The Optional Clause System and the Law of Treaties: Issues of Interpretation in Recent Jurisprudence of the International Court of Justice

Malgosia Fitzmaurice*

Introduction

The scope of this article

This essay will examine a number of issues concerning the relationship between the law of treaties and the Optional Clause system which arose in two recent cases before the International Court of Justice (ICJ), namely, the Case Concerning the Land and Maritime Boundary (Cameroon v Nigeria), the Bakassi Peninsula Case,1 and the Fisheries Jurisdiction Case (Spain v Canada).2 These issues include, in particular, the legal character of Optional Clause declarations, the applicability of the general rules of interpretation of treaties to them, and the legality of certain reservations to these declarations, as well as the applicability of other aspects of the law of treaties in the context of the Optional Clause system. This article will not attempt to cover all the aspects of Optional Clause declarations since many excellent publications are available that already do this,3 but will concentrate on the particular points outlined

* Queen Mary and Westfield College, University of London. 
above. Before coming to consider these two cases, it is necessary to review briefly certain aspects of the existing relevant jurisprudence.

Terminology

The system under Article 36 of the Statute of the ICJ is, in particular as it has been interpreted by the Court, quite complex, involving a number of distinct legal elements and relationships, and it is as well to be quite clear as to the terminology used in relation to each of these elements. Thus, the term ‘Optional Clause’ will refer to Article 36 itself, the term ‘Optional Clause declaration’ to a declaration made by a state pursuant to paragraph 2 of the Optional Clause, and the term ‘Optional Clause system’ to the whole system arising under the Optional Clause, which includes the Optional Clause itself (in its context as an Article of the Statute of the ICJ, itself an integral part of the Charter of the United Nations), the individual Optional Clause declarations of states and the consensual relations between declarant states which arise as a result of them. The issues that arose in the two recent cases concern, principally, the declarations themselves and the consensual relations between the declarant states. But the Bakassi Peninsula Case, following on the Rights of Passage Case, also involves issues relating to the interpretation of parts of the Optional Clause itself.

A word may usefully be added concerning the use of the word ‘reservation’ to describe the conditions or limitations which it has become the common practice of states to place upon their acceptance of the Court’s jurisdiction in Optional Clause declarations. Use of the word ‘reservation’ in this context has become so commonplace that it would probably now be confusing to refrain from its use. However, it needs to be emphasised that no conclusions as to the ‘treaty’ nature of Optional Clause declarations should be drawn from its use; nor are the treaty rules relating to reservations really at all applicable to the conditions in Optional Clause declarations. The word ‘condition’ would, arguably, be more appropriate, and is, indeed, the word used in paragraph 3 of the Optional Clause.

The issue of the legal character of Optional Clause declarations

This article mainly concerns the issue of the legal character of Optional Clause declarations and the principles to be applied in their interpretation. In considering the jurisprudence that existed prior to the cases under review in Part 2, I will treat the two issues of legal character and principles of interpretation separately and successively. The order is logical in the sense that, in the ordinary course one might anticipate that the principles of interpretation to be applied would follow from the legal character ascribed to Optional Clause declarations. However, in practice, it will be found that the Court has tended to be (and, indeed, remains) somewhat ambiguous in its findings concerning the legal character of Optional Clause declarations; whereas it has tended to be

---
