DISSENTING OPINION OF JUDGE ELARABY

Preliminary objection to jurisdiction of Court ratione temporis — *Context and wording of limitation* ratione temporis *may have justified departure from "real cause" test adopted in prior cases — Court's conclusion that real cause of dispute was in facts or situations prior to critical date wrong on the facts — Court should have joined objection to its jurisdiction* ratione temporis *to merits — Court's disposal of case* in limine, *after it had recognized that there was a dispute between the Parties, not a positive contribution to settlement of international disputes.*

1. The Court's finding that it lacks jurisdiction *ratione temporis* and consequently that it has no jurisdiction to entertain Liechtenstein's Application prompts me to append this dissenting opinion in order to clarify the reasons for which I cast a dissenting vote.

2. The Court based its conclusion that it has no jurisdiction *ratione temporis* on two premises:

(i) under Article 27 (*a*) of the European Convention for the Peaceful Settlement of Disputes, the Court does not have jurisdiction over "disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute [i.e. 1980]";

(ii) the case law of this Court and of its predecessor have established that the facts or situations that are relevant to a *ratione temporis* analysis are those that constitute the "source or real cause" of the dispute (Judgment, para. 46).

3. In applying the exclusion of jurisdiction *ratione temporis*, the Court rightly recognized that "the critical issue is not the date when the dispute arose, but the date of the *facts or situations* in relation to which the dispute arose" (Judgment, para. 48; emphasis added). It went on to decide which facts or situations were the "source or real cause" of the dispute. It concluded that "it is not contested that the present dispute *was triggered by* the decisions of the German courts" (*ibid.*; emphasis added) in the *Pieter van Laer Painting* case, but that this "conclusion does not . . . dispose of the question the Court is called upon to decide" *(ibid.)* because even though the German courts' decisions came after the critical date, they were not the dispute's "source or real cause". The "source or real cause", according to the Court, was instead the situation created by the Settlement Convention and the Beneš Decrees, both of which predated the critical date (Judgment, para. 52).

4. In applying the "real cause" test, the Court adopted an analysis originally applied in two cases that came before the Court's predecessor, the Permanent Court of International Justice, and reapplied in the *Right of Passage* case before this Court in 1960. At this juncture, it is appropriate to point out that in each of the cases cited by the Court:

(a) the exclusion clause was inserted into an optional clause declaration, not a treaty; and

(b) the clauses at issue contained identical language that limited the jurisdiction of the Court to disputes which "*aris[e] . . . with regard to* situations or facts" occurring after the critical date, whereas in the instant case the temporal limitation in the European Convention conferred jurisdiction over disputes which "*relat[e] to* facts or situations" occurring after the critical date.

5. Clearly, the language in the European Convention in this case is broader than the language at issue in the previous cases. In my view, this fact may have required a different interpretation of the "real cause" test than that which was previously applied in prior cases, or indeed a different test. Moreover, it would appear that by acknowledging — as it did several times in its Judgment (paras. 48 and 52) — that the German courts' decisions of the 1990s "triggered" the dispute, the Court also acknowledged that these decisions "relate" to facts or situations that occurred well after the critical date; but the Court saw no contradiction in this.

6. For the purposes of this dissenting opinion, however, I will assume that, notwithstanding the broader language in the exclusion *ratione temporis* in this case, the "real cause" test is the correct test and I will confine my remarks to an explanation of why I believe the Court reached the wrong conclusion in its application of this test to the specific circumstances of this case.

7. The basis of the Court's finding that the real cause of the dispute is not the German courts' decisions of the 1990s, but facts and situations that occurred before the 1980s, is that the German court decisions "cannot be separated from the Settlement Convention and the Beneš Decrees" (Judgment, para. 51). This is because, according to the Court, the German courts' decisions simply represented the latest in a long line of cases in which the German courts had consistently held that they lacked competence under the Settlement Convention to rule on the legality of property confiscated abroad (Judgment, para. 50). This misses the central point, however, which is that the German courts had never before applied the Settlement Convention to property belonging to a neutral State, so there is no long line of cases to be taken into account. Moreover, the Settlement Convention is a treaty dealing only with "German external assets". Liechtenstein is a third party and is not bound by its provisions. Whether the Beneš Decrees were based on citizenship or ethnicity (that is,

the wider concept of persons belonging to the German people regardless of nationality), is irrelevant in the case instituted by Liechtenstein against Germany because Germany, the Respondent, was in no sense connected to the promulgation of the Beneš Decrees. It did not issue or apply the Beneš Decrees to confiscate Liechtenstein property. Indeed, its relationship to the Decrees is identical to the Applicant's: both sustained damage as a result of confiscations that took place under them. Thus, all the facts and situations that predate the critical date under the European Convention serve only as historical background to the dispute between the parties to this case.

8. Some of these facts would be relevant if the Respondent were Czechoslovakia and the purpose of the proceedings was to challenge some aspect of the lawfulness of the Beneš Decrees. But this is not the case here. Moreover, as I seek to clarify, the factual circumstances of this case are not identical to those underlying the three cases relied upon by the Court. One difference is fundamental: in each of the three previous cases, certain acts attributable to the Respondent and complained of by the Applicant took place both *before* the critical date *and after* the critical date, and the Court, in deciding the scope of its jurisdiction *ratione temporis*, had to decide which of these acts constituted the facts and situations that were the "source or real cause" of the dispute.

9. Thus, in *Phosphates in Morocco*, Italy complained that French legislation monopolizing the Moroccan phosphate industry to the detriment of an Italian company occurred *before* the critical date, whereas a final denial of the company's rights by the French Ministry of Foreign Affairs occurred *after* it. In the *Electricity Company of Sofia and Bulgaria* case, Belgium complained that a Bulgarian municipality confiscated property of a Belgian company and that a mixed Belgo-Bulgarian tribunal established a formula for the price of coal to be sold by the company *before* the critical date, whereas the Bulgarian courts applied this formula in a way that caused the Belgian company to suffer a loss *after* it. And finally in *Right of Passage over Indian Territory*, Portugal complained that certain "minor incidents" between it and India regarding Portugal's passage over Indian territory occurred *before* the critical date, whereas a full-scale obstruction of its right of passage occurred *after* it. Although the Court in each case weighed the facts or situations differently — finding in only one of the cases that the facts or situations that constituted the "source or real cause" of the dispute occurred before the critical date — the point is that in each of these cases there were acts *attributable to the Respondent* and complained of by the Applicant that occurred *before the critical date*. There are no such acts here. To neglect recognizing this fact and the

legal consequences that flow from it is to deviate from the prior jurisprudence of the Court.

10. It should, in my view, be manifestly clear that the German courts' decisions purporting to include neutral Liechtenstein property under the umbrella of German external assets — in the 1990s, a decade after the critical date — should be considered the "real cause" of the dispute. Liechtenstein requested the Court to adjudge and declare that "Germany has failed to respect the sovereignty and neutrality of Liechtenstein" (Memorial of Liechtenstein, p. 187, para. 1 *(a)*) because it treated Liechtenstein property as German assets. Thus, its claim relates exclusively to the propriety under international law of the German courts' decisions. The lawfulness of the confiscation of Liechtenstein property in Czechoslovakia represents a separate issue which could constitute a dispute between Liechtenstein and Czechoslovakia but not Liechtenstein and Germany. Here then, the German courts' decisions have the same character and nature as the events that took place after the critical date in the *Electricity Company* and *Right of Passage* cases. In the latter case, the Court held that:

> "It was only in 1954 that . . . a controversy arose and the dispute relates both to the existence of a right of passage to go into the enclaved territories and to India's failure to comply with obligations which, according to Portugal, were binding upon it in this connection. It was from all of this that the dispute referred to the Court arose; it is with regard to all of this that the dispute exists. *This whole, whatever may have been the earlier origin of one of its parts, came into existence only after [the critical date].*" (*Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 35; emphasis added.)

11. It is difficult to grasp how in the instant case the "whole" could have materialized before 1980 since no pre-1980 conduct attributable to Germany was raised in the proceedings. Indeed the Court, by confirming that the "issue whether or not the Settlement Convention applied to Liechtenstein property had not previously arisen before German courts" (Judgment, para. 50) admitted as much. The Court has demonstrated that a "new situation", namely the application of earlier case law under the Settlement Convention for the "first time" to neutral and non-German property, existed, and it is this situation that for the first time caused a dispute between Liechtenstein and Germany.

12. My line of reasoning is as follows: if we proceed from the established fact that the Respondent is not responsible for the Beneš Decrees, the question should be legitimately asked: did the Respondent undertake any post critical date act that potentially engaged its international responsibility?

13. An examination of the case file suggests that two such acts were adopted by Germany. The *first* is the Exchange of Notes which

> "was executed between the three Western Powers and the Government of the Federal Republic of Germany (the parties to the Settlement Convention) under which that Convention would terminate simultaneously with the entry into force of the Treaty. Whereas that Exchange of Notes terminated the Settlement Convention itself, including Article 5 of Chapter Six (relating to compensation by Germany), it provided that paragraphs 1 and 3 of Article 3, Chapter Six, 'shall, however, remain in force'." (Judgment, para. 15.)

Thus, Germany retained the clause in Article 3, Chapter Six, of the Settlement Convention requiring Germany to "raise no objections" to measures taken against "German external assets", but terminated the obligation to pay compensation provided for in Article 5 of Chapter Six of the Settlement Convention, which stipulates that "[t]he Federal Republic shall ensure that the former owners of property seized pursuant to the measures referred to in Articles 2 and 3 of this Chapter shall be compensated". The *second* act attributable to Germany is the decision of the German courts to apply the Settlement Convention to property belonging to nationals of a neutral country. Both these acts occurred well after the critical date.

14. It is relevant to recall, in this context, that the European Court of Human Rights ("ECHR") reached a conclusion similar to the one I am espousing when it analysed its jurisdiction *ratione temporis* in the case brought by the Prince of Liechtenstein. In that case, the Prince of Liechtenstein made two separate claims, only one of which Liechtenstein duplicates here. In regard to the first claim — that the Czech Decrees were unlawful — the ECHR found that it did not have temporal jurisdiction[1]. But the Court drew an important distinction between this claim and the Prince's second and entirely separate claim. The Court, with respect to this second claim, noted:

> "that the applicant's complaint . . . does not concern the original confiscation of the painting which had been carried out by authori-

[1] *Prince Hans-Adam II of Liechtenstein* v. *Germany, European Court of Human Rights, Application No. 42527/98, Judgment, 12 July 2001* (Preliminary Objections of Germany, Vol. II, Ann. 1, pp. 29-30, paras. 84-85).

> ties of former Czechoslovakia in 1946. In the present proceedings, the applicant complains that, as in the German court proceedings instituted in 1992 he could not obtain a decision on the merits of his claim for ownership of the painting, it was eventually returned to the Czech Republic. The Court's competence to deal with this aspect of the application is therefore not excluded *ratione temporis*."[2]

15. Thus, the European Court found that any claim regarding the *Pieter van Laer* court decisions — the Prince of Liechtenstein's second claim before the European Court — was "*not* excluded *ratione temporis*"[3] because the relevant facts occurred in the 1990s, after the critical date. Liechtenstein raised *only* this second claim before this Court and in my view this Court should, like the ECHR, have found that it was not precluded from exercising jurisdiction over Liechtenstein's claim.

16. In sum, I am of the opinion that the temporal limitation in the European Convention was not a proper basis for a finding of no-jurisdiction. In the alternative, I believe that the various dimensions of the case could have been better clarified had the Court opted to explore the case further by joining the German second objection to the merits in conformity with Article 79, paragraph 9, of the Rules of Court instead of disposing of the case *in limine*.

17. I cannot conclude without expressing my concern regarding the final outcome. The Court has found that a legal dispute does exist between the Parties and made the finding that the real subject-matter of the dispute is:

> "whether, by applying Article 3, Chapter Six, of the Settlement Convention to Liechtenstein property that had been confiscated in Czechoslovakia under the Beneš Decrees in 1945, Germany was in breach of the international obligations it owed to Liechtenstein and, if so, what is Germany's international responsibility" (Judgment, para. 26).

Declining jurisdiction while a dispute persists does not represent a positive contribution to the settlement of international disputes, which is the central function of the Court.

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[2] Preliminary Objections of Germany, Vol. II, Ann. 1, p. 29, para. 81.

[3] *Ibid.*; emphasis added. The ECHR was careful to point out that it did not consider Germany's conduct to be a continuation of the former Czechoslovakia's:

> "The Court would add that in these circumstances there is no question of a continuing violation of the Convention which could be imputable to the Federal Republic of Germany and which could have effects as to the temporal limitations of the competence of the court." (*Ibid.*, para. 85.)

18. In the light of the foregoing, I voted for paragraph 1 *(a)* of the *dispositif* but was compelled to vote against paragraphs 1 *(b)* and 2 of the *dispositif*.

(Signed) Nabil ELARABY.