DISSENTING OPINION OF JUDGE AJIBOLA

Introduction — Procedural issue — Parties and the need to allow for second round of pleadings — Agreement with the Court's Judgment on jurisdiction and costs — Need for the Court to interpret — Distinction between facts and incidents — Court should have granted Nigeria's request — Article 36 (2) of the Statute and meaning of "dispute".

In this Judgment, the Court has decided to reject Nigeria's request for interpretation as inadmissible. I have decided to file this dissenting opinion because I do not agree with the conclusion reached by the Court. This was an Application filed by Nigeria on 28 October 1998 requesting the Court to interpret the scope and meaning of paragraphs 99 and 100 of its Judgment of 11 June 1998. This request by Nigeria for interpretation is quite independent from the pending case filed by Cameroon as entered in the General List of the Court.

Cameroon filed its observations to the Application on 13 November 1998 and made the following submissions:

> "1. The Republic of Cameroon leaves it to the Court to decide whether it has jurisdiction to rule on a request for interpretation of a decision handed down following incidental proceedings and, in particular, with regard to a judgment concerning the preliminary objections raised by the defending Party;
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> 2. The Republic of Cameroon requests the Court:
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> — *Primarily:*
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> To declare the request by the Federal Republic of Nigeria inadmissible; to adjudge and declare that there is no reason to interpret the Judgment of 11 June 1998;
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> — *Alternatively:*
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> To adjudge and declare that the Republic of Cameroon is entitled to rely on all facts, irrespective of their date, that go to establish the continuing violation by Nigeria of its international obligations; that the Republic of Cameroon may also rely on such facts to enable an assessment to be made of the damage it has suffered and the adequate reparation that is due to it."

Based on the documents submitted to it, the Court considered that it had sufficient information on the position of the Parties and did not deem it necessary to invite the Parties to "furnish further written or oral explanations" as provided for in paragraph 4 of Article 98 of the Rules of Court.

Quite justifiably, the Court "*may*, if necessary, afford the parties the opportunity of furnishing further written or oral explanations" (emphasis added). This demonstrably is within the discretion of the Court. There are instances when the Court has exercised this discretion by requesting the parties to furnish further written explanations. For example, such written observations or explanations were allowed in the *Asylum* case (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia* v. *Peru), I.C.J. Reports 1950*, pp. 400-401). In that case, although the Application was made by Colombia, the Peruvian Government submitted its observations in a letter of 22 November 1950 and this letter was forwarded to Colombia in order that, if Colombia wished to submit any observations, it could do so by 24 November 1950. In other cases the Court has allowed for "oral explanations". Such examples are reflected in the cases concerning the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, and *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), Judgment, I.C.J. Reports 1985*, pp. 192-194. There is, however, a compelling reason, as far as the present case is concerned, to request further observations from the Parties. This is clearly reflected in the manner in which the submissions of Cameroon were presented. In its observations Cameroon argues that the Court should declare Nigeria's request inadmissible, but also submits alternatively that the Court should

> "adjudge and declare *that the Republic of Cameroon is entitled to rely on all facts, irrespective of their date, that go to establish the continuing violation by Nigeria of its international obligations*; that the Republic of Cameroon may also rely on such facts to enable an assessment to be made of the damage it has suffered and the adequate reparation that is due to it" (emphasis added).

Although Nigeria is aware of the submissions made by Cameroon in its observations, it is deprived of the opportunity to react to such submissions, which not only urge for dismissal but argue further that the situation apparently anticipated by Nigeria is also justified in accordance with the Judgment of the Court. This is a clear indication of the contentious nature of this Application *post hoc*. It is not out of place in this regard for the Court to take into consideration the terms of Article 31 of the Rules of Court, which provides that:

> "In *every case* submitted to the Court, the President *shall* ascertain the views of the parties with regard to questions of procedure. For this purpose he shall summon the agents of the parties to meet him as soon as possible after their appointment, and whenever necessary thereafter." (Emphasis added.)

While the Court may consider it unnecessary for oral explanations to be allowed in the present case, it is, in my opinion, desirable that it should seek to ascertain the reaction of Nigeria to the submissions of Cameroon. Because this Application stands on its own, independent of the original mainline proceedings, and in order for the Court to ensure a full representation of the Parties' views and submissions, a second round of pleadings, which could just take a week, would ensure a juridical equilibrium and safeguard the essential need for *audi alteram partem.* In my view, therefore, there is need for one more round of observations from the Parties, or at least from Nigeria. The Court has unfettered freedom to decide on the procedure to be adopted as regards the Application requesting interpretation. It may even be advisable in a case like this, where an important and fundamental issue is to be determined, to allow for an oral hearing. In Shabtai Rosenne's view:

> "While Article 98 thus leaves the Court with a broad freedom to decide how proceedings in interpretation will be conducted, and in particular whether oral proceedings shall be held, practice indicates in general that the proceedings will be contentious in character (as is inevitable from the word *dispute* in Article 60 of the Statute and Article 98, paragraph 1, of the Rules). Moreover, proceedings in interpretation are an entirely new case and not incidental proceedings directly relating to the original mainline proceedings." (*The Law and Practice of the International Court of Justice, 1920-1996*, Vol. III, p. 1677.)

In the present Application there are three main issues to be decided upon by the Court, namely jurisdiction, admissibility and costs.

I agree with the Court, without any reservation, on its decision on costs as claimed by Cameroon.

I also agree with the Court regarding its decision on the issue of jurisdiction, and with its finding that "the statement of reasons" is linked with the operative part of the Judgment.

However, as earlier indicated and with due deference to the decision of the Court, this is a case where the Court should consider the Application of Nigeria admissible. Nigeria's request is clear and straightforward. In effect Nigeria, referring to the many incidents mentioned not only in Cameroon's Applications of 29 March and 6 June 1994, but also in its Memorial, observations and repertory of incidents, is asking the Court to clarify which of those incidents are relevant or admissible and which ones are not. Procedurally, and in order to ensure the expeditious determination of Cameroon's original case, the issue of which incidents are admissible or not admissible has become very important to the Parties.

Cameroon, at one stage during the hearings of the case, alleged that there are so many border incidents for which Nigeria should be blamed

that it cannot possibly give an exhaustive list of them. This well illustrates Nigeria's fear with regard to the content of the Parties' pleadings. During its oral arguments of 3 March 1998 in support of its preliminary objections, Nigeria expressed its views thus:

> "But a distinction has to be drawn between properly commenting on objections, and, on the other hand, substantially adding to the case which has to be answered by the respondent State. Just as the Memorial cannot enlarge the scope of the dispute as specified in the Application (although it can amplify the case there set out), even more so is it improper for a State's observations to seek to enlarge the substantive scope of the dispute yet further by bringing forward new circumstances not apparent from the Application and Memorial. This, however, is what Cameroon, by introducing in its observations yet further alleged incidents for which Nigeria is said to be responsible, has done: Cameroon has sought substantially to add to the case set out in its Application as amended, and as elaborated in its Memorial. Those additions should therefore be disregarded."

Nigeria did not dispute the right of Cameroon to amplify in its Memorial in respect of the incidents referred to in its Application, but it clearly rejects Cameroon's right to give details of incidents occurring after the Application has been filed. It is observed that Cameroon referred to many incidents, some in its original Application of 29 March 1994, others in its subsequent amending Application of 6 June 1994, others in its Memorial as well as in its observations. In fact, it catalogued many incidents in the repertory of incidents.

It is thus clear that the issue of these incidents in relation to States' international responsibility has to be addressed by the Court. It is therefore very difficult for the Court to give any meaningful consideration to the incidents as alleged by Cameroon in all of its various submissions to the Court, without determining, from the stage of the pleadings, which of these incidents are admissible and which are not admissible for the purposes of this case. Failure on the part of the Court to give such an interpretation in this regard would be to miss another opportunity to develop international law on this important issue, while at the same time creating difficulties for the Parties as regards their pleadings. Such difficulties would in turn result in delay.

The two paragraphs of the Judgment of 11 June 1998 that Nigeria is requesting the Court to interpret are paragraphs 99 and 100, which read:

> "99. Nor does Article 38, paragraph 2, provide that *the latitude of an applicant State, in developing what it has said in its application is strictly limited, as suggested by Nigeria.* That conclusion cannot be inferred from the term 'succinct'; nor can it be drawn from the Court's pronouncements on the importance of the point of time of

the submission of the application as the critical date for the determination of its admissibility; these pronouncements do not refer to the content of applications (*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, Judgment, 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, Judgment, I.C.J. Reports 1998*, p. 130, para. 43). Nor would so narrow an interpretation correspond to the finding of the Court that,

> 'whilst under Article 40 of its Statute the subject of a dispute brought before the Court *shall be* indicated, Article 32 (2) of the Rules of Court [today Article 38, paragraph 2] requires the Applicant "as far as possible" to do certain things. These words apply not only to specifying the provision on which the Applicant founds the jurisdiction of the Court, but also to stating the precise nature of the claim and giving a succinct statement of the facts and grounds on which the claim is based.' (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 28.)

The Court also recalls that it has become an established practice for States submitting an application to the Court to reserve the right to present *additional facts* and legal considerations. 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 by the application into another dispute which is different in character'* (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80). In this case, Cameroon has not so transformed the dispute.

100. As regards the meaning to be given to the term 'succinct', the Court would simply note that Cameroon's Application contains a sufficiently precise statement of the facts and grounds on which the Applicant bases its claim. That statement fulfils the conditions laid down in Article 38, paragraph 2, and the Application is accordingly admissible.

This observation does not, however, prejudge the question whether, taking account of the information submitted to the Court, the facts alleged by the Applicant are established or not, and whether the grounds it relies upon are founded or not. Those questions belong to the merits and may not be prejudged in this phase of the proceedings." (Emphasis added.)

Reading the two paragraphs of the Judgment quoted above, it is clear that the Court has decided on the issue of the procedural right of Cameroon to: *(a)* develop what it "said" in its "Application" and *(b)* present "additional facts".

But, quite clearly, the Court has not determined the issue of *additional incidents or new incidents.* Hence the need for the Court to interpret definitively what is expected from any applicant alleging that certain incidents, although relevant to the application, occurred *after* the application was filed.

It is my view that Nigeria is raising an important issue of substance on the interpretation of the Court's Judgment of 11 June 1998 which requires a definitive pronouncement of this Court. The question is not strictly speaking one of looking for the *meaning* of the two quoted paragraphs but rather of the *scope* of the Court's decision. It is therefore one of *ratione temporis.*

In view of Cameroon's intention, as stated in its observations (para. 6.04), to raise the issue of new and future incidents, and of the fact that it has indeed already done so at the oral hearings of 2 to 11 March 1998 (incidents of 16 March 1995, 30 April 1996, etc.), it is my considered opinion that the Court should draw a clear line of limitation on pleadings as they relate to the issue of incidents alleged by Cameroon in its Applications of 29 March and 6 June 1994. Put succinctly, the question is, which of the incidents alleged by Cameroon in its Applications will the Court consider as incidents relevant to the present case? In other words, will the Court consider post-1994 incidents along with the pre-1994 incidents or will the Court restrict Cameroon to the pre-1994 incidents only?

In the *Nauru* case the Court refused to entertain a "new claim" and said that such a new claim could only be entertained if it arose "directly out of the question which is the subject-matter of that Application" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 67; see also *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72). In the present case too the Court needs to clarify the category of incidents alleged by Cameroon to be relevant. Are they pre-1994 incidents only, or both pre- and post-1994 incidents?

Equally, the issue of what additional facts are required from Cameroon must be spelled out very clearly by the Court; are these additional facts in relation to the incidents before the Applications of Cameroon in 1994 or do they include additional facts concerning incidents subsequent to the year 1994? If the Court agrees that Cameroon may file *additional facts*, is the Court also saying that Cameroon can file particulars of *additional incidents* after 1994?

Cameroon in its observations admits that its freedom is not unlimited,

but contends that this matter should be left to the merits stage. However, Nigeria is required to file its Counter-Memorial very soon. If, for example, Cameroon is given the latitude by the Court to introduce new elements relating to incidents after 1994, this could involve open-ended pleadings that might result in an indefinite delay and wasting of the Court's time. If, for example, such additional or new incidents (say of 1998-1999) are introduced by Cameroon in its Reply to the Counter-Memorial of Nigeria (which could be an element of surprise) then Nigeria might have to respond to such incidents for the first time in its Rejoinder, which could then also warrant applications from both Parties for further rounds of pleadings and which in turn could continue ad infinitum. Another complex situation could emerge if there are further allegations of new or additional incidents at the close of pleadings or during the oral proceedings of the case on the merits. This might also compel the Parties to request further pleadings.

Apart from the fact that Nigeria's Application requires a decision of the Court one way or the other, a decision on this issue would further enrich the jurisprudence of the Court and serve as a guideline to litigants with regard to the limitations imposed on the content of applications. Quite rightly, the Court should not accept any delay in a matter of this nature; the case should be disposed of expeditiously because of the present situation along the Parties' frontiers. But at the same time there is need for caution; this should not be done at the expense of justice and proper procedure. There is no doubt that the pre-1994 incidents are the facts in issue in this case, and additional facts are indeed welcome to support such incidents; but not facts introduced to buttress post-1994 incidents.

Furthermore, I believe that the ordinary interpretation of the word "dispute" in Article 36, paragraph 2, of the Statute of the Court relates only to pre-existing disputes or incidents that occurred before the filing of an application, but definitely not to a future dispute. Apart from the illogicality of such an interpretation, its consequences could unduly and unnecessarily prolong pleadings before the Court and delay a speedy settlement of cases.

(Signed) Bola AJIBOLA.