The *Right of Passage* Doctrine Revisited: An Opportunity Missed

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Abstract: In the Preliminary Objections phase of this case the Court followed its previous jurisprudence based on the Right of Passage Over Indian Territory case (1957) concerning the operation of Article 36(2) of its Statute. It is argued here that there were compelling reasons why the Court should have reassessed this jurisprudence. The implications of the Right of Passage doctrine for the operation of Article 36(2) and the role of the Court in international affairs are also discussed.

1. INTRODUCTION

The recent ruling of the International Court of Justice in the Preliminary Objections phase of the *Bakassi Peninsula* case[1] raises many interesting points of international law. *Inter alia*, the Court was faced with a similar situation to that which arose in the *Right of Passage Over Indian Territory* case[2] regarding declarations accepting the jurisdiction of the Court under Article 36(2) of its Statute.

1.1. Background

There has been a long-standing boundary dispute between Nigeria and Cameroon, in particular in relation to certain areas of Lake Chad in the northern part of the border between the two countries, and the Bakassi Peninsula in the South.[3] On 29 March 1994, Cameroon filed an Application in the Registry of the Court

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1. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections, Judgment of 11 June 1998, 1998 ICJ Rep. (not yet published). All the available materials in this case are accessible on the Internet: http://www.icj-cij.org/idocket/icn/icnframe.htm. (Bakassi Peninsula case)
2. Right of Passage over Indian Territory case (Portugal *v.* India), Preliminary Objections, Judgment of 26 November 1957, 1957 ICJ Rep. 125, at 145-146. (Right of Passage case)
3. *See* Bakassi Peninsula case, *supra* note 1, paras. 48-55 for a brief description of some of the efforts made to resolve the differences between the two states. *See also* Nigeria's Memorial on Preliminary Objections of Nigeria, Vol. 1, Ch. 2. The text can be found on the Internet: http://www.icj-cij.org/idocket/icn/icnframe.htm.

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instituting proceedings against Nigeria. Cameroon requested the Court to deal with the question of sovereignty over the Peninsula of Bakassi, and to

> proceed to prolong the course of its maritime boundary with the Federal Republic of Nigeria up to the limit of the maritime zones which international law places under their respective jurisdictions.[4]

In an Additional Application filed on 6 June 1994, Cameroon requested the court to "specify definitively the frontier between Cameroon and the Federal Republic of Nigeria from Lake Chad to the sea".[5] Cameroon also sought monetary compensation for the "material and non-material damage" inflicted upon it by Nigeria's unlawful acts in relation to the disputed areas.

Nigeria filed eight Preliminary Objections against these applications. The first of these related to the operation of Article 36(2) of the Court's Statute (the so-called Optional Clause).[6] Nigeria argued that the Court lacked jurisdiction under Article 36(2) because the manner in which Cameroon had purported to seize the Court contravened the provisions of that Article. Nigeria had accepted the Court's jurisdiction under Article 36(2) of the Statute on 14 August 1965, and had deposited a declaration pursuant to that declaration with the Secretary-General of the United Nations on 3 September 1965. Cameroon had done likewise on 3 March 1994, and copies of its declaration were transmitted by the Secretary-General of the United Nations to the parties to the Statute "some ten and a half months before the Secretary-General informed Nigeria that the declaration had been made".[7] Before this transmission, Cameroon had lodged its application with the Court on 29 March 1994. Nigeria thus argued that it had no knowledge that Cameroon had deposited a declaration until it was notified by the Registrar of the Court of the lodging of Cameroon's application. Cameroon, it argued, had omitted to mention the making of its declaration to Nigeria even though there had been bilateral and multilateral meetings between the two states "during the period immediately before and after 2 March 1994".[8] Nigeria argued further that Cameroon had omitted to bring to the Court's attention the "inappropriate haste with which it had sought to institute the present proceedings against Nigeria".[9]

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4. *See* Bakassi Peninsula case, *supra* note 1.
5. *Id.*
6. The objection reads: "(1) that Cameroon, by lodging the Application on 29 March 1994, violated its obligations to act in good faith, acted in abuse of the system established by Article 36, paragraph 2, of the Statute, and disregarded the requirement of reciprocity established by Article 36, paragraph 2, of the Statue and the terms of Nigeria's Declaration of 3 September 1965; (2) that consequently the conditions necessary to entitle Cameroon to invoke its Declaration under Article 36, paragraph 2, as a basis for the Court's jurisdiction did not exist when the Application was lodged; and (3) that accordingly, the Court is without jurisdiction to entertain the Application." *See* Bakassi Peninsula case, *supra* note 1, para. 18.
7. Nigeria's Memorial on Preliminary Objections, *supra* note 3, para. 1.5.
8. *Id.*, para. 1.7.
9. *Id.*, para. 1.8.

The Court dismissed Nigeria's objection to its jurisdiction. It held, relying on *Right of Passage* case, that it had been validly seized, and that the manner in which Cameroon had acted did not contravene the provisions of Article 36(2) of its Statute. In reaching this decision, the Court responded to the objections raised by Nigeria and there was considerable discussion, both in the majority and dissenting judgments, of the *Right of Passage* doctrine and its significance in the system established by Article 36(2) of the Statute. It is the treatment by the Court of the provisions of Article 36 (in particular paragraphs 2 and 4 thereof) in the light of the latter case that will be the focus of this paper.[10] It is an important issue in the context of the role of the Court in international affairs, and this is borne out by the common argument in the Dissenting Opinions of Vice-President Weeramantry, Judge Koroma, and Judge *ad hoc* Ajibola.

1.2. The *Right of Passage* doctrine

In the *Right of Passage* case, Portugal filed her application instituting proceedings against India only three days after depositing its declaration under the optional clause with the Secretary-General of the United Nations as required by Article 36(4) of the Statute).[11] India, which had made its optional clause declaration in 1940, was notified of the Portuguese declaration and application by the Registrar of the Court. India had argued that before filing its application Portugal ought to have allowed such period to elapse as would reasonably have permitted the notification of the Secretary-General under Article 36(4) to take its "appropriate effects",[12] and that Portugal had accordingly not acted in conformity with the provisions of the Statute. The Court rejected this argument, holding that the consensual bond required by its Statute was established as soon as the declaration was deposited with the Secretary-General, and not later; the legal effect of a declaration "does not depend upon subsequent action or inaction of the Secretary-General". The Court went on:

> the contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, "*ipso facto* and without special agreement", by the fact of the making of the Declaration. Accordingly, every State which makes a Declaration of Acceptance must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligations of the Optional Clause in relation to anew Signatory as the result of the deposit by that Signatory of a Declaration of Acceptance. A State accepting the jurisdiction of the Court

10. The other issues arising in the case are not examined in this paper.
11. Article 36 of the Court's Statute provides in pertinent part as follows: "(2) The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court [...]; (4) Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court."
12. *See* Right of Passage case, *supra* note 2, at 145-146.

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> must accept that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance. For it is on that day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned.[13]

In the *Bakassi Peninsula* case, the Court fully endorsed this Judgment. Of course, and as the Court itself made very clear, Article 59 of its Statute prevents the earlier ruling from holding Nigeria to decisions reached in earlier cases.[14] The doctrine of *stare decisis* does not apply to the Court's judgments. The point, as Judge Weeramantry stated, is that while the *Right of Passage* doctrine may have been applied in subsequent cases like the *Temple* case and the *Nicaragua* case, "[n]o amount of contrary jurisprudence can override the imperative requirements of the Court's Statute".[15] The real issue then becomes, as was emphasised in the Dissenting Opinions,[16] whether there were reasons of fact or of principle for not following the earlier decision as to the nature and operation of Article 36(2) in the present case.

2. THE DIFFICULTIES WITH THE *RIGHT OF PASSAGE* DOCTRINE AS APPLIED IN THE *BAKASSI PENINSULA* CASE

2.1. The time when an optional clause declaration takes effect

2.1.1. The distinction between Articles 36(2) and 36(4)

The issue here is *temporal*; it is about the time when the creation of the consensual bond required by Article 36(2) is created. The interpretation of the words of Article 36(2) in the *Right of Passage* case must be the starting point. In holding that the relevant date is the date the declaration is made/deposited, the Court in effect imported a temporal requirement into the words of Article 36(2). That Article simply states the *substantive* rather than *temporal* effects of a declaration. The words "*ipso facto* and without special agreement" contain no reference to the time when the consensual bond takes effect. They relate only to the manner in which the obligation is created.[17] The fact that a state may make a declaration purporting to create a particular regime, which is all that Article 36(2)

13. *Id.*
14. *See* Bakassi Peninsula case, *supra* note 1, para. 28.
15. *Id.*, para. 13 (Judge Weeramantry, Dissenting Opinion)
16. *Id.*, paras. 5-6 (Judge Koroma, Dissenting Opinion). *See also* section I(E)(2) (Judge *ad hoc* Ajibola, Dissenting Opinion).
17. Vice-President Badawi made a similar observation in the Right of Passage case; importing such a temporal reading for him meant that "the complete idea contained in the Statute has been dismembered and disregarded". Right of Passage case, *supra* note 2, at 157 (Judge Badawi, Dissenting Opinion). *See also* Bakassi Peninsula case, *supra* note 1, para. 13 (Judge Weeramantry, Dissenting Opinion).

deals with, does not say anything about the timing of the effects of that declaration.

The judgment in the *Right of Passage* case separated paragraphs 2 and 4 of Article 36. The duty of the Secretary-General to transmit copies of deposited declarations and the manner of the fulfilment of that duty under paragraph 4 was held to be separate from the 'concern' of the state making the declaration under paragraph 2. There was nothing in paragraph 4, the Court said, which made the legal effect of the declaration conditional upon either the transmission of the declaration or the need for a reasonable time to have elapsed. But this reasoning applies both ways. Just as there is nothing in paragraph 4 which 'concerns' the state making the declaration, there is nothing in paragraph 2 which refers to the time when the consensual bond is created. Support for this temporal rule cannot be found anywhere in the words of Article 36.

2.1.2. The objection to the requirement of a reasonable period

It had also been argued on behalf of Cameroon that the requirement of a reasonable period after the declaration would be difficult to apply in practice and would lead to confusion in the operation of the optional clause system.[18] But it is difficult to sustain this argument. The requirement of a reasonable period did not constitute an obstacle to the Court endorsing such a requirement in the case of withdrawals of declarations. The court's purported distinction between acceptance of its jurisdiction and termination of such acceptance is dealt with in the next subsection. At this point, it would appear difficult to find a basis for the distinction. The point here is that in the case of withdrawals, allowing a reasonable time causes no more uncertainty as regards awareness of states as to their rights under Article 36(2) as it would if it were to operate in the context of acceptance of that jurisdiction.

It had also been argued on behalf of Cameroon that the need to inform a defendant state of impending suit against her was unheard of in domestic legal systems, and that by analogy, there cannot be such a requirement under Article 36.[19] This point need not detain us long; the simple fact is that while Article 36 is based on a consensual bond between the parties, the jurisdiction of a domestic court is hardly ever based on consent. The exception is where parties agree between themselves to confer jurisdiction upon a particular court; and in such cases, the parties sign the agreement at the same time.[20] There is no question of ignorance. The analogy with domestic law is misplaced.

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18. *See* Verbatim Record of the proceedings, 5 March 1998, (CR 98/3), at 34-36. The text can be found on the Internet: http://www.icj-cij.org/idocket/icn/icnframe.htm.
19. *Id.*, at 36.
20. *See, e.g.,* Art. 17 of the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJEC 1978, L 304/77 and 97; *and* P.M. North & J.J. Fawcett, Cheshire and North's Private International Law 189 and 314 (1992).

Furthermore, as Judge Koroma pointed out in his Dissenting Opinion, the result of the *Right of Passage* doctrine has been precisely to encourage states to enter increasingly complex modifications and exception to their declarations. Judge Koroma stated that

> what the Court is saying is that a declaration under Article 36, paragraph 2, of the Statute involves risks for a State and that, as a result of its decision in the *Right of Passage* case, States have found it necessary and are deeming it necessary, in order to protect themselves against surprise applications, to take measures which they had not understood Article 36 paragraph 2[sic] to entail when they first deposited their declarations.[21]

It could thus be said that it is the *Right of Passage* doctrine, and not its rejection, which has led to the practice of complicated reservations;[22] and it is disconcerting that the Court seemed to be endorsing this undesirable state of affairs when it referred to the fact that Nigeria, to its detriment, had not engaged in this practice[23] in order to protect itself. And as Judge *ad hoc* Ajibola pointed out in his Dissenting Opinion,

> all that is required of the declarant State is to ensure from the Office of the Secretary-General of the United Nations that this condition of transmission had been met by the Secretariat before filing its application...in my view, the issue of uncertainty can thereby be disposed of without much waste of time.[24]

2.1.3. The role of the United Nations Secretariat

Rather, taking both paragraphs 2 and 4 of Article 36 together would seem to be more in accordance with the spirit of the optional clause system. Given that no temporal requirement is apparent from the words of either paragraph, reading them together, as Nigeria had suggested, would have been a better indication of the operation of the system (an approach which the Court rejected). Nigeria had argued, referring to transparency and good faith in international dealings that

> [w]hile a declarant state is not directly involved in the Secretary-General's performance of the duties resting upon him under Article 36.4 of the Statute, it cannot fail to be affected by it since those duties are an inseparable part of the system established by that Article. The Secretary-General's part in that system lies in ensuring that States generally are aware of developments. Until he has done so, States are in ignorance of

21. *See* Bakassi Peninsula case, *supra* note 1, para. 27 (Judge Koroma, Dissenting Opinion).
22. *See* R. Higgins, Problems and Process: International Law and How We Use It 195 (1994): "[t]he increased tendency to *ad hoc* reference to the Court, often by agreed compromise, will hopefully reduce the proportion of the Court's time determining litigation about its own jurisdiction."
23. *See* Bakassi Peninsula case, *supra* note 1, para. 45.
24. *Id.*, section I(C) (Judge Ajibola, Dissenting Opinion).

> the true position and of their international rights and obligations, and the system cannot operate in the way envisaged by the Statute: their substantive rights and obligations as they would be if the system were operating properly are unaffected.[25]

The separation of paragraphs 2 and 4 does not appear to take this important point into consideration. The two paragraphs, when read together, seem to suggest a sensible working system, one which takes account of the interaction and interrelationship of two organs of the United Nations. This matter was developed at great length in Vice-President Weeramantry's Dissenting Opinion.[26]

2.2. The distinction between deposit and withdrawal of declarations: the notion of 'accrued rights'

In arguing that a reasonable period should elapse before a declaration takes effect, Nigeria argued for a symmetrical treatment of deposit and withdrawal of declarations under the optional clause. It referred to the position taken in the Court's previous decision in the *Nicaragua* case which had required a reasonable period before a withdrawal took effect. The Court rejected this analogy, on the basis that "[w]ithdrawal ends existing consensual bonds, while deposit establishes such bonds." The Court held that withdrawal deprived other states which have accepted the Court's jurisdiction of the right they had to bring proceedings against the withdrawing state, while the deposit of a declaration does not deprive those states of any accrued right. But this rejection would appear to overlook two considerations.

Firstly, the reference to Article 36(2) as being concerned with 'accrued rights' is a novel one whose application is in any event difficult to justify in the present context. There is nothing in the nature of an optional clause declaration which would import this function of protection of accrued rights into its operation. Indeed as the Court has itself noted in the present case, the aim of the optional clause is to facilitate the creation of that consensual bond necessary to raise the Court's jurisdiction, and this must mean, logically, that the optional clause is not meant to protect any existing rights in respect of recourse to the Court for such rights (if any) must perforce be the principal object of contention in the case of disputes over jurisdiction. In other words, at least at a theoretical level, that which is held in issue cannot be protected by the same rule which is meant simply to decide whether it exists for if so, the rule would already have assumed what it is meant to set out to discover. But it may be argued in response that such rights as are at issue must already exist, and that it would be disingenious to say that Article 36(2) is meant to do more than to simply 'discover' the proper legal position.

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25. *See* Nigeria's Memorial on Preliminary Objections, *supra* note 3, paras. 35-37.
26. *See* Bakassi Peninsula case, *supra* note 1, Section 3 (Judge Weeramantry, Dissenting Opinion).

Secondly then, and more importantly, the accrual of a right is the reverse of the deprivation of a right. State A's acquiring a right involves another state assuming an obligation. Just as a state may be deprived of a right it may have had to bring proceedings against a withdrawing state, so too a state which has previously accepted the Court's jurisdiction (like Nigeria in the present case) may be deprived of its rights by a state in the position of Portugal or Cameroon. Such rights were referred to expressly in the Nigerian Memorial, where it had stated that the optional clause system

> was designed in such a way as to give States participating in it certain rights, including the right to be informed of relevant action taken by the other States. Cameroon, by failing to allow a reasonable time for the proper operation of the system envisaged by the statute, not only acted precipitately but also acted unmindfully of the rights of other parties to the proceedings [...] as guaranteed by the Statute.[27]

Nigeria also stated that states in its position would be unaware of their international rights and obligations under the *Right of Passage* doctrine. One may add Vice-President Weeramantry's observation that the result of the *Right of Passage* doctrine is that the

> declarant can regulate its conduct and direct its negotiations from the vantage point of its certain knowledge that the matter is now justiciable before the Court, while its opponent negotiates in ignorance of this vital item of information regarding its rights.[28]

This is precisely what Nigeria had alleged,[29] and this was a consideration which did not exist in the *Right of Passage* case. The parties in the *Bakassi Peninsula* case had been involved in meetings and negotiations shortly before and after the declaration of Cameroon. In such a position of ignorance, the opponent of the declarant state could have made serious concessions in the context of political negotiations which could adversely affect its rights when the case came to be heard before the Court and which it may not have made had it known of the other party's declaration. What is not clear, then, is why the Court considered the rights of the declarant state, but not those of the ignorant state, worthy of protection.

In conclusion, the distinction between withdrawal and deposit thus appears to be one difficult to sustain, and the reasons for allowing a reasonable period to elapse in the one case would appear to apply equally to the other.[30]

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27. *See* Nigeria's Memorial on Preliminary Objections, *supra* note 3, para. 1.16.
28. *See* Bakassi Peninsula case, *supra* note 1, para. 3, (Judge Weeramantry, Dissenting Opinion).
29. *See* Nigeria's Memorial on Preliminary Objections, *supra* note 3, para. 1.24.
30. This issue was dealt with in Vice-President Badawi's Dissenting Opinion in the Right of Passage case, *supra* note 4, at 158-159. In response to the argument that the practice of states (including India) in denouncing and renewing their declarations "in the belief" that both the declaration and the renewal take immediate effect rather than coming into effect after a reasonable period, he stated that "it is doubtful [...] whether the word 'immediate' can have the effect of eliminating the consensual notion in respect of

2.3. The nature of Optional Clause declarations

In the *Bakassi Peninsula* case, the Court stated that Optional Clause declarations were not treaties, and that the rules governing the law of treaties could be applied only by analogy.[31] The Court proceeded to make reference to the general law of treaties in responding to Nigeria's contention that Article 78(c) of the 1969 Vienna Convention on the Law of Treaties should apply to Optional Clause declarations. According to Article 78(c), if a treaty is transmitted to a depositary, it is to be considered as received by the state for which it was intended only when the latter state has been informed by the depositary. The Court found that this provision dealt with the transmission of information and not with the effect of undertakings contained therein. The rule dealing with the latter was contained in Articles 16 and 24. The former states that a treaty comes into force with the conclusion of the instruments indicating the consent of the state to be bound. The latter provides that a treaty binds a state which establishes its consent to be bound by it after the treaty has come into force on the date on which that consent is established. The Court concluded, referring to the preference expressed by the International Law Commission for the *Right of Passage* doctrine, that Articles 16 and 24 were the applicable provisions, rather than Article 78(c). Thus the general law of treaties was at one with the *Right of Passage* doctrine.

This reasoning does seem compelling. The Nigerian argument was selective to the extent that it referred to Article 78(c) alone, and not to Articles 16 and 24. But again, the question is whether the *Right of Passage* case should be maintained. The fact that the International Law Commission supported it in its Report on the general law of treaties did not necessarily mean that the case itself was the best solution in the context of Article 36(2).

2.3.1. The analogy with treaties

The first point is that even if Optional Clause declarations are similar to treaties, this cannot be so in every respect. The Court, as mentioned above, referred first and foremost to the fact that the rules on treaty regimes could be applied to Article 36(2) declarations only by analogy, and went on to say that those rules would not support Nigeria's contentions "in any event."[32] One important situation in which a distinction must be maintained is in the context of reservations. The regime set up in Articles 19-23 of the Vienna Convention on the Law of Treaties for reservations to treaties clearly contemplates the possibility that

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the denunciation of the contract by which the jurisdiction of the Court is accepted. In the case both of the formation of this contract and of its denunciation, the same rules regarding the necessity for acceptance should be applied", Right of Passage case, *supra* note 4, at 158-159.

31. *See* Bakassi Peninsula case, *supra* note 1, para. 30.
32. *Id.*, para. 31.

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states have the right, where appropriate, to be notified of the instrument indicating consent of a new party to be bound by a multilateral treaty to which they are already a party. Without such knowledge, they are unable to determine whether they are willing to accept the reservations that may be contained in that instrument. Article 20(4) of the Vienna Convention provides that where a state expresses its consent to be bound by a treaty by an act containing a reservation, *that act is not effective until at least one other state has accepted the reservation.* Under Article 23(1), the reservation as well as acceptance or objections to that reservation must be communicated to all actual and potential parties to that treaty. Even then, the reserving state does not become a party to the treaty as regards those states which object to its reservation. Silent states may be held to have acquiesced.[33] Reservations are offers made to existing parties, offers which must be accepted before they can create a consensual bond between the parties.[34] Surely this regime requires the expiration of a time-limit before a declaration takes effect? And why should this rule, which applies in quite an analogous situation to Article 36(2) (given the monotonous regularity with which reservations are included in optional clause declarations) not apply to Article 36(2)?[35]

The reason for not allowing it to apply in the context of Article 36(2) of the Court's Statute is that unlike the case with reservations, optional clause declarations are governed by the *compétence de la compétence* principle which governs jurisdiction of legal tribunals and which is enshrined in Article 36(6) of the Statute. In other words, Article 36, unlike the situation with regular treaties, does not deal with regular contractual dealings.[36] Whereas it is for the Court to determine the effects of declarations accepting its own jurisdiction, it is for the states party to a treaty to determine the effect of ratifications containing reservations. Therefore the Court cannot properly draw such an analogy.

As it stands, then, to quote Judge Koroma, "[w]ith respect, it cannot be both ways".[37] If the Court is to apply the general law of treaties, it must do so in a less selective manner.[38] It must at least make it clear why some analogies (Articles 16 and 24) are to be drawn but not others (Articles 19-23). Had closer attention

33. *See* Art. 20(5) of the 1969 Vienna Convention on the Law of Treaties, 8 ILM 679 (1969): a reservation is considered to have been accepted by a state if it has not objected by the end of a twelve month period after it was notified of that reservation.
34. Sir R. Jennings & A. Watts (Eds.), Oppenheim's International Law, Vol. 1, at 1244, para. 616 (1992).
35. As Judge Koroma pointed out, a related development in general treaty practice is the consideration that "international legal instruments tend to impose a time period for them to take effect after they have been ratified and deposited". Bakassi Peninsula case, *supra* note 1, para. 18 (Judge Koroma, Dissenting Opinion).
36. The Dissenting Opinions made much of this contractual analogy. *See* Bakassi Peninsula case, *supra* note 1, section I(C) (Judge Ajibola, Dissenting Opinion) and section 4 (Judge Weeramantry, Dissenting Opinion).
37. *See* Bakassi Peninsula case, *supra* note 1, para. 22 (Judge Koroma, Dissenting Opinion).
38. It should be noted too, however, that this point was not referred to by Nigeria. But, unlike the Court, the maxim *iura novit curia* does not apply to Nigeria.

been paid to this point about the totally distinct nature of Optional Clause declarations, it would have been apparent that analogies with the coming into force of treaties raises many issues, not just those raised in Articles 16 and 24. A comparison with reservations, which are about the coming into force of consensual obligations, reveal that optional clause declarations do not create the same kind of consensual bond that operates in the context of treaties. If the reality is that special considerations operating in the context of Article 36 call for separate treatment of optional clause declarations, then the considerations noted in the previous sections in this paper must be taken into account. They are considerations which go to the very heart of the effectiveness and continued utility of the optional clause system. It is submitted that the analogy with treaties is of very limited utility. Declarations under the Optional Clause are not treaties, and the analogy is unreliable in the context of jurisdictional skirmishes of the sort herein encountered.[39]

Again, the Dissenting Opinion of Vice-President Badawi in the *Right of Passage* case captures the point elegantly:

> the Optional Clause system established by Article 36 of the Statute has nothing in common with a collective convention. It is concerned with individual Declarations, varying considerably in character, which combined together by means of their mutual exchange, constitute conventions which are equally variable and limited by reciprocity.[40]

2.3.2. The relevance of Article 78(c) of the Vienna Convention

If it is insisted that the treaty analogy is somehow nevertheless a sound one, the further point is that like Article 36(4) of the Statute, Article 78(c) of the Vienna Convention deals with transmission of instruments of acceptance. It must be asked why such provisions were included in the Statute and in the Vienna Convention. It could be that it is simply a consideration stemming from the fact that other parties should *at some point* be informed of their rights and duties. But it would be peculiar to interpret this as requiring that (a) there is an obligation on a third party to transmit the instrument to those it will affect but (b) to stop short of adopting the logical and practical conclusion to the effect that it cannot be sensible to have states bound by obligations about such rights and obligations about which they have a right to be informed. Such an interpretation would assume that the obligation of the third party (a) exists but does not have to be satis-

39. It should also be remembered that both Arts. 16 and 24 of the Vienna Convention, *supra* note x, apply "unless the treaty provides otherwise"; there was thus room for distinguishing between the circumstances in multilateral treaties and those in the Optional Clause system.
40. *See* Right of Passage case, *supra* note *2*, at 158. He dealt specifically with the point about reservations to multilateral treaties.

fied, and that (b) the rights of the party to be informed are not important.[41] Is it not precisely such results that the Articles 78(c) and 36(4) were intended to avoid? Why should Article 78(c) refer to the date of receipt of the instrument of ratification if that date were not to have some legal effects? It is true that there is this tension between Articles 16 and 24 on the one hand and Article 78(c) on the other. But the preferred option must be that the Court should have avoided being involved with these tensions arising from the general law of treaties and considered the *Right of Passage* case anew.

2.4. Jurisdictional equality

Nigeria, along with the dissenting judges, adopted notions of good faith and reciprocity which were wider than was previously encountered in the Court's jurisprudence. While the Court had reiterated the principle that the principle of good faith was not in itself a source of obligation in international law generally but merely one that applies to the exercise of existing rights, it was argued to the contrary that the Court could have taken a broader view.[42] While the Court was on much firmer ground (since it held that there was no obligation on the part of a declarant state to inform other states of its intention to subscribe or its subscription to the Optional Clause) in adopting this position compared to the issues discussed earlier, it went on to consider whether it was true that Cameroon had acted in a clandestine manner.[43] The Court referred to the *Journal of the United Nations* as evidence of the fact that Nigeria must have known of this declaration. As pointed out by Judge Koroma, this cannot be a reliable indicator in this context.[44] The better argument was the fact that Nigeria had notified the Security Council on 4 March 1994 of its concern at Cameroon's intention to raise the matter beyond the bilateral. Technically, it was difficult to refute this fact. Similarly, in relation to the observations about the meaning of the term 'reciprocity',[45] the Court applied its well-established jurisprudence according to which reciprocity is concerned solely with the scope and substance of the commitments entered into, and not with the formal conditions of their creation.[46] Nigeria's argument to the effect that it had accepted the Court's jurisdiction "on the sole condition of reciprocity" did not meet the Court's previous requirements, which themselves had never been the subject of such criticism as the

41. *See, e.g.*, Bakassi Peninsula case, *supra* note 1, section 3 (Judge Weeramantry, Dissenting Opinion); paras. 10-13 (Judge Koroma, Dissenting Opinion); and sections I(C) and I(D) (Judge Ajibola, Dissenting Opinion).
42. *See* Bakassi Peninsula case, *supra* note 1, paras. 36-40.
43. *Id.*, para. 40.
44. *Id.*, section 2 (Judge Weeramantry, Dissenting Opinion); and para. 21 (Judge Koroma, Dissenting Opinion).
45. *Id.*, paras. 41-47.
46. *Id.*, para. 40.

other aspects of the *Right of Passage* doctrine. The case for review of the Court's position in this regard was not as compelling.

But the technical application of rules cannot be viewed out of context. The same considerations referred to thus far in this paper cannot be properly severed from the considerations of fair play, which are at the root of the arguments rejected by the Court. To sever them would not be unlike divorcing the effects of procedural and adjectival law on the basis of that abstract doctrinal distinction alone.

The term 'jurisdictional equality', borrowed from Judge Koroma's Dissenting Opinion, covers these matters quite well. He stated that the optional clause should ensure 'jurisdictional equality'

> [t]o the extent that an application had been filed against a Party, but one which was not in a position to invoke the jurisdiction of the Court had it felt the need to do so – to that extent the jurisdictional equality which should exist between the two parties had not existed.[47]

There are many facets to this idea of jurisdictional equality. It covers Vice-President Weeramantry's observation that the declarant state is at an advantage:

> I note the prejudice that the *Right of Passage* case may cause to a party. A ruling which in effect confirms that the filing of a declaration becomes operative the very next moment after it is filed could be an embarrassment to a State which is in the process of negotiation with another. Unknown to itself, it could have the ground surreptitiously cut from under its feet, perhaps after it has made some vital concession, in the belief that the matter is still under consideration.[48]

He stated later that

> [i]f one party is aware of its rights under this provision, and the other is not, a disparity is created between the parties, which fundamentally breaches the basic principle of equality upon which the Court's jurisdiction is premised.[49]

It should also be recalled that the declarant state is at a further advantage because of the requirement of a reasonable period for withdrawing an existing declaration. A declarant state can actually accept the Court's jurisdiction "for a limited time only", and seise the Court against a state without such a reservation, which can only support the "jurisdictional equality" argument even further.

While these arguments, as stated above, are difficult to sustain in the face of widely accepted case-law, when read in conjunction with the earlier observations made in this paper, add to the basis for revisiting the *Right of Passage* doctrine.

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47. *Id.*, para. 27 (Judge Koroma, Dissenting Opinion).
48. *Id.*, para. 21 (Judge Weeramantry, Dissenting Opinion).
49. *Id.*, section 7, para. 55.

2.5. Other considerations

The effect of the *Right of Passage* doctrine in the broader international context were also referred to by Vice-President Weeramantry. He stated that

> I believe it is in the interests of the peaceful resolution of disputes and the general principles of our jurisprudence that [...] informal negotiations should be encouraged and promoted, and I can only see the effect of such a ruling as inhibiting this process. [...] It is important to international peace and goodwill that the processes of negotiation between the parties be given full scope, without the fear of a sudden and unexpected termination, followed by the dragging of a reluctant respondent to the Court. The deleterious effect that could ensue in regard to the willingness of States to file an Article 36, paragraph 2, declaration at all could be damaging to the development of the Court's jurisdiction.[50]

This underlines the consideration that adjudication and negotiation are placed on an equal footing in Article 33 of the Charter of the United Nations as means for the settlement of disputes. The Court had previously struck a careful balance between its role as the World Court on the one hand and the recognition of the role played by other processes of dispute settlement.[51]

3. CONCLUSION

The question of principle before the Court has already casued so much controversy in the past as to lead some to suggest that the Optional Clause should be abolished altogether.[52] That, of course, is an astounding suggestion, given the conditions that obtain in the international sphere, especially where the rights and obligations of sovereign and equal states are in issue. Whatever defects there may be, it is still clear that the jurisdiction of the Court, *compétence de la compétence* or not, is consensual through-and-through. It does little good and

54. *Id.*, paras. 56-58; and section I(F) (Judge Ajibola, Dissenting Opinion).

51. *See, e.g.*, Aegean Sea Continental Shelf case (Greece *v.* Turkey), Judgment 19 December 1978, 1978 ICJ Rep. 3, at 13; United States Diplomatic and Consular Staff in Tehran (United States *v.* Iran), Merits, Judgment of 24 May 1980, 1980 ICJ Rep. 3, at 20; and Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States), Jurisdiction and Admissibility, Judgment of 26 November 1984, 1984 ICJ Rep. 392. The Court had always made it clear that its functions were legal functions, and that the existence of parallel non-legal dispute settlement procedures would not stop it from rendering a judgment. But as Merrills notes, this separation "is bound to mean that there will be difficulties in securing acceptance of certain judicial decisions, and [...] this limits the contribution which adjudication can make to the solution of international disputes [...] if the isolation of the legal element is to result in a decision which can be implemented, it is important to ensure that the respondent's interests are recognised elsewhere." *See* J.G. Merrills, International Dispute Settlement 139-141 (1991). The present judgment does nothing to quell these fears.

52. *See, e.g.*, S. Rosenne, The Law and Practice of the International Court of Justice: 1920-1996, at 753 (1996); and S. Rosenne, An International Law Miscellany 92-93 (1994).

indeed much damage to elevate the consensual nature of the Court's jurisdiction to the level simply of legal theory so that legal practice becomes so ungrounded in legal doctrine that one wonders whether the simplest, and indeed basic, doctrines of the present international legal order are just so much legal fiction. It is precisely the strength of this doctrine (i.e. consensualism) and consequently the demands that its elision would make on the conduct of international affairs, that stands against the call to abolish the Optional Clause system altogether.[53] The crux of the matter is that what is 'wrong' with the Optional Clause system is the potential lack of control of the parties in respect of the submission of disputes before the Court.[54] As former President Jennings has observed,

> [t]he optional clause remains an underused and less than satisfactory method for augmenting the competence of the Court. It remains true [...] that despite the principle of reciprocity, states may well decide that there is some political advantage in remaining outside a system which permits states to join more or less on their own terms at an opportune moment. It would be difficult if not practically impossible to change the system, given the difficulties of amending the Statute of the Court.[55]

The Court should not be seen to compound such fears, and the problem can be avoided without amending the Statute.

53. One of the main fears expressed in the call for abolition is that the Optional Clause system (as applied by the Court in cases such as these) would perpetuate the political inequality between large and small nations. For example, making light of the requirement of true consent in favour of compulsory jurisdiction would favour stronger nations because of "their inability to defy Court decisions" and the methods of enforcing those decisions. *See, e.g.*, G.L. Scott & C.L. Carr, The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause, 81 AJIL 57, at 70-71 (1987), written in the wake of the decision in the case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua *v.* United States), Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 4. They argue that truly compulsory jurisdiction would allow powerful states an even greater opportunity to "posture in favour of lawfulness in international dealings and still defy the Court when they perceive it to be politically desirable". They continued: "[a] system of international law should embody, and take seriously, some (if not all) of the principles and ideals that lend credibility and integrity to domestic legal systems. The principle of equal justice is perhaps the first virtue of any legal system [...]. Any putative system of law that permits a double standard of justice thus fails in an important sense to qualify as a legal system. Tinkering with the Court's jurisdiction should be undertaken only if proposed alterations can feasibly be calculated to enhance (rather than defeat) equal justice."
54. *See* G. Fitzmaurice, *The Future of Public International Law, in* Evolution et perspectives du droit international (Livre du Centenaire de l'Institut de droit International) (1873-1973) 196, at 276-280 (1974).
55. Sir R. Jennings, *The International Court of Justice after Fifty Years*, 89 AJIL 493, at 495 (1995).