DISSENTING OPINION OF JUDGE KOROMA

Optional clause (Article 36, paragraph 2, of the Statute) — Mandatory requirements prior to invoking compulsory jurisdiction of the Court — Reliance on Judgment in Right of Passage *case — Non-recognition or application of principle of* stare decisis *by Court — Article 59 of Statute — Article 38 of Statute establishes a hierarchy as to the application of the law — Article 36, paragraph 4, of Statute — Deposit of declaration and requirement of transmission by Secretary-General — Distinguished from Article 78 of Law of Treaties — Treaty-related communication-trend in international law — Whether time period required after deposit of a declaration before seising Court of a matter — Principle of good faith — How it should have been considered by the Court — Condition of reciprocity — Need for mutuality and equality — Submissions relating to inadmissibility of claim — Not to cross threshold of jurisdictional and admissibility phase into merits.*

In its reply to the first preliminary objection by Nigeria that the Court has not been invested with jurisdiction to entertain the Application by Cameroon, as the condition precedent for the Applicant to invoke Article 36, paragraph 2, of the Statute had not been met, the Court, in rejecting the objection, held that the manner in which Cameroon's Application was lodged was not contrary to Article 36 of the Statute, nor was it made in violation of any right which Nigeria may claim under the Statute or by virtue of its Declaration; and that in any event it has jurisdiction to pass upon Cameroon's Application. Since I strongly disagree with the holding that the manner of lodging the Application was consistent with the mandatory requirements of Article 36 of the Statute, that it was not made in violation of Nigeria's rights under the Statute, and that in any event the Court has jurisdiction to pass upon Cameroon's Application, I feel it incumbent upon me to set out the basis of my disagreement.

My view is that, in order to invoke the jurisdiction of the Court under Article 36, paragraph 2, of the Statute, two mandatory requirements must have been fulfilled. First, a State must have made a declaration that it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes which fall under that provision. Second, such a declaration should be deposited with the Secretary-General of the United Nations, who is obliged to transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

Nigeria, in its first preliminary objection, stated that it had accepted the Court's jurisdiction under Article 36, paragraph 2, of the Statute on 14 August 1965, and had deposited a declaration to that effect with the Secretary-General of the United Nations on 3 September 1965; Cameroon had done likewise on 3 March 1994, and copies were transmitted by the Secretary-General of the United Nations to the parties to the Statute eleven-and-a-half months later, prior to which Cameroon had lodged its Application with the Court on 29 March 1994 instituting the present action. Nigeria claimed that it had no knowledge that Cameroon had deposited a declaration under Article 36, paragraph 2, until it was informed by the Registrar of the lodging of Cameroon's Application. In the light of the foregoing, it submitted that the requirements of Article 36, paragraph 2, read with its own Declaration, had not been satisfied when Cameroon lodged its Application, in other words, that Cameroon had acted prematurely and had not satisfied the conditions necessary for the Court to be invested with jurisdiction; and that the Court accordingly lacks jurisdiction to entertain the Application.

As stated earlier, the Court rejected this line of reasoning and reached the conclusion that it has jurisdiction to pass upon Cameroon's Application. In reaching this conclusion, the Court overwhelmingly and substantively relied on the Judgment it had rendered in the case concerning *Right of Passage over Indian Territory* (*Preliminary Objections, I.C.J. Reports 1957*, p. 125).

While it is understandable that the Court should seek guidance from its previous decisions, one of the disturbing aspects of the present Judgment would seem to be the reluctance or disinclination on the part of the Court to undertake a juristic and judicial enquiry or examination of the meaning of Article 36 of the Statute — the meaning of which has been in contention between the two Parties in this first preliminary objection. To reinforce and justify its overwhelming reliance on the *Right of Passage* case, the Court in turn cited those cases which had been decided on the basis of the decision in the *Right of Passage* case, as justification for its reasoning in the present case. I am not sure whether in fact much has been gained in terms of legal clarity or in the dispensation of justice by this method of judicial accretion, as a judicial response to this particular legal problem. To illustrate the point, the Court commenced its Judgment by quoting Article 36, paragraphs 2 and 4, of the Statute and proceeded immediately to quote with approval a passage of the Court's Judgment in the *Right of Passage* case, as follows, that:

> "by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. The contractual rela-

> tion 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 . . . 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." (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957,* p. 146.)

The Court further quoted from that Judgment and stated with approval that the State making the Declaration

> "is not concerned with the duty of the Secretary-General or the manner of its fulfilment. The legal effect of a Declaration does not depend upon subsequent action or inaction of the Secretary-General. Moreover, unlike some other instruments, Article 36 provides for no additional requirement, for instance, that the information transmitted by the Secretary-General must reach the Parties to the Statute, or that some period must elapse subsequent to the deposit of the Declaration before it can become effective. Any such requirement would introduce an element of uncertainty into the operation of the Optional Clause system. The Court cannot read into the Optional Clause any requirement of that nature." (*Ibid.*, pp. 146-147.)

In paragraph 27 of the present Judgment, the Court, referring to the *Right of Passage* case, stated that "this Judgment is not an isolated one", and then went on to cite a series of cases that had been decided on the basis of that case. In paragraph 28 the Court dealt with Article 59 of the Statute, and acknowledged that there should be no question of holding Nigeria to decisions reached in prior cases. But reliance on the *Right of Passage* case continued and the Court again made reference to it in paragraph 39 of the present Judgment.

The point which is now sought to be made is the fact that the Court did not grasp the opportunity which the present case presented, as well as the circumstances surrounding it, to carry out a juristic as well as a judicial reappraisal of Article 36 of the Statute, a provision which is not only fundamental to the two Parties in this case but also pivotal in determining whether compulsory jurisdiction has been properly invoked and the Court rightfully seised of the matter. In view of the fact that this provision is so crucial to both Parties for the establishment of the jurisdiction of the Court, and in view of the fact that the Judgment in the *Right of Passage* case not only was rendered more than 40 years ago but has been the subject of repeated calls for reconsideration, it would have been more than timely for the Court to undertake a reappraisal both of the provision of the Statute and the Judgment itself. Regrettably the Court appears to have adopted an uncritical approach to that Judgment, basing itself mainly on the Judgment to reach its decision in the present case. Whatever may be the merits or demerits of that Judgment, and many eminent scholars of the jurisprudence of the Court have taken issue with it,

Nigeria specifically requested the Court to review the Judgment, given the circumstances of the present case, and in the interests of justice. Since that Judgment was delivered, not only have many changes taken place in the practice of States, but international law has developed in a way which should have some bearing on the *Right of Passage* case and on the meaning of the Article. It is my view that, while the Judgment in the *Right of Passage* case bears on the present case, it should not have controlled its outcome, as it would seem to have done.

Moreover, it is an important principle of this Court that it does not recognize the principle of *stare decisis* — the principle of binding precedent does not apply in the Court. It is also part of the Court's jurisprudence that even when legal principles are accepted by the Court in a particular case, they are not regarded as binding upon other States or in other disputes. The Court has the power and the duty to depart from previous decisions when this is necessary and in the interests of justice. To my mind, the present case before it is just such a case.

With regard to this case, it should be recalled that Article 38 of the Statute provides that the Court in deciding disputes should do so in accordance with international law, and should apply:

> "*(a)* international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
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> . . . . . .
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> *(d)* subject to the provisions of Article 59, judicial decisions . . . as subsidiary means for the determination of rules of law."

In other words the Article establishes a hierarchy as to the application of the law, and the Court is called upon to determine — to find out — what the existing law is in respect of the dispute before it and to apply that law. The Court has, on the whole, shown a tendency to develop the law, to interpret the law and not to consider itself burdened or bound by previous decisions.

It is a well-established principle of international law, and one accepted by the Court's jurisprudence, that the jurisdiction of the Court is based on consent. In other words, a State may not be compelled to submit to the jurisdiction of the Court without its consent. In this regard, for the Court to assume jurisdiction on the basis of a declaration made under Article 36 of the Statute, the Court has to ensure that jurisdiction has been conferred on it; such conferment cannot be presumed. Article 36, paragraphs 2 and 4, provide 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 in all legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation.

. . . . . .

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."

When this provision is interpreted and given its plain and natural meaning, it follows that, for a State to be in a position to invoke the jurisdiction of the Court, under Article 36, paragraph 2, of the Statute and to seise the Court of a matter, it must first of all have made a declaration recognizing the jurisdiction of the Court; such a declaration must have been deposited with the Secretary-General of the United Nations, who should have transmitted copies thereof to the parties to the Statute and to the Registrar of the Court.

In other words, when a State makes a declaration in conformity with the Article, that State not only assumes the obligations embodied in the provision, including the obligation to accept the jurisdiction of the Court, but also acknowledges that such acceptance, if the Statute is to be complied with, can only be effected after the Secretary-General has transmitted copies of the declaration, and, in the absence of such transmission, parties to the Optional Clause system cannot be aware that another State has become a party to the system. While it is true that the object and purpose of the Optional Clause system is to ensure advance acceptance of the jurisdiction of the Court, it is essentially the case that, by making a declaration, a State is not making a commitment to bring another party before the Court, but indicating a willingness to be brought before the Court. In the absence of the transmission of copies of the declaration, there will be no knowledge that the declarant State can be brought before the Court.

Relying on the Judgment in the *Right of Passage* case, where the Court had stated that "the legal effect of a Declaration does not depend upon subsequent action or inaction of the Secretary-General", and in a later case that

> "'The only formality required is the deposit of acceptance with the Secretary-General of the United Nations under paragraph 4 of Article 36 of the Statute.' (*I.C.J. Reports 1961*, p. 31.)" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 412),

the Court took the view that to require transmission of a declaration, which would involve allowing a reasonable time to elapse before it could be said to take effect, would be to introduce an element of uncertainty into the operation of the Optional Clause, which in the opinion of the Court would not be helpful at a time when the intensification of State relations has multiplied the possibilities of legal disputes which are capable of being submitted to the Court. The Court would seem to read the obligation of the Secretary-General to transmit copies of a declaration to the parties to the Statute and to the Registrar as the introduction of an additional time requirement into the Optional Clause system.

To construe the provision in this way would mean that the obligation of the Secretary-General is not only not mandatory but even superfluous; that it is of no interest or moment whether the Secretary-General fulfils this statutory function. Not only would such a construction be contrary to the intent and clear meaning of the provision, but transmission is necessary and indispensable for the States parties to be aware that another State has made such a declaration, thereby putting in place the consensual bond necessary to establish the jurisdiction of the Court. The functional obligation of the Secretary-General is therefore not only not superfluous but is mandatory if the Optional Clause system is to operate as it was conceived. Contrary to the Court's reasoning, in my view, transmission of the declaration by the Secretary-General would ensure the avoidance of that "uncertainty" which the Court feared would be introduced if the Secretary-General were to perform his duty in the manner prescribed in the Statute of the Court. On the contrary, it can only lead to legal security for the parties to the Statute.

The Court, in attempting to distinguish the deposit and transmission of a declaration pursuant to Article 36, paragraph 4, of the Statute from the régime laid down for treaties by the Vienna Convention on the Law of Treaties, stated that Article 78 of the Convention is only designed to lay down the modalities according to which notifications and communications should be carried out; that the provision does not govern the conditions in which a State expresses its consent to be bound and those under which a treaty comes into force. This attempted distinction, it would seem to me, missed the point of Nigeria's contention with reference to that Article. Article 78 provides as follows:

> "Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:
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> . . . . . .
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> *(c)* if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary . . .".

According to Nigeria, that rule "must apply to Cameroon's Declaration".

Nigeria had argued that, since 1957, the trend in international law has been that where a State makes a treaty-related communication to a depositary for transmission to other States, those other States are only to be considered to have received it when they have been informed of it by the depositary acting in fulfilment of its obligation to inform other States of such communications; and that, although a declaration made under Article 36, paragraph 2, of the Statute is not a treaty as such, to the extent that both Parties are in agreement that such a declaration is to be treated as a treaty, then Cameroon's Declaration, made after the Vienna Convention entered into force, is subject to that provision.

For the Court to dismiss this contention by saying that Article 78 *(c)* does not govern the conditions in which a State expresses its consent to be bound, and those under which a treaty comes into force, does not constitute a proper response to the submission that, as the law has developed, other States are to be deemed as having received communications relating to a treaty only if the obligation to transmit has been fulfilled. As the Court is aware, consent to be bound by a treaty can be established either upon the exchange of instruments between the States parties, on their deposit with the depositary, or on their notification to the States parties or to the depositary. In the case of multilateral treaties, to which declarations made under the Statute can be likened in nature, the law as it has developed is that transmission of a treaty cannot be deemed to have taken place until the depositary has forwarded it to the other States. It is for this reason that Articles 16 and 24 of the Vienna Convention must be construed in the light of Article 78 *(c)* of the Vienna Convention of the Law of Treaties of 1969 and the principles it enunciated. In other words, declarations made under Article 36, paragraph 2, of the Statute of the Court can only be deemed to have established the consensual link between the relevant States for the purpose of the Court's jurisdiction after they have been transmitted by the Secretary-General.

The Court refers to the views expressed by the International Law Commission when it was considering the problem of the deposit of an instrument with a depositary, and reached the conclusion that the act of deposit establishes the legal nexus. Those views are correct as far as the deposit of a treaty goes; they do not impair the validity of the argument that transmission is a requirement for the establishment of a consensual bond under Article 36, paragraph 2, of the Statute. The point is not that declarations are treaties, which they are not as such, but even as unilateral acts, they establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are to be observed. Hence, although the rules of treaties do not apply to declarations as such, which are governed by the Statute, in particular Article 36, paragraph 4, on this

point both the Statute and treaty law coincide. Article 36, paragraph 4, requires the Secretary-General to transmit copies of a declaration in order to consummate the consensual bond between parties to the Optional Clause for the jurisdiction of the Court to be established. In other words, the deposit of the declaration is the beginning of the process in meeting the conditions precedent for the jurisdiction of the Court to be established, as a declaration by itself cannot establish the Court's jurisdiction, unless and until it has been deposited and transmitted by the Secretary-General. It is only after such transmission that the States that are parties or will become parties accept the consequence and recognize that there is jurisdiction between them and the State which has made the declaration.

Nigeria objected that Cameroon could not file an application before the Court without allowing a reasonable period to elapse "as would . . . have enabled the Secretary-General to take the action required of him in relation to Cameroon's Declaration of 3 March 1994". Nigeria, in advancing this view, had relied on the Court's Judgment of 26 November 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, in which the Court stated that a reasonable time is required for the withdrawal of declarations under the Optional Clause. In that case the Court stated, *inter alia*, that

> "the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity." (*I.C.J. Reports 1984,* p. 420, para. 63.)

The Court considers that in this case "no time period is required" to establish a consensual bond, as opposed to a withdrawal which would bring such a bond to an end. This conclusion by the Court would seem to be at variance with the evolution of the law. Nowadays, and in spite of the Judgment in the *Right of Passage* case, international legal instruments tend to impose a time period for them to take effect after they have been ratified and deposited. Moreover, the conclusion of the Court when examined closely does not appear to respond to the objection as formulated. The objection was not that a reasonable time was required for the establishment of a consensual bond, but that Cameroon should not have filed its Application before the Court without allowing a reasonable period "as would have enabled the Secretary-General to take action required of him in relation to Cameroon's Declaration of 3 March 1994". In other words, when could a State that has made a declaration under the Optional Clause seise the Court? One would have thought that both under the Statute and in conformity with legal principles, a reasonable time period would be required before the Court could be seised. In the

first place, under the Statute itself, a reasonable time will be required to enable the Secretary-General to transmit copies of the Declaration to the other States parties to the Optional Clause as well as to the Registrar. Secondly, if only to prevent the allegation of bad faith, a State would surely not wish to be seen to be seising the Court so soon after it had deposited its Declaration that the Secretary-General had not had time to carry out his statutory duty.

Thirdly, if a reasonable time period is not to be required for the transmission of a declaration before the filing of an action, the other States parties to the Optional Clause would not be in a position of knowing that such a deposit has been made, that the declarant State is entitled to exercise its right, or that the other States parties to the Statute have had such a right conferred on them and are entitled to exercise such a right as well. Hence, in my view, both under the Statute and from a position of principle, a reasonable time is required after the deposit of a declaration before the Court may be seised. Related to this matter is Nigeria's contention that, even while continuing, during the first three months of 1994, to maintain contacts with it on boundary questions, Cameroon was in fact preparing to seise the Court. Such conduct, Nigeria contends, infringes the principle of good faith and should not be accepted.

While the Court acknowledged the principle of good faith as "one of the basic principles governing the creation and performance of legal obligations . . .", but that "it is not in itself a source of obligation where none would otherwise exist" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94), it concluded that there is no specific obligation for States to inform other States parties to the Statute that they intend to subscribe or have subscribed to the Optional Clause. Cameroon was not bound to inform Nigeria of its intentions. In justification of this conclusion, the Court cited with approval its statement in the *Right of Passage* case, 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." (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146.)

In my view, not only is this statement too sweeping but, if applied, the effect would be not only to make the Optional Clause system confusing, but would be a risky enterprise as well. Therefore when the Court decided to follow this dictum, which it was not bound to do, it decided the matter too simply by stating that "[t]here is no specific obligation in international law to inform other States party to the Statute that they intend to subscribe or have subscribed to the Optional Clause". Perhaps

the Court could also have viewed this matter from the perspective of what it recognizes as part of its jurisprudence also, namely, the principle of good faith. As Vice-President Judge Alfaro stated, good faith "must prevail in international relations, inasmuch as inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith" (*Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 42).

Judge Sir Percy Spender thought that the principles operated

> "to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other States was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself" (*ibid.*, pp. 143-144).

While the tendency of the Court has been to apply good faith only in situations where a legal obligation is said to exist, perhaps the Court could have taken a less abstract position in applying the principle to this case. For, despite the absence of a legal obligation on a State to inform another State that it intends to subscribe to the Optional Clause, the Court could have determined whether the bilateral negotiations on boundary problems which both States had been conducting created an expressed or implied representation on which one or the other had come to rely as a means of resolving their boundary problems. Instead the Court devoted its attention to considering whether or not Nigeria was aware of Cameroon's intentions to bring the matter before the Court. Nor did the Court say what effect or value should be given to the *Journal of the United Nations* of 4 March 1994, which it had itself introduced, and which reported that Cameroon had deposited with the Secretary-General its declaration under Article 36, paragraph 2, of the Statute recognizing the compulsory jurisdiction of the Court. Is this best evidence to be substituted for the statutory obligation of the Secretary-General to transmit copies of a declaration to parties to the Statute? If that is the intention it should be pointed out that, both for reasons of principle and of practical experience, the *Journal* cannot replace the statutory duty of the Secretary-General under Article 36, paragraph 4, of the Statute. Moreover, as a matter of experience, no delegation can rely on the *Journal* alone, susceptible as it is to so many vagaries, as an official channel for the purposes of Article 36, paragraph 2, of the Statute.

However that may be, one cannot help but observe the inconsistency in this section of the Judgment. In paragraph 30 of the Judgment, the Court

stated that the Optional Clause régime as prescribed by Article 36, paragraph 4, of the Statute is distinct from the régime laid down for treaties by the Vienna Convention. Later, however, the Court took the view that the general rule with regard to treaties equally applies to a declaration made under the Optional Clause. With respect, it cannot be both ways. As pointed out earlier, although declarations made under the Optional Clause are not to be regarded as treaties, this is not to say that the relationships which are established do not partake of the characteristics of a treaty relationship, in other words that, in certain respects, the rule governing treaty relationships would govern declarations made under the Optional Clause. This is owing to the fact that, in my view, the consensual link which is eventually established between States parties is a result of the offer and acceptance of each other's declaration and is binding. Under Article 78 *(c)* of the Vienna Convention on the Law of Treaties of 1969, States are only to be deemed to have received a treaty communication such as an instrument of ratification when they have been informed of it by the depositary in the fulfilment of its obligation.

It seems to me that, when the Court stated in the Judgment in the *Right of Passage* case that "the day a State deposits its Declaration of Acceptance under Article 36, paragraph 2, of the Statute, a consensual bond is established with other States that have made similar or identical Declarations", this presupposes, that following the deposit of a declaration with the Secretary-General acting as a depositary, he would in turn have performed his statutory duty by transmitting copies of that declaration to the other parties. If these copies are in conformity with similar or identical declarations, the consensual bond thus established would look to the date of the deposit or the date stipulated as the date on which the bond took effect for jurisdictional title. This construction would also appear to be in harmony with Article 102 of the Charter of the United Nations, which provides as follows:

> "1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat *and published by it.*
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> 2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations." (Emphasis added.)

The intent of this provision "that every treaty shall be registered with the Secretariat and published by it" is, as it has been recognized, to ensure that a treaty when concluded receives publicity, as well as its contents. By parity of reasoning, when Article 36, paragraph 4, of the Statute enjoins a party to deposit its instrument of declaration with the Secretary-General, who shall transmit copies thereof, the implication is that

with transmission a State is put on notice to accept such a declaration or that its declaration made previously has been accepted. It seems to me that it is only then that a consensual bond would have been established and jurisdiction would thus have been conferred on the Court. To suggest that a declaration takes effect instantaneously and automatically without transmission, as the Court has held, would deprive other States of the knowledge that such a declaration had been made, and the consensual bond necessary and indispensable for the establishment of the jurisdiction of the Court would be missing.

The Court also held, in paragraph 35 of the Judgment, that to allow a reasonable time which the transmission of a declaration requires for it to take effect would introduce an element of uncertainty into the Optional Clause régime. With respect, it was this rejection of a reasonable lapse of time before a declaration could take effect in the *Right of Passage* case that had an unsettling effect on that régime, albeit unintentionally. Following that Judgment, some States which had previously made a declaration under Article 36, paragraph 2, of the Statute took measures to protect themselves against the institution of surprise proceedings by introducing further reservations into their declarations, in addition to that of reciprocity. The United Kingdom, for instance, amended its declaration to include the following reservation:

> "disputes in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or 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" (*I.C.J. Yearbook 1959-1960*, p. 255).

France, for its part, excluded disputes with any State which, at the date of the occurrence of the facts or situations giving rise to the dispute, had not accepted the compulsory jurisdiction of the Court.

Similar reservations have since been made by several other States to their declarations under the Optional Clause system, and the trend seems to have continued. In other words, instead of the certainty which the Court in its Judgment in the *Right of Passage* case predicted, the experience has been in the opposite direction. The Court indirectly acknowledged this when it stated in the present Judgment that

> "In order to protect itself against the filing of surprise applications, in 1965, Nigeria could have inserted in its Declaration an analogous reservation to that which the United Kingdom added to its own Declaration in 1958. Ten or so other States proceeded in this way. Nigeria did not do so." (Para. 45.)

In other words the Court is saying 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 4, to entail when they first deposited their declarations.

It is also Nigeria's contention that, when Cameroon filed its Application on 3 March 1994, it acted prematurely and so failed to satisfy the requirement of reciprocity as a condition to be met before the jurisdiction of the Court under Article 36, paragraph 2, of the Statute could be invoked against it. Nigeria further contended that, for the consensual bond to exist between it and Cameroon under Article 36, paragraph 2, invoking the jurisdiction of the Court implies that there must exist not only "coincidence" and "reciprocity", but mutuality as well, so that each would be in the same position vis-à-vis the other as that other is in relation to itself. Nigeria further claimed that, at the time Cameroon instituted its proceedings, it was in ignorance of any possibility of instituting proceedings against Cameroon; that ignorance, it claimed, resulted in the lack of reciprocity. Nigeria also claimed that the haste with which Cameroon filed its Application affected its position adversely, including its position as a Respondent before this Court, since the resources it has had to devote to these proceedings, both now and at the earlier interim measures phase, and the harassment which it has suffered from Cameroon on the international plane, have had a clear and substantial material dimension.

In answer to this contention, the Court stated, *inter alia*, and referred to its dictum in the *Right of Passage* case, that " 'the principle of reciprocity is not affected by any delay in the receipt of copies of the Declaration by the Parties to the Statute' (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 147" (Judgment, para. 43).

Such response, with respect, does not seem to meet this particular objection of Nigeria. As I understand it, the complaint is not about the delay as such, but one of substance, namely, that reciprocity under the Optional Clause should ensure jurisdictional equality. To 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. Nigeria claims that, until it was informed by the Registrar of the Application filed by Cameroon, it was not in a position to file a claim against Cameroon, as it could not have been aware that Cameroon had become a party to the Optional Clause system. It seems as if the proviso had envisaged this problem and solved it by enjoining the Secretary-General to perform his statutory function of

transmitting a declaration, and, since this would allow for the receipt or acceptance of that declaration, reciprocal equality between the Parties would have thus been established.

It may be argued that the lapse of a reasonable time before a declaration would be allowed to take effect would allow a State to modify its declaration. The customary norm governing the modification is that a declaration cannot be modified after a dispute has developed. According to the Court, as stated in the *Nottebohm* case:

> "At the time when the Application was filed, the Declarations of Guatemala and of Liechtenstein were both in force. The regularity of the seising of the Court by this Application has not been disputed. The subsequent lapse of the Declaration of Guatemala, by reason of the expiry of the period for which it was subscribed, cannot invalidate the Application if the latter was regular: consequently, the lapse of the Declaration cannot deprive the Court of the jurisdiction which resulted from the combined application of Article 36 of the Statute and the two Declarations.
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> . . . . . .
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> An extrinsic fact such as the subsequent lapse of the Declaration . . . by denunciation, cannot deprive the Court of the jurisdiction already established." (*Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, pp. 122-123.)

To sum up on this point, since Nigeria's Declaration under Article 36, paragraph 2, of the Statute was based on reciprocity, for there to have been reciprocal equality with Cameroon, Nigeria should have been in a position in which, had it wanted to invoke the jurisdiction of the Court at the same time as Cameroon filed its Application, it would have been able to do so. According to the material before the Court, it was not in a position to exercise such a right had it wished to do so, hence the element of reciprocal equality and mutuality was absent. The jurisdiction of the Court cannot be imposed on a State against its clearly expressed will.

Nigeria, in its submissions, had also asked the Court to declare that the claims brought by the Republic of Cameroon are inadmissible to the extent specified in the preliminary objections an objection based on law and fact; in other words for the Court to rule on the Application other than on its ultimate merits.

In my view, while making such a ruling, one way or the other, the Court should have resisted the temptation of what could be read as taking a position on the merits of the matter, which is still in the preliminary objection phase. As I understand the material presented to the Court, to rule on whether the entire boundary between the countries is contested or whether or not the Court is in a position to delimit the maritime boundary when the rights of third countries could be involved would not have required entering into the merits of the dispute. In paragraph 109 of the Judgment the Court should have made it clear that the Court's jurisdic-

tion cannot be established on the basis of a declaration made under Article 36, paragraph 2, of the Statute, if such a declaration would be contrary to the provisions of or obligations undertaken in a prior treaty otherwise than in conditions laid down in that treaty. On the other hand, I am constrained to note that, by some of its holdings, the Court would appear to have gone too far in taking positions which may appear prejudicial when it reaches the merits phase of the matter and would in that regard have crossed the threshold on a matter which is still at the jurisdictional and admissibility phase. There is a general recognition in the jurisprudence of the Court that, during the preliminary phase of a matter before it, the Court could not pre-empt — even in a remote way — its order, judgment or advisory opinion on the merits of a case when deciding questions of jurisdiction.

CONCLUSION

In view of the reasons which I have advanced above, I regret that I cannot support the Court's holding that it has jurisdiction to pass on Cameroon's Application. The decision of the Court should have been governed by the provisions of the Statute. Jurisdiction cannot be imposed on a State contrary to the clearly expressed provision of the Statute. The Court should not have allowed its decision to be governed by the Judgment in the *Right of Passage* case. It is also a matter of regret that the Court did not take this opportunity to review the decision in the *Right of Passage* case.

(Signed) Abdul G. KOROMA.