DISSENTING OPINION OF VICE-PRESIDENT WEERAMANTRY

Article 36, paragraphs 2 and 4, and Article 38, paragraph 1 (c), *of the Statute — Need for communication of acceptance before consensual relationship is formed — Duty imposed on Secretariat by Article 36, paragraph 4 — Use under Article 38, paragraph 1* (c), *of comparative law perspectives regarding formation of consensus — Need for time interval between deposit of declaration and formation of consensual bond — Avoidance of surprise to party sought to be bound — Strengthening of Court's jurisdiction through due compliance with Article 36, paragraph 4.*

I have some reservations in regard to the Court's conclusions on objection 1. Since the principles involved are of considerable importance to the jurisprudence of the Court, I consider it necessary to set out these reservations in some detail.

Briefly stated, my concerns centre on the proposition that the deposit of a declaration under Article 36, paragraph 2, of the Statute is all that is required to establish the necessary consensual bond under the Optional Clause. It follows from this proposition that the moment a declaration is lodged under Article 36, paragraph 2, the party lodging the declaration has the right to bring another declarant to Court, irrespective of that other party's knowledge that such declaration has been lodged. It seems to me that such a proposition cannot be in conformity with either the express law or the essential philosophy governing the Optional Clause.

Such a view negates a specific provision of the applicable law which is contained in Article 36, paragraph 4, of the Statute, and runs contrary to the philosophy of consensus on which the structure of the Court's jurisdiction, as well as of this particular provision, is based. It is also in disharmony with the principles of equality, fairness, good faith, and reciprocity. Moreover, it results in the rather incongruous situation that, during the interim period between the filing of the declaration and the communication of this fact, there is great inequality between the parties in relation to their practical right of access to the Court. The right to take one's adversary to court is, in any circumstances, a valuable right. It is rendered all the more valuable — and inequitably so — if one's adversary does not know that it has a corresponding right. If such a one-sided state of affairs prevails for nearly a year — which could occur, as we have seen, owing to delays in communication by the Secretariat — so much the greater is the advantage to one party and the resulting lack of equality and reciprocity. 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.

I do not think such results were within the contemplation of those who drafted the Statute of the Court, especially having regard to their particular concern with the question of communication, as reflected in the wording of the Article itself.

The authority for the proposition underlying the Court's ruling is the often-invoked *Right of Passage* case[1], but, with much respect, it seems to me that that case, though followed in the Court's subsequent jurisprudence, needs re-examination. It affects too fundamental an aspect of the Court's jurisdiction to remain as the leading authority on this question. After 40 years of development of international law, in the spheres of such concepts as fairness, reciprocity and good faith, so sweeping a hypothesis as the immediate creation of a right to sue, regardless of the other party's knowledge thereof, is much in need of review.

* * *

A word is necessary regarding the facts of this particular case. Nigeria had filed its Declaration in 1965. Cameroon filed its Declaration on 3 March 1994, and made its Application to the Court three weeks later. The Secretary-General did not communicate Cameroon's Declaration for nearly a year, and Nigeria states that it first received formal intimation of Cameroon's Application from the Registrar on 29 March 1994.

Cameroon relies on informal references to such a possibility in the communications between the States, and on other sources from which Nigeria might have gleaned this information. In dealings between States on a matter of such importance and formality, one would require something more than a communication which is both informal and indefinite. The question arises whether, in any event, the announcement of the Declaration in the *Journal of the United Nations* would have been sufficient notice to Nigeria of the Declaration of Cameroon. It is necessary to observe in this connection that not every mission in the United States is so well equipped with professional personnel that it can keep a tab on all the treaties deposited and link up the declarations under Article 36, paragraph 2, with their country's immediate concerns. Such a view would operate harshly on the less well-equipped missions at the United Nations.

[1] *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 125.

I cite, in this connection, the following passage from Rosenne's work on *The Law and Practice of the International Court of Justice, 1920-1996*:

> "An announcement of the deposit of a declaration is published immediately in the *Journal of the United Nations* issued on each weekday in New York. That announcement is made for information purposes. It is accompanied by a footnote specifying that the date indicated is the date of receipt of the relevant documents, meaning that the documents will have to be reviewed for determination as to the actual deposit. Given the Court's interpretation of Article 36, paragraph 4, this announcement is not a satisfactory method of bringing the deposit of a declaration to the immediate notice of the parties to the Statute, since the *Journal of the United Nations* is not a document of general circulation but rather the day's work programme in United Nations Headquarters in New York. Permanent Missions in New York are unlikely to appreciate the significance of announcements of this character appearing in the *Journal*."[2]

* * *

I shall now deal with the reasons why I consider the *Right of Passage* decision to be in need of review, commencing with the strictly legal provisions, and moving thereafter to the conceptual reasons underpinning them.

That decision, which receives endorsement from the Court's Judgment in the present case, holds that:

> "A State accepting the jurisdiction of the Court must expect 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 very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned."[3]

My first point of disagreement with the *Right of Passage* case is based on its unequal treatment of the two mandatory clauses contained in Article 36, paragraph 4, of the Statute. The two requisites stipulated by

[2] *The Law and Practice of the International Court of Justice, 1920-1996*, 1997, Vol. II, p. 759.

[3] *I.C.J. Reports 1957*, p. 146.

Article 36, paragraph 4, are deposit with the Secretary-General and transmission by the Secretary-General of copies to the parties to the Statute and to the Registrar of the Court. The Court, in *Right of Passage*, treats the first request as essential and virtually discounts the other. I do not think that two parallel statutory requirements can be treated so differently, especially when both alike are couched in imperative terms.

Secondly, it is an important rule of statutory interpretation that all words in the instrument under interpretation should, as far as possible, be given full efficacy. The Court must necessarily avoid any interpretation which would reduce important words or clauses in the Statute to mere surplusage which has no legal effect whatever. Under the *Right of Passage* interpretation, the words "who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court" might as well have been omitted from the Statute. Such an interpretation does not seem to me to be in conformity with the recognized rules of legal interpretation. The Court is under a duty to render effective all the provisions of its Statute, rather than to encourage the disregard of sections of it by interpretations which denude them of significance or meaning.

The Court's Judgment means that if the Secretariat ignored these words completely, the legal result would still be the same. Such a view is all the more questionable when the statutory requirement is not an arbitrary imposition, but is based, as will be shown, upon well-accepted universal norms and concepts pertinent to the creation of consensual relationships.

It is true this Judgment has been followed in the Court's later jurisprudence in *Temple of Preah Vihear* and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*. However, no amount of contrary jurisprudence can override the imperative requirements of the Court's Statute and, if indeed the Statute makes such a communication compulsory, it must be treated as such.

Thirdly, one must look upon the deposit of the declaration and the communication by the Secretary-General as together constituting the composite package of conditions which needs to be satisfied to give legal efficacy to the declaration. It is clear that the first requisite must be satisfied, for, without it, there could be no question of the declaration being operative. The article in question designedly does not place that requisite alone, but couples it with another in terms which are equally mandatory.

One constituent element cannot be detached from this statutory package by a process of judicial interpretation. Nor can one element be emphasized and the other neutralized when the Statute itself gives no indications to that effect. If the juristic right fashioned by Article 36 is to

come into existence, the events attending its creation must fit the mould cast for that purpose by the governing statutory provision.

A fourth reason why the *Right of Passage* decision needs review is that it could well encourage the Secretariat to take a more relaxed view regarding its obligations under Article 36, paragraph 4. Since the interpretation placed by *Right of Passage* on the requirement of communication deprives that requirement of all effective impact upon the matter it was meant to regulate, it is not to be wondered at that the Secretariat, acting presumably on that ruling, takes its time — up to one year — in transmitting the required communication.

If, indeed, a practice of delay in communication has resulted in the United Nations from the belief that one of these imperative conditions is not imperative, despite the language of the Statute to the contrary, it is important that the practice be rectified and the procedures brought into regularity with the binding requirements of the Statute.

It is true the second of these requirements is not within the control of the party depositing the declaration, but it is to be presumed that official acts will be duly performed, the more especially where they relate to matters of such fundamental importance to the rights of States, as the voluntary surrender of some part of their sovereign autonomy — for declarations by States under Article 36 amount to no less than this. Due performance by the Secretariat of its responsibility of transmitting such copies in a matter such as this can mean nothing short of transmission of such declarations forthwith. This is yet another reason why I believe the Court should take this opportunity to review that Judgment, and stress the imperative nature of this statutory responsibility. The delay of nearly one year that has occurred in communication in this instance is not, in any event, a proper compliance with the Statute.

My fifth objection to the *Right of Passage* case is that it takes out of context the expression "*ipso facto* and without special agreement", and treats it as an indication of the point of time at which the parties became consensually bound. This provision was not intended to produce such a result, nor can it bear such a construction. What Article 36, paragraph 2, provides is that where a declaration is filed, no special agreement is necessary, as the declaration has a compulsory force of its own. Nowhere does this provision purport to indicate *when* that declaration becomes operative.

I would endorse what Vice-President Badawi observed of this construction in his dissenting opinion in the *Right of Passage* case when he criticized the isolation of the expression *"ipso facto"* from its context.

This led to the achievement of a result by which, in his words, "the complete idea contained in the Statute has been dismembered and disregarded"[4].

As a sixth objection, I note the prejudice that the *Right of Passage* interpretation 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 negotiation. This aspect is further developed later in this opinion.

A seventh reason is that the declaration which constitutes the act of acceptance is not a declaration in a standard form. It is infinitely variable in its terms, and the mere fact of deposit cannot be an intimation of the terms in which the declaration is framed. The party sought to be bound is entitled to know those terms. If it is held to be consensually bound, it cannot reasonably be held to be bound to terms of which it is unaware. This factor militates so strongly against the core content of the concept of consensus that even had it stood alone, it would, in my view, have been conclusive.

An eighth and final reason why, in my view, the *Right of Passage* decision needs re-examination is that it could have an adverse effect on the development of the Court's jurisdiction. The Court's interpretation could well result in a reluctance on the part of States to make such declarations in the first instance. Indeed, the Court's ruling in the *Right of Passage* case was followed shortly thereafter by the introduction of a series of reservations to declarations already filed under Article 36. For example, the United Kingdom's Declaration on 26 November 1958 excepted from the scope of its Declaration disputes

> "where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court"[5].

So, also, India filed an amended declaration on 14 September 1959, restricting the Court's jurisdiction in respect of future applications to cases where the acceptance of the Court's compulsory jurisdiction was deposited or ratified more than twelve months prior to the filing of an application bringing the dispute to the Court[6].

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[4] *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 157.
[5] *I.C.J. Yearbook 1959-1960*, p. 255.
[6] *Ibid.*, p. 242.

Other States may well be expected to take similar steps to protect themselves against surprise applications if this view of the law is confirmed, while some others contemplating the filing of such a declaration may well have second thoughts on the subject. All this is not conducive to the extension of the compulsory jurisdiction of the Court.

Indeed, while the Court has been deliberating on its Judgment, Nigeria itself has taken action, on 29 April 1998, to amend its Declaration, so as to impose a time-limit of twelve months before acceptance of the Court's jurisdiction by a State becomes operative against Nigeria.

So much in regard to the interpretation of the governing statutory provision.

* * *

I pass now to an examination of some conceptual considerations which underlie the statutory provision and reinforce the conclusions already reached.

Since the so-called compulsory jurisdiction clause is consensual in its architecture, one must satisfy oneself that the results of the Court's Judgment are in conformity with the legal concept of consensus.

A State lodging a declaration under Article 36, paragraph 2, performs a twofold juristic act. On the one hand, it is making an *offer* to every other State that has not already filed a declaration that it will be bound by its terms to such State, upon that State making a declaration in accordance with Article 36. On the other hand, a declaration made in terms of Article 36 is an *acceptance* of the offers made by other States which have already filed such a declaration. A declaration duly made under Article 36 is thus both an offer to some States and an acceptance of the offer already made by other States.

It is true we are considering a question of international law, but this analysis shows us also that we are very much in the sphere of the law of consensual obligations, from which we draw our general principles and foundation requirements. We must not be diverted from the basic principles of this body of law, as universally recognized, by the circumstance that we are operating in the territory of international law. Where any situation in international law depends on consensus, the generally accepted principles relating to consensual obligations would apply to that situation, unless expressly varied or abrogated.

How is a consensual obligation formed? The completed legal product results from the classical process of the meeting of minds which follows from a confluence of offer and acceptance. This is accepted by most legal

systems, with the rarest of exceptions[7]. This principle is accepted alike by the Anglo-American law and the Romanistic legal systems[8]. There are indeed substantial differences among different legal systems regarding such matters as the status and revocability of the offer[9], but the basic principle that the minds of offeror and offeree must meet remains unaffected by these considerations, and belongs to the common core of legal systems.

Probably the most exhaustive study available on the core content of consensus across a wide variety of legal systems is Schlesinger's monumental work on the *Formation of Contracts*[10]. Schlesinger would indeed appear to have anticipated cases such as the present where the Court needs to satisfy itself on the universally agreed fundamentals of consensus.

One of the purposes of this study, as expressly stated therein, was to render assistance to judges of international tribunals having occasion, under Article 38, paragraph 1 *(c)*, of the Statute of the International Court of Justice, to deal with issues relating to the formation of agreements[11]. Schlesinger was examining the "reservoir of legal concepts and precepts traditionally utilized in, and shared by, a number of national legal systems"[12], and expressed the hope that international judges "would make ample use of the 'general principles' as prime materials for the building of a systematic body of international law"[13].

The present case of interpretation of a statutory provision arising out of the concept of consensus or agreement is an apt occasion for the use of such scholarly research for the purposes of international law. In particular, it would be helpful in testing whether the interpretation adopted in

[7] E.g., a rare exception, which studies of comparative law note as atypical, is the Löfte doctrine of the Scandinavian countries, under which obligations stem not from the agreement of parties but from the duty undertaken by each party in its contractual declaration. See K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd ed., 1984, trans. Tony Weir, p. 382. It has never been suggested that Article 36, paragraph 2, followed such a conceptual model.

[8] *Ibid.* pp. 381 *et seq.*

[9] See P. de Cruz, *Comparative Law in a Changing World*, 1995, pp. 302 *et seq.*, regarding the general rule of revocability of offers in the common law, the general rule of irrevocability in German law, and the somewhat intermediate position of French law. See, also, S. A. Nussbaum, "Comparative Effects of the Anglo-American Offer and Acceptance Doctrine", (1936) *Columbia Law Review*, Vol. 36, p. 920.

[10] Rudolf B. Schlesinger (ed.), *Formation of Contracts: A Study of the Common Core of Legal Systems*, 2 vols., 1968.

[11] *Ibid.*, Vol. 1, pp. 7-8.

[12] *Ibid.*, p. 8.

[13] *Ibid.*

the *Right of Passage* case conforms to the "general principles" attending agreement as universally understood.

Schlesinger notes preliminarily the following general propositions:

> "I A. In all legal systems under consideration, the first requirement of a 'contract', in the core meaning of the word, is the existence of an agreement, *i.e.*, of manifestations of mutual assent on the part of two or more persons. Whether or not they are promissory in nature, these manifestations as a rule must be referable to each other."[14]
>
> "III. . . .
> In all legal systems under consideration, contracts are normally (although not necessarily . . .) formed by offer and acceptance occurring in an ascertainable sequence."[15]

* * *

Once this norm of offer and acceptance is established, the next question for examination is whether the acceptance needs to be communicated. In this regard, Schlesinger observes as follows, in the section of the General Report dealing with the question:

> "*Is Communication of Acceptance Necessary?*
>
> The problem to be treated in this Report is connected with the offeror's interest in obtaining knowledge concerning the conclusion of the contract.
> Normally, although not necessarily, such knowledge is obtained through communication, *i.e.*, an act of the offeree aimed at bringing acceptance to the offeror's knowledge.
>
> With the possible exception of French law, all systems under consideration agree, as a matter of principle, that communication of acceptance is necessary to bring about a contract."[16]

He also observes that the differences between French law and the other systems under consideration may be more apparent than real[17].

There are indeed exceptional circumstances in which legal systems do not require a specific communication of acceptance, e.g., in standard

[14] *Op. cit.*, p. 71.
[15] *Ibid.*, p. 74. The exceptional circumstances, which are rare, are dealt with in Part Two, Section C1, of Schlesinger's work.
[16] *Ibid.*, p. 147.
[17] *Ibid.*, note 2.

form contracts or contracts of adhesion[18]. Vice-President Badawi, in the *Right of Passage* case, distinguished this category of contracts from Declarations under Article 36 in the following terms:

> "Indeed, whereas the essential feature of the 'adherence' or 'accession' contract is uniformity, that of Declarations is variety and diversity. Each Declaration expresses the conditions, the purposes and the policy of the State which makes it. Furthermore, in 'adherence contracts' one of the parties in fact is in a position in which it is impossible to discuss the terms of the contract. It is obliged to contract and gives its adherence to the all powerful will of the other. In this category are included, *inter alia*, contracts of service, contracts for transport and for insurance. What analogy can there be between such contracts and Declarations accepting jurisdiction?" [19]

Another such exceptional category consists of postal offers, in regard to which a variety of theories have been propounded[20] to meet the difficulties arising from time taken in transit, revocation pending transmission, and the like. All theories have been the subject of contention, but they are all designed to meet the special difficulties arising from this particular mode of communication. There may also be cases where an unusual mode of acceptance is prescribed by the offeror, and compliance with this method obviates the need for communication, which is therefore considered to be waived[21]. It is in such cases, where good reasons exist for departure from the norm, that the law of contract waives the

[18] Where a standing offer is made on standard terms, e.g., by a public carrier, it becomes a contract upon acceptance of the act of service, as when a passenger boards a bus. There is no room for negotiation or for individual variations of terms in such a situation, and the meeting of minds is deemed to take place when the relevant act is performed. There is no analogy between such situations and offers of acceptance of the Court's jurisdiction, which are infinitely variable in their terms.

[19] *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, dissenting opinion, pp. 157-158.

[20] A variety of theories have evolved in relation to acceptance of postal offers — the declaration theory (that the contract is complete as soon as the offeree has made a declaration of his acceptance), the expedition theory (that the contract is formed when a letter or telegram has been despatched accepting the offer), and the information theory (that communication of the acceptance must be received by the offeror). See de Cruz, *op. cit.*, p. 308. All of these are fashioned to meet the varied practical difficulties that arise in the context of postal offers. See also the reference to these theories in the dissenting opinion of Vice-President Badawi in *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 156).

[21] As in the classic common law case of *Carlill* v. *Carbolic Smoke Ball Co.*, where an act prescribed by the offeror was considered without more to constitute acceptance. Even that case affirmed, however, that "One can not doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together" ([1893] 1 QB 256; 62 LJQB 257). See the reference to this case in Schlesinger, *op. cit.*, Vol. II, p. 1309.

requirement of communication of an acceptance. This is not such a case. Indeed, the present situation is the very opposite of the case where actual communication is *waived* by the law, for the Statute in fact expressly *requires* communication by action of the Secretary-General.

Except in such exceptional circumstances, or where communication is expressly dispensed with by the parties, there is very good reason for concluding that there can be no consensus in the absence of communication of the acceptance. Without it, the offeror would be in a state of ignorance that it is bound by a contractual relationship. In the words of Nigeria, the "consensual bond" between itself and Cameroon in regard to the Court's jurisdiction "cannot be said to exist with respect to another State of whose participation in the system established by Article 36.2 of the Statute Nigeria knew nothing"[22]. This is contrary to the considerations of fairness that should govern such relationships; and the exceptional circumstances in which a merely notional communication is deemed sufficient are not replicated in the case of Article 36, paragraph 2, declarations. Such a conclusion is strengthened further by the requirement of communication built into Article 36, paragraph 2, itself.

The procedure of deposit of the declaration with the Secretariat is clearly not tantamount to a notification to all the world, as would be the case, for example, of the deposit and registration of a deed with a Land Registry within a domestic legal system. Indeed, the Statute would not specifically require communication if the mere fact of the deposit were to be constructive notice to all the world.

An important principle involved in all of the foregoing considerations is the principle of the protection of the offeror.

I quote Schlesinger's conclusions again, in relation to the recognition by legal systems of the need for the protecting the offeror. He refers to the fact that

> "most of the legal systems under consideration will in some way protect the offeror's interest in obtaining knowledge that the contract has been concluded. Such protection is given by imposing a duty on the acceptor to inform the offeror, promptly or at least within a reasonable time, of the conclusion of the contract. However, these systems differ as to the scope of the duty and the consequences of non-compliance."[23]

I can do no better than to conclude this discussion with a reference to what Grotius himself has to say on the matter, not in his treatises on the

[22] Preliminary Objections of Nigeria, Vol. I, p. 40, para. 1.23.
[23] Schlesinger, *op. cit.*, Vol. I, p. 148.

Roman-Dutch law, but in *De Jure Belli ac Pacis* itself. His conclusions are as follows:

> "*Whether an acceptance ought to be made known to the promisor; explanation, with a distinction*
>
> This question is also commonly raised, whether it is sufficient that the acceptance be signified, or whether, in fact, the acceptance ought also to be made known to the promisor before the promise attains its full effect.
>
> It is certain that a promise can be made in both ways, either thus: 'I desire that this be valid, if it be accepted'; or thus: 'I desire that this shall be valid if I shall have understood that it has been accepted'. In promises which deal with mutual obligations the latter meaning is assumed, but in merely generous promises it is better that the former meaning should be believed to be present, unless something else should appear."[24]

Declarations under Article 36, paragraph 2, deal with mutual obligations, and there is no doubt that they fall into the category in which the offeror must know that his offer has been accepted[25].

This discussion of the general principles of law relating to the formation of consensus through the process of offer and acceptance show their applicability to the matter under consideration by the Court. It indicates also how the Court's decision departs from those principles, and thereby weakens the foundation of true consensus on which the Court's jurisdiction must in all circumstances be based.

There are two ancillary matters which need some consideration to complete an examination of the matter before the Court — the need for a time interval between deposit of the declaration and the creation of the consensual bond, and the question of prejudice to a party that can result from the view of the law which the Court has endorsed.

* * *

A time interval between deposit of the declaration and the creation of the consensual bond provides a necessary safety cushion to ensure that the party sought to be bound by the declaration is not taken by surprise.

Scholarly writings on Article 36, paragraph 4, reinforce this point. I refer, in particular, to Shabtai Rosenne, who points out that Article 36, paragraph 4, was added at a late stage of the San Francisco Conference,

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[24] Hugo Grotius, *De Jure Belli ac Pacis*, Kelsey (trans.), 1925, Vol. II, Bk. II, p. 338.

[25] For this and other references reaching back to discussions by the mediaeval glossators upon the subject of communication of acceptance, see Weeramantry, *The Law of Contracts*, 1967, Vol. I, pp. 121-124.

and immediately became subject to interpretation[26]. Rosenne's own view is that, should the Statute ever be revised, there should be "a short interval between the date of deposit and the date on which the deposit of the instrument produces its effects"[27]. The manifest reasons for such a precaution have already been discussed. Such a view underlines the need for knowledge of the declaration on the part of the States who are to be bound. This result would follow inevitably if the terms of Article 36, paragraph 4, are to be given their natural meaning rather than the truncated meaning given to them by the decision in *Right of Passage*.

Indeed, Rosenne's conviction of the need for such an interval was so strong that he made submissions to the International Law Commission in this regard when it was giving consideration to Article 78 of the Vienna Convention — a consideration which was no doubt heavily influenced by the prevailing *Right of Passage* jurisprudence[28]. Indeed, that eminent jurist, in dealing with the "small time-lag before the other States become aware that the treaty is in force between them and the State depositing the instrument", suggested that this period should be fixed at 90 days, "thus allowing both for the observance of the normal administrative practices of the depositary and for receipt of the notice by the home authorities of the States concerned and the observance of their normal administrative practices"[29].

This suggestion was meant to allow for different depositary practices, the notices being sometimes transmitted "through a government's own diplomatic posts abroad, sometimes through diplomatic posts accredited to the depositary; and sometimes by mail". The essential thrust of the recommendation was no doubt to ensure that the State sought to be bound was informed of the existence of the instrument which locked it into a consensual relationship.

I doubt very much that the interpretation of Article 36, paragraph 4, according to its natural meaning, could unsettle the Court's jurisdiction. Rather, a clarification of that provision and of the reasons underpinning it would regularize and strengthen that jurisdiction. It would also give to States making such declarations the confidence that they will not be taken by surprise, thereby reinforcing their willingness to accept the Court's optional jurisdiction.

No doubt modern methods of duplication and transmission of documents could considerably expedite this process, but it seems to me that the "small time-lag" stipulated by Rosenne is essential.

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[26] *The Law and Practice of the International Court of Justice, 1920-1996, op. cit.*, Vol. II, p. 753.

[27] *Ibid.*, p. 755, footnote 56.

[28] See *Yearbook of the International Law Commission*, 1965, Vol. II, p. 73, doc. A/CN.4/L.108.

[29] *Ibid.*

It is also relevant to refer to the full recognition accorded by Article 78 *(c)* of the Vienna Convention on the Law of Treaties to the necessity of communication of notifications in regard to treaties, if the recipient is to be bound. This is an application of the normal consensual rule. The Court does indeed refer to this provision, but observes that, in so far as declarations under Article 36 are concerned, the régime for depositing and transmitting declarations of acceptance of compulsory jurisdiction is prescribed by Article 36, paragraph 4, of the Statute of the Court (Judgment, para. 30). I respectfully agree, but that very régime prescribes a method of transmitting the communication, and must therefore be followed.

* * *

I refer finally to the question of possible prejudice to parties, which can result from the interpretation the Court lays upon Article 36.

I have already adverted to the first item of prejudice: that for the period between the deposit of a declaration and the communication of that declaration to the party who is to be impleaded, the party depositing the declaration is at an advantage over the other, in that the former is aware that the Court has jurisdiction, and the latter is not. The vesting of jurisdiction in the Court is an important juristic act with major repercussions on State sovereignty. If 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 on which the Court's jurisdiction is premised.

This inequality can have practical repercussions on the course of the informal negotiations between parties, that precede the formal institution of an action. I believe it is in the interests of the peaceful resolution of disputes and the general principles of our jurisprudence that such informal negotiation should be encouraged and promoted, and I can only see the effect of such a ruling as inhibiting this process.

It is important that when parties are in bona fide negotiation with each other there should not even theoretically be the possibility of one of those parties filing a declaration and lodging an application before the Court almost simultaneously. This could amount, in a hypothetical case, to an abuse of the process of the Court. It is by no means implied that such is the case here, but the decision of the Court opens the door to such a possibility in the future.

It is important to international peace and goodwill that the processes of negotiation between 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 juris-

diction. This is an important reason why such a construction should be avoided.

In the process of bona fide negotiations, concessions are made, facts are accepted, compromises are worked out, admissions and apologies are offered. Documents embodying such acts may well be exchanged. It is important that all this should take place on a footing of openness and equality.

* * *

For all these reasons, I am of the view that Nigeria has made out a case of lack of consensus in regard to Cameroon's declaration under Article 36, paragraph 2, at the time Cameroon's Application was filed.

An interpretation of Article 36, paragraph 4, according to its natural meaning, would result in more confidence on the part of States in making declarations under Article 36, paragraph 2. Any uncertainty as to whether consensus had been established could be removed by the prompt discharge by the Secretariat of its statutory duties under Article 36, paragraph 4, which modern methods of reproduction and communication of documents render much less labour intensive and time consuming than they were when the Statute was framed. A proper attention to this statutory obligation could result in communication within a matter of a few days, thus removing all uncertainty.

Other advantages of this view are that it would bring the operation of consensual jurisdiction within the consensual principles which lie at its very foundation, ensure fairness and reciprocity between the parties, and bring the operation of declarations under Article 36 within the express terms of the article which fashioned them.

(Signed) Christopher G. WEERAMANTRY.