the purpose of giving the Court jurisdiction to entertain Nigeria's request for interpretation of the Judgment. However, for reasons which I shall set out, I find that I am not in agreement with the Court's conclusion that the request of Nigeria is inadmissible. It is my respectful view that Nigeria's request is legally admissible, and should have been entertained by the Court. The clarification, one way or the other, of the matter raised by Nigeria would also have achieved the great practical advantage of placing both Parties on clearer ground regarding the exact ambit of their future conduct of these proceedings.

Before addressing this particular matter, I would like to associate myself also with the Court's observation that "a judgment on preliminary

[1] Apart from the present Application, there have been four cases before the Permanent Court of International Justice and the present Court: *Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation), Judgment No. 3; Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów); Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case; Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya)*.

objections, just as well as a judgment on the merits, can be the object of a request for interpretation" (para. 10). Even in preliminary objections, there may well be some aspect which genuinely needs clarification. Considerations of fairness in the presentation of one's case, as well as the right of a party to know precisely what the Court has decided, cannot be overridden by the circumstance that the Court is operating within the framework of its preliminary objections to jurisdiction. Such a technical and procedural consideration cannot in principle deprive a party of its substantive right to seek clarification of a matter so crucial to it as the meaning of the Court's judgment. The principle of affording parties such essential assistance as they are entitled to, in terms of the Court's Statute and Rules, cannot vary, depending on whether the proceedings are in regard to preliminary objections or at the stage of hearing upon the merits. This is all the more so, having regard to the fact that Article 79, paragraph 7, of the Rules expressly gives to the Court's decision on preliminary objections the status and form of a judgment.

The Court must therefore consider, irrespective of the preliminary context of the proceedings, the entitlement of a party to seek clarification of the Court's judgment. In proceedings upon the merits as well as in preliminary objections proceedings, there are of course certain clear limitations to the entitlement of parties to resort to Article 60. They may not, for example, under the guise of an application under Article 60, attempt to seek revision of a judgment or reopen a matter which is already *res judicata*. Nor are parties entitled, in any circumstances, to use a request for clarification as a device for gaining time. All of these are to be discountenanced, and the Court will in no way lend its assistance to such procedures.

The request by Nigeria for interpretation is, on the contrary, of a substantial character affecting the very presentation of its case. Whether Cameroon may present additional incidents, as opposed to additional facts, in terms of the Judgment, seems to me to raise an important question which needs clarification from the point of view of adequate preparation and presentation of Nigeria's position. The question arises from the phraseology in paragraph 99 of the Judgment of 11 June 1998 which indicates that it has become an established practice for States submitting an application to the Court to receive the right to present "additional facts" and legal considerations. The Court indicates in that paragraph that the limit of the freedom to present such facts and considerations is that the result is not to transform the dispute brought before the Court into another dispute which is different in character.

It is necessary at this stage to advert to some of the background features of this particular case.

Border incidents were alleged by Cameroon, both to show that the boundary is in dispute, and as giving rise to international responsibility on the part of Nigeria. The legal significance of these incidents thus falls

into two distinct categories. Fresh incidents not pleaded initially may, on the one hand, reinforce the contention that the boundary is in dispute. They may, on the other hand, not involve a challenge to the boundary, but have other implications. Indeed, the Court has expressly recognized this possibility in paragraph 90 of its Judgment when it observed, "[h]owever, not every boundary incident implies a challenge to the boundary". In the event that such fresh incidents are relevant as the basis of a claim of international responsibility, they would constitute fresh claims subsequent to the joinder of issue between the parties. As separate claims, each claim would be based upon its own particular facts, each claim would stand or fall independent of the others, and each claim would give rise to a separate item of relief distinct from the relief flowing from other and different incidents which have already been pleaded.

When, therefore, there is a reference to subsequent facts, there are two clear distinctions that need to be drawn, namely:

(1) the distinction, on the one hand, between proof of new facts supportive of an incident already alleged, and new facts which constitute a new incident in themselves; and
(2) the distinction between new facts which are confirmatory of the existence of a boundary dispute and new facts which, in the form of new incidents, are averred as the basis of claims of State responsibility.

Do "additional facts", as referred to in the Judgment, refer comprehensively to all these categories of fact, irrespective of whether they are fresh facts relating to incidents already pleaded, or fresh incidents; and irrespective also of whether they are confirmatory of a border dispute or the basis of claims of State responsibility?

These are the questions in respect of which Nigeria seeks clarification. Bearing in mind that the object of a request for clarification, as stated in *Factory at Chorzów* is "to enable the Court to make quite clear the points which had been settled with binding force in a judgment"[2], it seems to me that this object is fully satisfied by Nigeria's request.

Certainly the phraseology used in the Judgment could be construed so as to include fresh *incidents*, as opposed to fresh *facts*, and facts confirmatory of a boundary dispute as well as facts unrelated to boundary disputes which are the basis of claims of State responsibility. Since it can comprise facts in all these categories which have occurred after the filing of pleadings, there is a substantial difficulty facing the party that has to reply to them. It is in respect of this difficulty that Nigeria seeks clarification.

[2] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 11. See also Manley O. Hudson, *The Permanent Court of International Justice*, 1972, Louis B. Sohn (ed.), p. 59.

The basic principle that the new facts should not transform the dispute into one of a different character may well be transgressed by the presentation of new facts which amount to new claims in the sense of being fresh claims of international responsibility. There is therefore a substantive basis for Nigeria's claim for clarification, in addition to the purely procedural one discussed. It is to be noted in this connection that a substantial part of Cameroon's Memorial[3] deals with the international responsibility of Nigeria, so that this represents an important aspect of Cameroon's case. Chapter 6 of this Memorial is entirely devoted to "The Internationally Wrongful Acts Attributable to Nigeria", and paragraph 6.01 of this Chapter reads:

> "The Federal Republic of Nigeria does not just formally dispute the frontier between it and Cameroon; it is also engaged in various activities contrary to general international law and to a variety of international legal instruments to which it is a party."

A number of wrongful acts are then alleged, and the Memorial goes on to set out Cameroon's entitlement to reparation for the damage caused to the Republic of Cameroon and to its nationals[4]. Each of these separate acts would presumably be the subject of claims by the Republic for damages sustained by itself as well as by its nationals. It would have to be independently proved, and even though it is subsequent to the date of the Application, Nigeria would have to marshal the necessary evidence to rebut it, quite independently of such other evidence as it might have assembled to rebut other and distinct claims arising from other and distinct incidents.

Consequently, the question whether Cameroon can, under the Court's Judgment, add fresh incidents, each of which may ground a separate claim, is a question of great moment to Nigeria. The question arises whether fresh incidents giving rise to fresh claims for compensation are included within the terms of the Court's Judgment.

If such incidents are permitted to be brought in, where does one draw the line? Nigeria's Application seeks clarification of this issue, and I believe Nigeria is entitled to seek that clarification.

Nigeria accepts that a party is entitled to present additional facts relating to incidents already pleaded, even if those facts should be discovered at a point of time subsequent to the filing of pleadings. They still relate to the incidents alleged, and it is quite conceivable that additional material

[3] Around 50 pages in Part II of the Observations on the Nigerian Preliminary Objections, pp. 283-335.

[4] Pp. 636-648.

in support of the incidents alleged may be uncovered at a later point of time.

This is a totally different situation from the entitlement of a party to plead fresh *incidents* arising subsequent to its earlier pleadings on the basis of which its opponent was brought to Court. While opening the door to a variety of new allegations being made, and altogether fresh incidents being referred to right up to the time of hearing, it raises questions also as to the critical date for the purpose of ascertaining what constitutes a party's claim. Does a party's claim consist of a situation as prevailing at the date of the claim, or is it open to a party, without any limitation of time, to keep averring and pleading fresh incidents that occur right up to the date of hearing? If not right up to the date of hearing, what is the cut-off point?

If such possibilities exist of expanding the content of an application after the application has been filed, this would have major implications in relation to procedure and the conduct of proceedings.

This Court held in *Lockerbie*[5] that the relevant date for determining the admissibility of an application is the date of its filing. This was but a specific application of the general rule that the critical date for assessing a party's claim is its date of institution. It is by reference to that date that it will be ascertained whether the applicant has a justiciable and admissible claim, and it is by reference to that date that the content of that claim will be determined. In regard to content, it will no doubt be possible for a claim to be increased subsequent to institution by such additions as claims to continuing damages or interest, which are intrinsically linked to the claim already made, but it would at least prima facie appear to be contrary to principle that new claims based on new incidents and new evidence may be added, where these have arisen after that date. Applicants, like plaintiffs, come into court on the basis that they have a justiciable claim *at the date of the application*, and that is the date by which, prima facie at any rate, their claim would be judged, whether in regard to admissibility or content. The content of that complaint would not ordinarily be capable of expansion by incidents arising after the date of the application, unless the Court so indicates. A party is entitled, in case of doubt, to know whether the Court's order gives such an indication.

Another way of viewing this matter is to consider that a dispute must

[5] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, I.C.J. Reports 1998*, p. 26, para. 44; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, I.C.J. Reports 1998*, p. 130, para. 43.

exist at the time of the application. That is the critical date for examining both the existence and the substance of the dispute. If the facts then existing were not sufficient to form the basis of a party's claim, that insufficiency cannot be supplied by the introduction of later incidents to shore up that insufficiency. A party's case must be tested as it was on the date of filing of the application — and this is the critical date for determining whether it has approached the Court with a cause of action which is ripe for hearing.

This considerable practical distinction between the allegation of fresh *facts* and the allegation of fresh *incidents*, and the equally significant distinction between new facts confirmatory of a boundary dispute and new facts forming the basis of State responsibility, entitle a party, in my view, to know which category is comprehended within the terms of a Court order allowing a party to present additional facts. If, as stated in *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya)* [6], a condition of admissibility to a requirement for interpretation is that the real purpose of the request should be to obtain an interpretation, it is my view that this precondition to admissibility is satisfied in the present case.

I respectfully take the view, therefore, that Nigeria's request for clarification is not inadmissible, and that Nigeria is entitled to ask the Court for guidance on the question whether the terms of its Judgment admitted the possibility of future *incidents* being urged by Cameroon. This is clearly a dispute as to the meaning or scope of the Judgment, which the Court is under an obligation to construe under Article 60 at the request of a party seeking clarification.

In so concluding, I wish to stress that this view casts no reflection whatsoever upon the phraseology adopted in the Judgment. A judgment, however well crafted, could well embody phraseology which, in the context of a given set of circumstances, may require some clarification. It is one of those incidents of litigation which the judicial experience of ages has shown may arise from time to time, and it is precisely for this reason that Article 60 of the Court's Statute made such clear provision for the right to interpretation. Indeed, the Article was drafted so strongly as to cast the Court's duty in imperative terms: "In the event of a dispute as to the meaning or scope of the judgment, the Court *shall* construe it upon the request of any party" (emphasis added). I refer in this context to the *Factory at Chorzów* case where the Permanent Court observed that where there is a difference of opinion as to whether a particular point has or has not been decided, this comes within the terms of the provision in question (Art. 60), "and the Court cannot avoid the *duty incumbent*

[6] *I.C.J. Reports 1985*, p. 223. See, also, *Asylum* case, *I.C.J. Reports 1950*, p. 402.

upon it of interpreting the judgment in so far as necessary, in order to adjudicate upon such a difference of opinion" (emphasis added). This is part of a passage in the *Factory at Chorzów* Judgment[7] which, in the words of Rosenne, has become the classic statement of the law on this point[8].

A difference of opinion has clearly arisen here, with Nigeria contending for one interpretation, and Cameroon for another. Either interpretation can well be attributed to the passage, thus giving rise to a genuine doubt regarding the meaning and scope of the Judgment. In the interests of justice, parties would be entitled, when a genuine doubt arises regarding the meaning or scope of a judgment, to ask for clarification, and this is especially so when such a construction is necessary for the proper conduct of their proceedings and the proper presentation of their case.

For these reasons, I conclude that both in the interests of justice and in terms of the express provisions of Article 60, Nigeria is entitled to seek a construction of the Judgment by the Court.

(Signed) Christopher Gregory WEERAMANTRY.

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[7] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 11-12.

[8] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III, 1997, p. 1679.