The International Court of Justice: Crisis and Reformation

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Introduction

During the last two years the United States has taken several significant actions to reduce both the jurisdiction and the prestige of the International Court of Justice (the Court). On April 6, 1984, the United States attempted to modify its declaration accepting the compulsory jurisdiction of the Court in order to exclude disputes involving Central America for a period of two years. On January 18, 1985, the United States notified the Court that it would no longer participate in the Nicaragua v. United States proceedings. Finally, and most significantly, on October 7, 1985, the United States terminated its acceptance of the Court’s compulsory jurisdiction.

These actions have exposed the fundamental weakness of the Court’s most important basis of jurisdiction, the so-called “optional clause,” which permits a state to accept, at its option, the compulsory jurisdiction

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5. The Court held that the provision in the U.S. declaration requiring six months notice for termination formed a condition that must be complied with in case of either termination or modification. Id. at 415-19.
7. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36(2) [hereinafter I.C.J. STATUTE]:
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;
of the Court. This article argues that compulsory jurisdiction was fatally flawed from its inception, has never played a major role in resolving international disputes despite its many adherents, and has become an unfortunate talisman interfering with the development of more vital conflict resolution mechanisms.

Many commentators have lamented the actions of the United States with regard to the Court, and have expressed concern for the Court's future viability. At such a time, it is appropriate to reexamine the historical roots of the optional clause jurisdiction provision and to reassess its effectiveness as a tool for resolving international conflict. This examination is undertaken to determine whether the optional clause system should be retained or whether other alternatives might better serve the goals of world peace and conflict resolution.

The optional clause system was instituted during the political euphoria following each of the two world wars in hopes of creating a world governed by the rule of law. This attractive vision, fueled by the Western legal and cultural tradition, was flawed from the outset. The acceptance of compulsory jurisdiction requires the surrender of an element of sovereignty, a sacrifice which is, at present, unacceptable to any of the major world powers. Only a few nations have submitted declarations accepting compulsory jurisdiction, and their number, as a percentage of

d. the nature or extent of the reparation to be made for the breach of an international obligation.

8. Jurisdiction may be conferred on the Court in three ways: compulsory jurisdiction via the optional clause, special agreement between the parties, or provision within a treaty referring disputes concerning that treaty to the Court. I.C.J. STATUTE art. 36; see also 1984-85 I.C.J.Y.B. 54-57 (1985) (explaining bases of Court's jurisdiction).


10. D'Amato, The United States Should Accept, by a New Declaration, the General Compulsory Jurisdiction of the World Court, 80 AM. J. INT'L L. 331, 334 (1986); Taylor, U.S. Plans to Quit World Court Case on Nicaragua Suit, N.Y. Times, Jan. 19, 1985, at A1, col. 3.

11. The First Committee of the Fourth Commission of the United Nations Conference on International Organization, in proposing a draft of the Statute of the Court, explained its goals as follows:

On the basis of the texts proposed for the Charter and for the Statute, the First Committee ventures to foresee a significant role for the new Court in the international relations of the future. The judicial process will have a central place in the plans of the United Nations for the settlement of international disputes by peaceful means. . . .

. . . In establishing the International Court of Justice, the United Nations hold before a war-stricken world the beacons of Justice and Law and offer the possibility of substituting orderly judicial processes for the vicissitudes of war and the reign of brutal force.


12. See infra text accompanying notes 176-77.
members of the United Nations, has been declining over time. The majority of the declarations that have been submitted have been encumbered with conditions and reservations that severely restrict their use as a basis for jurisdiction. While the United States' withdrawal from the Nicaragua v. United States proceeding may have been lamentable, it was not surprising. Compulsory jurisdiction is now and has always been an illusory basis for international adjudication.

This article argues that nations are unwilling to limit their sovereignty through participation in international adjudication for two primary reasons. First, the inflexible, zero-sum nature of adjudication makes it an unattractive method of settling disputes between sovereign states. Because significant international disputes have political as well as legal aspects, most nations prefer to take part in face-saving negotiations or to temporize. Nations can avoid legal defeat simply by not submitting to the Court's jurisdiction or by declining to appear or comply if the Court asserts jurisdiction. Second, there are fundamental disagreements among nations, across broad substantive areas, about the governing principles of international law and their appropriate application. Nations are reluctant to risk committing themselves to judgments based upon principles they regard as incorrect.

Unfortunately, the hope of a just world order based on compulsory jurisdiction has deceived statesmen, diplomats, and the world public alike into thinking that a world governed by the rule of law is presently possible. In place of the optional clause system, this article proposes a model of international decision-making premised on the voluntary submission of disputes to an array of dispute resolution mechanisms. Only through voluntary submission to forums able to fashion more flexible and face-saving remedies can we hope to resolve disputes amid the existing divergence of opinion on legal principles and their application.

I. The History of the Optional Clause

A. The Permanent Court of International Justice

The optional clause, article 36(2) of the Court's statute, originated not with the framers of the United Nations or the Court, but with the First
Assembly of the League of Nations. After the devastation of World War I, the major nations of the world sought to create an international tribunal to resolve future conflicts. The Paris Peace Conference of 1919 created the League of Nations and directed the Council of the League to formulate “plans for the establishment of a Permanent Court of International Justice” (Permanent Court). The Council appointed a committee of distinguished jurists to carry out this instruction. The 1920 Committee of Jurists proposed that the Permanent Court have extensive compulsory jurisdiction over all members of the League of Nations. However, the notion of bringing a state before a tribunal without its consent was opposed by some members of the Council as beyond the mandate of the Permanent Court. The Council subsequently approved amendments that eliminated automatic compulsory jurisdiction.

At the First Assembly of the League of Nations, the majority of states preferred a system of automatic compulsory jurisdiction. The Great Powers, on the other hand, particularly Britain, France, and Japan, opposed this plan. They envisioned bilateral and multilateral treaties as the appropriate method of accepting the Permanent Court’s compulsory jurisdiction over limited classes of disputes.

The First Assembly adopted the “optional clause” as a compromise between those advocating automatic compulsory jurisdiction for all legal disputes and those contending that the Permanent Court’s jurisdiction required specific consent. The optional clause, which became article 36(2) of the statute of the Permanent Court, permitted each nation to

19. M. HUDSON, supra note 17, at 97.
20. Id. at 190-91.
21. Id. at 191-92.
22. Id. at 191.
24. Id. at 29. Britain’s objections to compulsory jurisdiction were influenced by its recent conflict with the United States and other neutral states over its naval blockade of Germany. Britain felt that the blockade was a major factor in the defeat of Germany, and that it might have been found illegal under the accepted view of international law. Compulsory jurisdiction might therefore have forced Britain, in time of war, to choose between foregoing a vital tactic and defying the World Court. Id. at 36-37.
27. Id. at 40-45.
declare in advance its acceptance of compulsory jurisdiction. Thus, from the very beginning, the major powers were unwilling to accept the broad restriction on their sovereignty required by automatic compulsory jurisdiction.

B. The Formation of the International Court of Justice

After the Second World War, strong sentiment favored the establishment of a new international court as part of the United Nations. When the four sponsoring powers, the United States, the United Kingdom, the Soviet Union, and the Republic of China, developed the Dumbarton Oaks Proposals for the United Nations, they proposed that an international court be created as the principal judicial organ of the United Nations and that all members of the United Nations be parties to the Statute of the Court.

The United Nations Conference on International Organization convened in San Francisco on April 25, 1945, to consider and approve the charters of the U.N. and the Court. In preparation for the San Francisco Conference, the Committee of Jurists developed two variations of compulsory jurisdiction. One retained the optional clause, while the other gave the Court compulsory jurisdiction over all legal disputes.

At the Conference, the majority of states again favored automatic compulsory jurisdiction. Both the United States and the Soviet Union, however, were unalterably opposed, and the United Kingdom shared their view. Such forceful opposition to compulsory jurisdiction at this critical juncture resulted in retention of the optional clause.

The optional clause system imposed two major limitations on jurisdiction. First, the principle of reciprocity required that consent to jurisdiction be granted only "in relation to any other Member or State accepting the same obligation." These words were inserted to limit a state's expo-

29. Id. at 11-12.
33. Id. at 227; see also U.S. DEP'T OF STATE, 1 FOREIGN RELATIONS OF THE UNITED STATES 962 (1945) (statement of H. Green Hackworth, Legal Adviser to the Department of State).
34. Waldock, supra note 25, at 245.
35. I.C.J. STATUTE art. 36(2); see also Waldock, supra note 25, at 255 (explaining that language "on condition of reciprocity on part of several or certain states" was added in order to meet the concern of the Brazilian Committee of Jurists that Brazil should not accept compulsory jurisdiction until at least some of the great powers also accepted jurisdiction).
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sure to "cases when the dispute falls within a category of disputes covered by both their declarations."36 As a result, a state is not bound beyond the scope of its consent or that of the opposing state.37

The second major limitation permitted states to qualify their declarations by attaching reservations limiting the scope of the obligation assumed by the declaration. Although the Statute of the Court does not specifically confer a general power of reservation, the First Committee of the Fourth Commission, in proposing the Statute, considered the attachment of reservations to be an established right of states under the Permanent Court and found any specific mention of them unnecessary.38 The Court itself has recognized this right in practice.39 In addition, the principle of reciprocity allows a state to invoke on its own behalf the reservations of an opposing state.40

C. The United States' Declaration

Following adoption of the Statute by the San Francisco Conference, the Truman Administration supported a U.S. declaration accepting the Court's compulsory jurisdiction.41 The ratification debate in the U.S. Senate focused on whether or not to subject the declaration to reservations.42 The resolution, as finally passed, contained three reservations: one covering disputes involving matters essentially within the domestic jurisdiction of the United States, as determined by the United States (the Connally Reservation);43 one covering disputes entrusted to other tribu-

36. Waldock, supra note 25, at 256 (emphasis deleted).
40. See, e.g., Case of Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9 (Judgment of July 6).
41. Compulsory Jurisdiction, International Court of Justice: Hearings on S. Res. 196 Before a Subcomm. of the Senate Comm. on Foreign Relations, 79th Cong., 2d Sess. 14-15 (1946) (letters of President Truman and Secretary of State Byrnes) [hereinafter 1946 Hearings]; see also id. at 133 (statement of Under Secretary of State Dean Acheson).
42. Senator Morse introduced S. Res. 196, 79th Cong., 1st Sess. (1946), reprinted in 1946 Hearings, supra note 41, at 1, a bill designed to confirm the U.S. declaration accepting compulsory jurisdiction of the Court without any reservations. At the hearings Senator Austin offered language that would permit the United States to determine for itself the question of domestic jurisdiction. Id. at 36. His proposed amendment failed to pass in the subcommittee.
43. Senator Connally of Texas introduced this amendment, which would allow the United States to determine for itself what questions fell within its domestic jurisdiction, during the Senate floor debates. See 92 CONG. REC. S10,624 (1946). The amendment was vigorously opposed by Senator Morse and Senator Thomas, Chairman of the Senate Subcommittee responsible for writing the report. Id. at S10,631, S10,625-26. Thomas argued that the self-judging reservation was inconsistent with the Court's authority to determine its own jurisdic-
nals by agreement; and one covering disputes arising under a multilateral treaty unless all parties are present or the United States specifically agrees to jurisdiction. Of these, only the Connally Reservation, with its self-judging character, had the potential to undermine U.S. participation in the optional clause system.

II. Weaknesses in the Optional Clause System

A. Declarations

After approving the United Nations Charter and the Statute of the Court, the San Francisco Conference adopted a recommendation that all members make declarations recognizing the obligatory jurisdiction of the Court. Proponents of the optional clause system hoped that it would promote, through the evolutionary increase in nations submitting declarations, a general system of compulsory jurisdiction.

Within the first year, twenty-five states, including all members of the Security Council except the Soviet Union, had either deposited declarations with the Secretary-General of the United Nations as required by article 36(4) or retained their membership in the optional clause system under the grandfather clause in the Court’s Statute. By 1953, thirty-seven states, a majority of the then-existing members of the United Nations, had submitted to compulsory jurisdiction. Over the next two years this number dropped to thirty-three. Portugal accepted compulsory jurisdiction, but Belgium, Bolivia, Brazil, Guatemala, and Iran either terminated their declarations or allowed them to lapse.

The intervening years have not been kind to the optional clause. While the number of states in the United Nations has grown tremendously since the 1950’s, the number accepting compulsory jurisdiction has increased only gradually. The high of forty-eight optional clause ad-

45. See infra text accompanying notes 101-37.
46. Doc. 1007, IV/12, 13 U.N.C.I.O. Docs. 61-64 (1945).
47. Waldock, supra note 25, at 245.
49. I.C.J. STATUTE art. 36(4).
50. Id. art. 36(5).
52. Thirty-two states are listed in 1954-1955 I.C.J.Y.B. 187-200 (1955). The thirty-third is Portugal, which submitted its declaration after the 1954-1955 Yearbook was published.
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herents in 1985\(^5\) represented only thirty percent of the United Nations membership.

Perhaps more important than the declining percentage of U.N. members participating in the system has been the precipitous drop in participation by permanent members of the Security Council. When the United States' termination became effective on April 7, 1986,\(^5\) only one member of the Security Council, the United Kingdom, remained bound by the optional clause.\(^5\)\(^5\) The Soviet Union has never accepted compulsory jurisdiction. China withdrew its declaration in 1972,\(^5\)\(^6\) shortly after the People's Republic of China replaced the Republic of China (Taiwan) as the legal representative of the Chinese people at the United Nations.\(^5\)\(^7\) France terminated its declaration in 1974\(^5\)\(^8\) after it refused to appear before the Court in the Nuclear Test Cases,\(^5\)\(^9\) and subsequently ignored the Court's Interim Order of Protection.\(^6\)\(^0\)

France was not the only country to terminate its declaration abruptly once the consequences of compulsory jurisdiction became apparent. In April 1951, for example, Iran nationalized its oil industry. The United Kingdom, acting in accordance with the principle of diplomatic protection, filed an application to the Court to protect the interests of a British corporation.\(^6\)\(^1\) Iran quickly terminated its declaration accepting compulsory jurisdiction. The Court retained jurisdiction, however, because the termination occurred after the Court had received the United Kingdom's application. It later dismissed the case for lack of jurisdiction on other grounds.\(^6\)\(^2\) Iran's termination did, of course, have the effect of blocking any future applications. Since 1951, in addition to the six countries men-

\(^{54}\) See supra note 6.
\(^{56}\) China's declaration accepting compulsory jurisdiction is reprinted in S. Rosenne, supra note 13, at 354-55.
\(^{57}\) 8 U.N. MONTHLY CHRON. 34-61 (Nov. 1971).
\(^{58}\) Letter received January 10, 1974, 907 U.N.T.S. 129.
\(^{60}\) Elkind, French Nuclear Testing and Article 41—Another Blow to the Authority of the Court?, 8 VAND. J. TRANSNAT'L L. 39, 45 (1974).
\(^{62}\) Iran's declaration excluded disputes resulting from treaties entered into prior to ratification of its declaration. The Court held that it lacked jurisdiction to address the merits because the Iran-United Kingdom treaty preceded the ratification of the Iranian declaration. 1952 I.C.J. at 114.
tioned above, South Africa, Thailand, and Turkey have terminated their declarations or permitted them to lapse.

The United Kingdom has developed a technique nearly as useful as termination for avoiding adjudication that it perceives to threaten its interests. It terminates its declaration and substitutes a new one excluding the specific matter in dispute. In October 1955, the United Kingdom terminated a declaration made only five months previously in order to include a new reservation. This reservation was carefully designed to exclude consideration of the Burami dispute with Saudi Arabia. In 1957, the United Kingdom again terminated its declaration in order to add a self-judging reservation concerning national security. This reservation had the effect of insulating its nuclear weapons testing program from challenge.

Table A below graphically displays the decline of the optional clause. A comparison of membership in the optional clause system in 1955 and 1986 indicates a steady erosion in the percentage participation of both General Assembly and Security Council members. Participation in the system under the Permanent Court is included to show that the decline is a long-term one.

63. Belgium, Bolivia, Brazil, Guatemala, Iran, and France; see supra note 52 and accompanying text.
65. See Waldock, supra note 25, at 269 (giving three such examples).
68. See Waldock, supra note 25, at 268.
70. Merrills, supra note 26, at 94.
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Table A

<table>
<thead>
<tr>
<th>Declarations</th>
<th>Members of U.N. or League of Nations</th>
<th>Other Parties to the Statute</th>
<th>Percent of United Nations or League of Nations</th>
<th>Permanent Members of Security Council</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oct. 1934\textsuperscript{71}</td>
<td>42</td>
<td>60</td>
<td>4</td>
<td>70</td>
</tr>
<tr>
<td>Dec. 1955\textsuperscript{72}</td>
<td>33</td>
<td>60</td>
<td>4</td>
<td>55</td>
</tr>
<tr>
<td>May 1986\textsuperscript{73}</td>
<td>46</td>
<td>158</td>
<td>3</td>
<td>29</td>
</tr>
</tbody>
</table>

B. Conditions and Reservations

Even more damaging than the decline of participation in the optional clause system has been the growing practice of placing limitations on declarations. Because the optional clause system is a consensual one, states may impose nearly any limitation they wish on the acceptance of compulsory jurisdiction.\textsuperscript{74} Most of these limitations serve to undermine the effectiveness of the compulsory regime.

Limitations with which states encumber their declarations\textsuperscript{75} take two forms: conditions and reservations. Conditions restrict the period of creation, duration, or extinction of the legal force of declarations.\textsuperscript{76} For example, the original British declaration accepting jurisdiction was limited to a period of five years.\textsuperscript{77} Reservations, on the other hand, limit the scope and substance of the obligation assumed in a declaration. Reservations may limit the subject matter (ratione materiae), the period in which the dispute may arise (ratione temporis), or the states that may assert jurisdiction (ratione personae).\textsuperscript{78}

\textsuperscript{71} 1934 was chosen as representing the “high-water mark” of participation in the optional clause system. Waldock, supra note 25, at 245.

\textsuperscript{72} 1954-1955 I.C.J.Y.B. 187 (1955). Portugal, which deposited its declaration in 1955, after the 1954-1955 Yearbook was published, has been added to the total. See supra note 52.


\textsuperscript{74} Waldock, supra note 25, at 285.

\textsuperscript{75} See supra text accompanying notes 35-40 (discussing two structural limitations on compulsory jurisdiction: reservations and reciprocity).

\textsuperscript{76} I.C.J. STATUTE art. 36(3) (“[D]eclarations . . . may be made on condition of reciprocity on the part of several or certain states, or for a certain time.”).


\textsuperscript{78} This classification of reservations is found in Merrills, supra note 26, at 96-110.
The distinction between conditions and reservations was significant in the Nicaragua case, where the Court held that reciprocity did not apply to conditions.\textsuperscript{79} This ruling prevented the United States, under the principle of reciprocity, from using the fact that the Nicaraguan declaration was of undefined duration to terminate or modify the U.S. declaration without prior notice.\textsuperscript{80}

1. Conditions

Conditions that render declarations terminable upon notice by the accepting state have proven to be the most devastating limitation upon compulsory jurisdiction.\textsuperscript{81} Such conditions permit states to avoid undesirable adjudication by terminating their declarations just prior to the filing of an application by an opposing state.\textsuperscript{82} Under the holding in the Nottebohm case,\textsuperscript{83} the Court does not lose jurisdiction if the termination occurs after the Court is seized of the case.\textsuperscript{84} However, termination prior to the filing of an application withdraws a state's consent to compulsory jurisdiction.\textsuperscript{85}

The effect of such a condition is to turn compulsory jurisdiction from a system in which states bind themselves in advance to adjudicate disputes before the Court into a system in which states decide on a case-by-case basis whether to subject themselves to the Court's jurisdiction. In this era of instantaneous communication and elaborate intelligence-gathering networks, advance knowledge of the preparation of an application may be the rule rather than the exception. The United States, for example, had advance warning of Nicaragua's application. If its declaration had not required six months notice before termination, it would have been able to avoid jurisdiction in the Nicaragua case by its modification of April 6, 1984.\textsuperscript{86}

There are now twenty-one declarations that are terminable upon notice. Fourteen declarations state this condition explicitly;\textsuperscript{87} seven others

\textsuperscript{79} Nicaragua, Jurisdiction, 1984 I.C.J. at 419.
\textsuperscript{80} Id.
\textsuperscript{81} See Waldock, supra note 25, at 283 (noting that if the present trend continues, "the large majority of declarations will become terminable either immediately or on short notice").
\textsuperscript{82} The United Kingdom, as noted above, has used a variation of this technique by terminating its declaration and substituting a more restrictive one. See supra text accompanying notes 65-70.
\textsuperscript{83} Nottebohm Case (Liecht. v. Guat.), 1953 I.C.J. 111 (Preliminary Objection).
\textsuperscript{84} Id. at 120-23.
\textsuperscript{85} Australia, for example, terminated its declaration in 1954 to avoid a dispute with Japan over pearl fisheries. See Waldock, supra note 25, at 267-68.
\textsuperscript{86} Nicaragua, Jurisdiction, 1984 I.C.J. at 419.
\textsuperscript{87} Australia, Barbados, Canada, Gambia, India, Israel, Malta, Mauritius, Pakistan, the Philippines, Somalia, Sudan, Swaziland, and the United Kingdom. 1984-1985 I.C.J.Y.B. 66-101 (1985).
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were initially in force for a limited period and became terminable upon notice thereafter.\textsuperscript{88} One of these, the Portuguese declaration of 1955, reserved, in addition to the right to terminate upon notice, a general right to modify the categories of disputes by immediate notification.\textsuperscript{89} The Court in the \textit{Right of Passage} case\textsuperscript{90} upheld Portugal's right of modification.\textsuperscript{91} Portugal's last-minute modification prevented the Court from reaching the merits of the case.

Botswana, El Salvador, Malawi, and Senegal similarly reserve the right to add to, amend, or withdraw any of their reservations at any time.\textsuperscript{92} Unlike Portugal, they do not retain the right to terminate upon notice.\textsuperscript{93} Although modification is less broad than termination, the \textit{Right of Passage} holding demonstrates that it is as effective as termination in blocking adjudication by the Court.

When these four states are added to the previous twenty-one, a total of twenty-five states may, upon notice, contract out of the optional clause system to avoid adjudication. These escape devices essentially turn compulsory jurisdiction into a consensual system for the majority of the states (twenty-five out of forty-seven) now participating in the optional clause system.

It is also arguable that the twelve states whose declarations are of undefined duration,\textsuperscript{94} i.e., contain no provision for termination, are equally terminable upon notice.\textsuperscript{95} According to this view, since a state's participation in the optional clause system is based upon consent, even a state that has not restricted its right to terminate or amend should be able to withdraw or modify its consent. In the \textit{Nicaragua} case, the majority opinion stated that the power to modify or terminate a declaration in-

\textsuperscript{88} Austria, Belgium, Costa Rica, Democratic Kampuchea, Japan, Liberia, and Portugal. \textit{Id.}

\textsuperscript{89} \textit{Id.} at 93.

\textsuperscript{90} \textit{Right of Passage over Indian Territory (Port. v. India)}, 1957 I.C.J. 125 (Preliminary Objections).

\textsuperscript{91} \textit{Id.} at 144.

\textsuperscript{92} 1984-1985 I.C.J.Y.B. 69, 75, 84, 93-94 (1985). Seven other states (Canada, Kenya, Malta, Mauritius, Somalia, Swaziland, and the United Kingdom) retain a general right to amend, but may also terminate upon notice. \textit{Id.}

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} Colombia, the Dominican Republic, Egypt, Haiti, Honduras, Kenya, Nicaragua, Nigeria, Panama, Togo, Uganda, and Uruguay. \textit{Id.} at 66-101.

\textsuperscript{95} See Waldock, \textit{supra} note 25, at 263-65 (arguing that such declarations are subject to the law of treaties, that a state may not terminate its declaration without the consent of other states in the system, and that termination is only justifiable under special rules such as the doctrine of \textit{rebus sic stantibus} (fundamental change of circumstances)). Waldock has apparently since subscribed to the modern trend that such declarations are terminable upon notice. See Waldock, \textit{Second Report on the Law of Treaties}, [1963] 2 Y.B. INT’L L. COMM’N 36, 68, U.N. Doc. A/CN.4/SER.A/1963/Add.1.
hered in a state's unilateral act of accepting jurisdiction. However, the opinion went on to indicate that such termination should be done in good faith and, by analogy to the law of treaties, after a reasonable period of notice; three days did not constitute reasonable notice. Three judges went further, asserting that there was an inherent right to modify or terminate without notice.

An interpretation consistent with the majority view would allow a state with a declaration of undefined duration the right to terminate its declaration to avoid contentious issues, so long as the termination is not done precipitously in order to forestall an application it knows will be filed in the near future. Such an interpretation is consistent with the unilateral nature of declarations and the obligation of good faith. If declarations of undefined duration can be terminated unilaterally, then twelve more declaring states could severely restrict the effectiveness of compulsory jurisdiction to suit their short-term interests.

2. Reservations

Reservations limit the scope and substance of a state's obligation. Because they are numerous and widely used, they severely limit the effectiveness of the optional clause system. The limiting effect of the reservations currently in force is multiplied by the ability of opposing states to invoke them reciprocally in order to limit their obligation vis-à-vis reserving states. The number and variety of reservations have significantly increased over time.

a. Self-Judging Reservations

Self-judging reservations have the greatest potential to undermine the validity and effectiveness of states' declarations. These reservations purport to permit a state, rather than the Court, to determine the scope of its declaration. A state asserting a broad, self-serving interpretation of

96. Nicaragua, Jurisdiction, 1984 I.C.J. at 419. The Court found that the United States, in including a six-month advance notice provision in its declaration, assumed a legal obligation toward other states accepting the optional clause.
97. Id. at 420.
98. Id. at 618-21 (Schwebel, J., dissenting); see also id. at 547 (Jennings, J., separate opinion); id. at 510 (Oda, J., separate opinion) (implying an inherent right to terminate without notice).
99. Declarations are unilateral acts establishing a series of bilateral engagements with other states in which conditions, reservations, and time-limit clauses are taken into consideration. See Nicaragua, Jurisdiction, 1984 I.C.J. at 418.
100. Interhandel, 1959 I.C.J. at 23.
101. Such reservations have acquired a variety of names, including subjective reservations (see Merrills, supra note 26, at 112) and automatic reservations (see Crawford, The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court, 1979 BRIT. Y.B. INT'L L. 62, 63).
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its reservation effectively denies the Court's compulsory jurisdiction in favor of its own interests. When such reservations are used in this manner, compulsory jurisdiction becomes illusory.

When the United States deposited its declaration containing the Connolly Reservation, it became the first nation to reserve for itself the power to self-judge the extent of the Court's jurisdiction.\(^\text{102}\) The reservation removed from the Court's purview "matters essentially within the domestic jurisdiction of the United States as determined by the United States of America."\(^\text{103}\) On February 18, 1947, France followed suit, reserving "matters which are essentially within the national jurisdiction as understood by the Government of the French Republic."\(^\text{104}\) At present, five states include self-judging reservations of this kind in their declarations.\(^\text{105}\) Thirteen other states reserve matters of domestic jurisdiction, but their reservations are not self-judging.\(^\text{106}\)

The legal effect of such reservations has been a matter of considerable dispute. Judge Lauterpacht, in his separate opinion in \textit{Certain Norwegian Loans}\(^\text{107}\) and in his dissenting opinion in \textit{Interhandel},\(^\text{108}\) forcefully argued that a self-judging reservation renders the entire declaration invalid. First, he reasoned, such a reservation runs counter to the intent of article 36(6) of the Statute of the Court, which gives the Court the authority to determine its own jurisdiction.\(^\text{109}\) Second, the reserving state, by retaining the right to determine if the Court has jurisdiction, has not undertaken any legal obligation.\(^\text{110}\)

A number of legal scholars disagree with Lauterpacht and have attempted to limit the impact of this type of reservation in order to save the

\(^{102}\) See U.S. Declaration, \textit{supra} note 2; see also \textit{supra} text accompanying notes 41-45 (discussing the adoption of this reservation).

\(^{103}\) \textit{Id.}

\(^{104}\) Declaration Accepting Compulsory Jurisdiction, Feb. 18, 1947, 26 U.N.T.S. 91, 93.

\(^{105}\) Liberia, Malawi, Mexico, the Philippines, and the Sudan. See 1984-1985 I.C.J.Y.B. 82, 84, 87, 92, 95 (1985). France, Pakistan, South Africa, India, and Swaziland at one time had self-judging domestic jurisdiction reservations; however, those declarations either are no longer in effect or have been changed to eliminate the self-judging provision. S. ROSENNE, \textit{supra} note 13, at 271, 278, 293, 301. In 1957 the United Kingdom had a self-judging national security reservation that is no longer in force. \textit{Id.} at 310. The United States, whose reservation was withdrawn effective April 7, 1986, is of course excluded from this list. \textit{See supra} note 6.


\(^{107}\) (Fr. v. Nor.), 1957 I.C.J. 9, 34-66 (Judgment of July 6) (Lauterpacht, J., separate opinion).


\(^{110}\) \textit{Id.} at 48.
declaration itself. The weight of scholarly opinion, however, appears to support the idea that the self-judging character of such a reservation renders the entire declaration invalid. In both Certain Norwegian Loans and Interhandel, the Court dismissed the cases without finding it necessary to consider the validity of the reservation. A number of judges did, however, express their agreement with Judge Lauterpacht. Two considered the reservation invalid, but severable from the declaration. Only one judge found the reservation valid. An examination of both the legislative history of the Connally Reservation and the practice of the United States before the Court reveals that the United States has never been willing to consent to compulsory jurisdiction. The legislative history of Senate Resolution 196 strongly suggests that the intent of the reservation was to provide the United States with a vehicle to escape compulsory jurisdiction when such jurisdiction seemed to threaten U.S. interests. Senator Austin, when introducing the self-judging reservation in the subcommittee, expressed concern that the Court's interpretation of a treaty on immigration might be contrary to that of the United States. Senator Connally, in introducing on the Senate floor the reservation that was to bear his name, explained that he did not want to make it possible for the Court to decide questions affecting immigration, the right to levy tariffs and duties, or the Panama Canal.

111. Professor Henkin argues that the reservation was not intended to be used arbitrarily, but was meant only to protect the United States against possible abuse by the Court. Henkin, The Connally Reservation Revisited and, Hopefully, Contained, 65 AM. J. INT'L L. 374, 376 (1971). His approach would apparently require that the reservation be used in good faith. Leo Gross contends that its self-judging nature invalidates the domestic jurisdiction reservation, but not the declaration itself. See Gross, Bulgaria Invokes the Connally Amendment, 56 AM. J. INT'L L. 357, 375 (1962). James Crawford insists that the paucity of objections to the reservations and the state practice of treating such declarations as valid are sufficient to make the declarants parties to the optional clause system. Crawford, supra note 101, at 62, 85; see also D. GREIG, INTERNATIONAL LAW 654-57 (2d ed. 1976).


113. (Fr. v. Nor.), 1957 I.C.J. 9 (Judgment of July 6).


115. Certain Norwegian Loans, 1957 I.C.J. at 68-70 (Guerrero, J., separate opinion); id. at 94-95 (Read, J., separate opinion); Interhandel, 1959 I.C.J. at 55-59 (Spender, J., separate opinion).

116. Interhandel, 1959 I.C.J. at 76-78 (Klaestad, J., separate opinion); id. at 93-94 (Armand-Ugon, J., separate opinion).

117. Certain Norwegian Loans, 1957 I.C.J. at 29 (M. Badawi, Vice-President of the Court, separate opinion).

118. 1946 Hearings, supra note 41, at 36.

Questions concerning the Panama Canal were and are questions of international law. A reservation used to exclude such a matter would not appear to be a good faith interpretation of domestic jurisdiction. In its report on Senate Resolution 196, the Senate Committee on Foreign Relations differed with Senator Connally in its concern about just such an expansive use of the reservation:

The question of what is properly a matter of international law is, in case of dispute, appropriate for decision by the Court itself, since, if it were left to the decision of each individual state, it would be possible to withhold any case from adjudication on the plea that it is a matter of domestic jurisdiction.

The practice of the U.S. government before the Court similarly indicates the United States’ intention that the reservation be an escape clause. The United States first invoked the clause in the *Interhandel* case. The government of Switzerland asked the Court to order the United States not to sell the shares of a corporation that Switzerland claimed to be the property of one of its nationals. The United States, invoking the Connally Reservation, declared the matter to be within its domestic jurisdiction. Luftus Becker, the Agent of the United States, argued: “This determination . . . is not subject to review or approval by any tribunal. It operates to remove definitively from the jurisdiction of the Court the matter which it determines. After the United States of America has made such a determination . . .[,] the subject-matter of the determination is not justiciable.” The Court dismissed the Swiss application on the ground that Switzerland’s local remedies were not exhausted. Judge Lauterpacht, as previously noted, dissented on the grounds that the U.S. reservation invalidated its declaration because it had not created a legal obligation.

The Connally Reservation was invoked again in 1959 in the *Aerial Incident* case. Strong winds drove an El Al airliner containing Israeli, British, and U.S. nationals off course into Bulgarian airspace. Bulgarian

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120. The legal status of the Panama Canal was governed by the Isthmian Canal Treaty, Nov. 18, 1903, United States-Panama, 33 Stat. 2234, T.I.A.S. No. 431, and the Treaty of Friendship and Cooperation, Mar. 2, 1936, United States-Panama, 53 Stat. 1807, T.I.A.S. No. 945 (entered into force July 27, 1939). The latter treaty withdrew the U.S. guarantee of Panama’s independence found in article I of the 1903 Treaty, prohibited the establishment of private business enterprises in the Canal Zone, and increased the annual payment for the Canal Zone to $430,000.


123. *Id.* at 452-53.


125. *Id.* at 101.

military aircraft fired on the civilian plane, killing all passengers. The United States referred the matter to the Court, accusing Bulgaria of violating international law, and prayed for monetary reparations. The United States initially argued that the reservation did not permit the United States or any other state to make an arbitrary determination in bad faith. However, once it became apparent that this position contradicted the U.S. position in the Interhandel case, the Legal Adviser to the State Department retracted the argument. The Legal Adviser then reaffirmed the position taken by the United States in Interhandel that a determination of domestic jurisdiction is not subject to review or approval by any tribunal: "A determination under [the Connally] reservation ... that a matter is essentially domestic constitutes an absolute ban to jurisdiction irrespective of the propriety or arbitrariness of the determination." The United States then requested that the proceeding be discontinued. This action supported the U.S. position that it alone would determine, whether in good faith or arbitrarily, if a matter fell within its domestic jurisdiction. Insistence on this principle, even to the detriment of immediate U.S. interests, underlines its importance to U.S. participation in the system. As a result, any nation can use the Connally Reservation reciprocally to avoid, as Bulgaria did, an application to the Court by the United States. The United States' escape hatch was thus locked behind it, effectively barring American resort to the Court.

The U.S. position remains controversial. Article 36(6) appears to give the Court broad authority to determine its jurisdiction: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." A strong Court could assert this authority to determine the reasonableness of the invocation of a self-judging reservation. Yet such an attempt to limit a self-judging reservation

127. Id. at 24.
128. Id. at 278-79.
129. Id. at 324.
130. Id. at 677 (letter of May 13, 1960 from Legal Adviser to Department of State to Registrar of Court) (emphasis added).
131. The Court dismissed the portion of the proceeding between the United States and Bulgaria by order of May 30, 1960. The incident is recounted in Gross, supra note 11, at 357.
132. I.C.J. Statute art. 36(6).
133. A similar judicial technique is used by U.S. courts to impose a standard of reasonableness on "satisfaction clauses" in private contracts. In construction contracts an owner may condition the obligation to pay the contractor on his satisfaction with the work. See Mattei v. Hopper, 51 Cal. 2d 119, 330 P.2d 625 (1958) (imposing duty to exercise judgment in good faith). Domestic courts ask if the circumstances of the contract indicate an intent to create an
would be ineffectual. The Court remains a fledgling adjudicative body that lacks the confidence and support of the world community and possesses no effective enforcement power or other means of exacting compliance. The legislative history of the Connally Reservation, the ill-fated attempts to repeal it, and the consistent position of the U.S. government that its determination is unreviewable and may be used arbitrarily, compel the conclusion that the United States never intended to consent to compulsory jurisdiction. By reserving the right to choose when it is bound, the United States has made jurisdiction on these matters consensual rather than compulsory.

b. Limitations Ratione Temporis

Limitations ratione temporis remove from the Court's jurisdiction disputes arising before a particular date. Such a limitation may preclude the litigation of stale disputes, remove disputes arising out of a particular period in a nation's history from the Court's scrutiny, or limit a nation's exposure to suits concerning events occurring only after the submission of the declaration. Since 1955, the United Kingdom’s reservation has excluded disputes based on circumstances that arose during World War II. Kenya and Pakistan exclude disputes that originated prior to independence.

In some instances, time reservations may severely curtail jurisdiction. Canada (1970), El Salvador (1973), and India (1974) have attached reservations that exclude disputes arising before their most recent declarations. Since nearly all disputes have an historical dimension, many existing disputes are excluded. India has found this to be a particularly useful escape device. It has terminated and replaced its declaration three times. If there was such an intent, then the parties must also have intended that the satisfaction clause be reasonably exercised or the agreement would be a nullity. See C. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 101 (1964). In this way, the courts attempt to fashion objective criteria to assess whether one party's performance has reasonably met the requirements of the satisfaction clause. Id.

137. 1960 Hearings, supra note 43.
139. See S. ROSENNE, supra note 13, at 306-07.
141. Id. at 69-70, 73-75, 77-79.
times, most recently to exclude disputes whose foundations, reasons, and causes arose prior to 1974.142

c. Other Reservations

Many of the remaining declarations contain reservations that, while not self-judging, severely restrict the scope of international law issues subject to compulsory jurisdiction. Most significant are the reservations of El Salvador, India, Israel, Kenya, Malawi, Malta, Mauritius, and the Sudan, which remove certain disputes involving hostilities, armed conflict, self-defense, belligerency, or military occupation from the Court’s compulsory jurisdiction.143 These reservations severely constrain jurisdiction over disputes involving the use of force, the Court’s primary raison d’être.144

Barbados, Canada, and New Zealand exclude disputes concerning the conservation, management, or exploitation of the bordering seas.145 El Salvador, India, and the Philippines exclude disputes over the continental shelf and other areas of territorial sovereignty.146 There are a number of other types of reservations, but their impact on the scope of compulsory jurisdiction has been relatively minor.147

C. Summary

Table B below summarizes the most significant conditions and reservations that restrict the effectiveness of declarations. When the twenty-one states with declarations terminable upon notice are added to the states that may either amend upon notice (four) or whose declarations are of indefinite duration (twelve), it becomes apparent that thirty-seven of the forty-seven states (seventy-nine percent) in the optional clause system have devices enabling them to avoid unwanted adjudication before the Court is seized of a matter. These thirty-seven states include all the major powers in the system. Of the five states with self-judging reservations,148 only one, Mexico, does not also have available one of the other escape devices. Thus thirty-eight of the forty-seven states in the optional


143. See supra notes 105-06.


146. Id. at 73-75, 77-79, 92-93.

147. For example, 26 nations exclude disputes for which other means of peaceful settlement have been agreed upon; 4 nations exclude disputes arising under a multilateral treaty unless all affected parties are joined; 8 nations exclude disputes with members of the British Commonwealth. See id. at 66-101.

148. Liberia, Malawi, Mexico, the Philippines, and the Sudan. See supra note 105.
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clause system possess escape devices that make their participation essentially consensual.

### Table B
**Major Conditions and Reservations**

<table>
<thead>
<tr>
<th>Terminable Upon Notice</th>
<th>Modifiable on Notice*</th>
<th>Indefinite Duration</th>
<th>Total Self-Judging Domestic Jurisdiction</th>
<th>Ratioe Temporis</th>
<th>Nations with Escape Devices***</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dec. 1955</td>
<td>7</td>
<td>1</td>
<td>8</td>
<td>6</td>
<td>16</td>
</tr>
<tr>
<td>May 1986</td>
<td>21</td>
<td>4</td>
<td>12</td>
<td>5**</td>
<td>18</td>
</tr>
</tbody>
</table>

* Does not include declarations also terminable on notice.
** Excludes the United States.
*** Includes only nations with the escape devices in the first four columns, not reservations that merely limit the scope of the declaration. Nations with more than one device are counted only once.

III. The Use of the Optional Clause in the World Courts' Jurisprudence

Although compulsory jurisdiction was originally conceived as the cornerstone of the rule of law for the world community, it has played only a minor role in the fifty-eight years of the jurisprudence of the two world courts. Not only has participation in the optional clause system declined over time, but even those states within the system have rarely utilized compulsory jurisdiction.

A. *The Permanent Court of International Justice*

During the eighteen years of the Permanent Court's existence, sixty-six applications were filed before it.149 Thirty-eight of these involved contentious cases and twenty-eight were requests for advisory opinions from the Council of the League of Nations.150 The optional clause formed the basis of jurisdiction in only eleven of the contentious cases.151

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In only two of these eleven was jurisdiction exercised by the Permanent Court without objection.\(^{152}\)

The jurisdiction of the Permanent Court was challenged in four of the eleven cases. It sustained the objections to jurisdiction under the optional clause in two of these cases, *Phosphates in Morocco* \(^{153}\) and *Panevezys-Saldutiskis Railway*. In the *Paiz, Casky, Esterhazy* case between Hungary and Yugoslavia, Hungary withdrew its application because Yugoslavia's declaration had expired. \(^{155}\) In *Electric Company of Sofia and Bulgaria*, \(^{156}\) the Permanent Court held that one of Belgium's claims involved a dispute which arose prior to Belgium's application under the optional clause, but sustained its jurisdiction as to another aspect of the case. The five remaining cases did not proceed far enough for jurisdiction to be considered. Thus, of the eleven cases brought under the optional clause, a final judgment resulted in only two cases; jurisdiction went unchallenged in both. Only in *Electric Company of Sofia and Bulgaria* \(^{157}\) did the Permanent Court assert its jurisdiction over the objections of a state litigant.

**B. The International Court of Justice**

The International Court of Justice has also been markedly underutilized in the forty years of its existence. Of the seventy-one matters filed with the Court, \(^{158}\) fifty-three have been contentious cases and eighteen have been requests for advisory opinions. \(^{159}\) In eleven of the contentious cases, there was no apparent basis for jurisdiction. \(^{160}\) A unilateral application was filed in each, but the opposing party had not accepted the

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\(^{152}\) These were the Eastern Greenland Case (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5), and the Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70 (June 28). In the former, the Permanent Court sustained Denmark's claim of prior sovereignty over the territory, and Norway withdrew its decree claiming sovereignty. In the latter, the Netherlands entered a claim that Belgium had been diverting the waters of the Meuse River. The Court interpreted a treaty governing such diversions and rejected both the Netherlands' claim and the Belgian counterclaim.

\(^{153}\) (Italy v. Fr.), 1938 P.C.I.J. (ser. A/B) No. 74 (June 14).

\(^{154}\) (Eston. v. Lith.), 1939 P.C.I.J. (ser. A/B) Nos. 75, 76 (Feb. 28).

\(^{155}\) (Hung. v. Yugo.), 1936 P.C.I.J. (ser. A/B) No. 66, at 5-6 (May 23).

\(^{156}\) (Belg. v. Bulg.) 1939 P.C.I.J. (ser. A/B) No. 77, at 82-83 (Apr. 4).

\(^{157}\) Id. at 81-83.


\(^{159}\) Id.

\(^{160}\) In eight cases the Court found no basis for jurisdiction because it was admitted that the opposing party did not accept jurisdiction. These cases are listed in 1984-1985 I.C.J.Y.B. 54 n.1 (1985). In the three Aerial Incident of 27 July 1955 cases, the Court held that Bulgaria had not accepted the compulsory jurisdiction of the Court. (Isr. v. Bulg.) 1959 I.C.J. 127 (Preliminary Objections).
Court’s jurisdiction. Nine of the eleven involved suits by the United States or its allies against Soviet bloc countries.161

In the history of the Court, only seventeen disputes have been filed on the basis of compulsory jurisdiction. Even in these few cases, the Court has had great difficulty exercising its jurisdiction. In four of the seventeen disputes, a party either failed to appear or refused to comply with the Court’s judgment.162 In a fifth case, a party initially refused to appear, but did so after the Court ruled that it had jurisdiction.163

States have also failed to appear or refused to comply in a number of cases in which the Court based its jurisdiction not on the optional clause, but rather on either a special agreement or a treaty provision.164 Nine cases have been filed on the basis of a special agreement.165 In two of these, the losing party refused to comply with the Court’s orders;166 the remaining seven were boundary disputes.167

161. See cases cited supra note 160.
164. See supra note 8.
166. In the Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 244 (Judgment of Dec. 15), the first matter to come before the Court, Albania refused to pay the reparations awarded by the Court. It has not done so to this day. In the Asylum Case (Colom. v. Peru), 1950 I.C.J. 395 (Second Phase) and the Haya de la Torre Case (Colom. v. Peru), 1951 I.C.J. 71, the government of Peru refused to abide by the Court’s order requiring it to allow Haya de la Torre to leave the country as a protected person; he was forced to remain in the Colombian Embassy in Peru for three years.
167. The Court has performed a valuable function in consensual boundary cases. It has provided a dispute resolution mechanism that the parties have willingly chosen and supported. The parties have agreed to submit these disputes to the Court not because they necessarily centered on “legal” issues, but rather because each nation perceived that international adjudication would serve its interests—for example, by deflecting domestic opposition that might have undermined a negotiated settlement. Other disputants in similar situations, for example,
The same pattern emerged in four cases in which jurisdiction was based on a treaty referring disputes to the Court. Iceland refused to appear in the *Fisheries Jurisdiction* cases.\(^{168}\) Turkey failed to appear in the *Aegean Sea* case,\(^{169}\) which was dismissed by the Court for lack of jurisdiction. In the *Iranian Hostages* case,\(^{170}\) Iran refused to appear and later ignored the Court’s order to release the hostages.\(^{171}\) Finally, the United States refused to appear on the merits in the *Nicaragua* case,\(^{172}\) in which jurisdiction was based both on the optional clause and on the Friendship, Commerce, and Navigation Treaty in force between the two parties.\(^{173}\)

The number of cases based on treaties has always been small and has declined over the years. The United States, for example, has adopted a policy of rejecting such clauses in treaties. In its recent advice and consent to ratification of the Genocide Convention,\(^{174}\) the Senate inserted a reservation requiring the United States’ specific consent for the submission of any dispute to which it is a party to the Court, despite a contrary provision in the Convention.\(^{175}\)

IV. Reforming the Role of the International Court of Justice

As the above analysis reveals, compulsory jurisdiction has been little used to little effect. Few nations have submitted declarations. Most of these declarations have been so hampered by conditions and reservations that participation has been essentially consensual. States in the system have rarely invoked the Court’s compulsory jurisdiction, and such disputes have even more rarely proceeded to judgment.

The trend away from submitting disputes to the Court has emerged not so much because the Court is viewed as dealing with nonjusticiable political rather than legal issues, but because participants lack faith in adjudication as the appropriate means of resolving disputes and disagree

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172. *See supra* notes 3-6 and accompanying text.


on the applicable principles of international law. In the resulting confusion, few nations are willing to trust their fate to adjudication.

A. Fundamental Causes of the Court's Disuse

The central fact of the history of both world courts is that nations have rarely used this mechanism to solve disputes. Even those nations that have consented in advance to jurisdiction have sought to extricate themselves from subsequent proceedings. What once was merely a trend has become the rule. Since 1972, the respondents in all eight contentious cases before the Court have chosen either not to appear or not to participate at some stage in the proceedings.176

The underlying problem is a lack of will; the nations of the world are simply unwilling to commit themselves in advance to the process of international adjudication. In some circumstances, such as the Gulf of Maine case177 and other boundary disputes, nations find that it serves their interests to refer a matter to the Court through a special agreement. Such a decision, however, is made on a case-by-case basis with due regard for its legal and political ramifications. The vast majority of nations, especially the major world powers, have been and continue to be unwilling to limit their sovereignty by submitting to the Court's compulsory jurisdiction. Several factors are responsible for this situation.

1. The Zero-Sum Character of Adjudication

The relatively inflexible, zero-sum nature of adjudication178 makes it unattractive as a mode of settling disputes between nations. Court judgments generally create a winner and a loser. Heads of State, whether out of a sense of national pride or an assessment of the costs, fear losing. The art of diplomacy was developed precisely to prevent the kind of injury to national pride that such a judgment can produce. The process of negotiation and compromise is more flexible and permits consideration of a larger array of alternative resolutions.179 Moreover, for the more power-


178. Adjudication usually results in a winner and a loser rather than a mutually acceptable solution. See supra note 15.

179. During the General Assembly's Sixth Committee review of the role of the International Court of Justice, many nations expressed the view that negotiation and compromise are the preferred means of settling disputes. See, e.g., statements by representatives of the German Democratic Republic, 29 U.N. GAOR, C.6 (1470th mtg.) at 38, U.N. Doc. A/C.6/SR.1470 (1974), and the Soviet Union, id. at 37 (reference to negotiation). See generally statements by
ful nations, negotiation and coercion may provide more favorable results than adjudication.

The zero-sum character of adjudication may also result in a decision totally unacceptable to one of the parties. Most international disputes, whether concerning the use of force, the taking of property, or maritime rights, are resolved on grounds that are minimally acceptable to all the parties. A concomitant benefit of the more flexible process of negotiation and compromise is that it may instill commitment to the negotiated solution. Without such commitment, the dispute may continue to fester. The recent history of contentious cases demonstrates that respondents uncommitted to the process often refuse to appear or comply with the Court’s orders.

2. Lack of Agreement on Legal Principles

A relatively discrete body of legal principles recognized as applicable by the nations of the world is a prerequisite if the Court’s role is to be expanded. Such a body of law is absent in the existing international legal order.

The legal order accepted by the founders of the two world courts was based on legal principles that evolved over several centuries to govern the relations of the nations of Western Europe. This body of law focused on the international problems of a largely European and Christian political and social order.

Two major events have undermined that consensus. The first was the rise of communist states—the Soviet Union, China, and the Eastern European countries—and the concomitant spread of Marxist ideology. The second was the emergence of the newly independent nations of Asia and Africa. These nations now constitute a majority of nations in the United Nations, and their citizens comprise the majority of people on the globe.


182. The classic definition is found in J. BRIERLEY, THE LAW OF NATIONS 1 (5th ed. 1955) ("The Law of Nations . . . may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another.").

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Together with a number of the nations of Central and South America, the newly independent countries are challenging many of the basic tenets of international law.\textsuperscript{184}

As a result of these events, there are now three distinct perspectives on international law infusing diversity and confusion into the emerging legal order: the classical Western perspective,\textsuperscript{185} the Marxist perspective,\textsuperscript{186} and the Third World perspective.\textsuperscript{187}

These three perspectives are not merely theoretical. They are having a marked effect on the evolution of classical legal norms and the develop-


\textsuperscript{185} The structure and content of classical international law was developed by the nations of Western Europe to regulate their relations with one another. W. \textsc{Hall}, \textit{A TREATISE ON INTERNATIONAL LAW} 40 (7th ed. 1917). As modified by state practice and treaties throughout the nineteenth and early twentieth centuries, the principles formed a coherent body of rules. J. \textsc{Starke}, \textit{AN INTRODUCTION TO INTERNATIONAL LAW} 11-16 (5th ed. 1963). The content of these rules reflected the nation-state system of Western Europe and its economic values. The rules focused primarily on recognition, the mutual respect of national territory, and non-interference in internal affairs.

\textsuperscript{186} Marxist international law theorists attack the nation-state and economic assumptions of the classical system. They see classical international law as a justification of the capitalist social structure. \textit{See, e.g.,} G. \textsc{Tunkin}, \textit{THEORY OF INTERNATIONAL LAW} 225-31 (W. Butler trans. 1974). However, the Soviet Union, recognizing its political and economic power in the existing nation-state system, has made selective accommodations. Accordingly, it rejects the notion of state responsibility for foreign-owned property, while respecting the norm of \textit{pacta sunt servanda}.

For socialist theorists, norms of international law are created by the concordant wills of states. \textit{Id.} at 249. As a result, these theorists regard the international treaty as the basic source of international law. International custom has only a limited role in norm creation. \textit{Id.} at 113-23. This approach permits the Soviet Union to participate in the process of norm creation through consensual treaties, while selectively choosing those classical customary legal norms that it regards as valid. Consistent with this consensual approach, the Soviet Union does not regard the decisions of the World Court or other international tribunals as a source of law or even necessarily as evidence of law. \textit{Id.} at 179-84.

\textsuperscript{187} Third World theorists, to the extent that their views can be generalized, maintain that many of the norms of the classical system evolved before the majority of nations were born and were designed to meet the needs of the nation-states of a largely homogeneous Western, Christian Europe. \textit{See M. \textsc{Bedjaoui}, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER} 50-57 (1979) (the author, a former Algerian Ambassador to the U.N. and member of the U.N. International Law Commission, is now a judge on the World Court); R. \textsc{Anand}, \textit{NEW STATES AND INTERNATIONAL LAW} (1972). As a result, they argue, nations that played no role in the development of such norms should not be bound by them except to the extent that these nations specifically choose, by treaty or conscious state practice, to be so bound. Anand, \textit{Attitude of Asian-African States Toward Certain Problems of International Law}, 15 INT'L & COMP. L.Q. 55, 63-66 (1966); M. \textsc{Bedjaoui}, \textit{supra}, at 134-36; Qadeer, \textit{The International Court of Justice: A Proposal To Amend Its Statute}, 5 HOUS. J. INT'L L. 35, 47 (1982); see also Garcia-Amador, \textit{The Proposed New International Economic Order: A New Approach to the
ment of new norms. For example, the classical formulation of a state's responsibility for expropriation of foreign-owned property maintains that the taking must be for a public purpose, non-discriminatory, and accompanied by prompt, adequate, and effective compensation.\textsuperscript{188} Third World nations and their theorists challenge the validity of this formulation\textsuperscript{189} and assert that a series of General Assembly resolutions\textsuperscript{190} have created a new standard.\textsuperscript{191}

There is also considerable turmoil surrounding the appropriate legal justifications for intervention by one state into the territory of another.\textsuperscript{192} Some writers have suggested limited reforms of the U.N. Charter system to reduce the discontinuity between the practice of states and the Charter.\textsuperscript{193} Even more fundamental is the dispute over the appropriate normative weight to be given resolutions of the U.N. General Assembly.\textsuperscript{194}

\textit{Law Governing Nationalization and Compensation}, 12 \textit{Lawyer of the Americas}, 1, 5-10 (1980).


188. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 518 (2d ed. 1973); see also RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 712 (Tent. Draft No. 6, 1985).


194. See M. BEDJAOUI, supra note 187, at 138-44; 2 INTERNATIONAL CLAIMS, supra note 189, at 646-49; Schwebel, \textit{The Legal Effect of Resolutions and Codes of Conduct of the United Nations}, 7 FORUM INTERNATIONALE 1 (1985). For the Soviet position, see G. TUNKIN, supra note 186, at 162-76 (concordance of wills required to create a norm).
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This lack of agreement on what is to be considered an accepted legal principle causes severe problems for any court attempting to find and apply rules of international law.\textsuperscript{195} The uncertainty of legal principles creates an element of unpredictability and discretion in the judicial process that is disconcerting to Western, socialist, and Third World nations alike.\textsuperscript{196}

B. \textit{Past Proposals for Reform}

The stagnation of the World Court and the proliferation of conditions and reservations have not gone unnoticed.\textsuperscript{197} It is generally recognized that the Court has not fulfilled the expectations of its founders and supporters.\textsuperscript{198} Many scholars and writers have proposed reforms of the current system.\textsuperscript{199} The majority of the various proposals would increase use of the Court by encouraging nations to accept compulsory jurisdiction or by expanding its subject matter jurisdiction.

\begin{itemize}
\item \textsuperscript{195} The U.S. Supreme Court recognized this difficulty when it stated:
There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. . . . It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.
\item \textsuperscript{196} See supra note 181.
At the present the International Court of Justice does not have a single case before it, although this is not, as we all know, for lack of disputes. Nor can it be said that this reluctance has been accompanied by a compensating growth in recourse to the alternative means of settlement listed in Article 33 of the Charter, ranging from negotiation and arbitration to resort to regional agencies or peaceful means of the parties' own choosing. In this sphere, if no other, the past 25 years have witnessed a disappointing lack of progress and it is difficult to envisage any sudden change in the preference of States for keeping a dispute alive, rather than entrusting it to some form of third party settlement which might not come out wholly in their favour.
\item \textsuperscript{198} The United Nations has formally recognized this problem. See 25 U.N. GAOR Annex (Agenda Item 96) at 3, U.N. Doc A/8042 (1970) (proposal to create committee to study reasons for Court's limited use); G.A. Res. 3232, 29 U.N. GAOR Supp. (No. 31) at 141, U.N. Doc. A/9631 (1974) (after review, this weak resolution recommending that nations consider the possibility of accepting compulsory jurisdiction and making greater use of the Court was passed; no amendment to the U.N. Charter or the Statute of the Court was proposed). See generally The Future of the International Court of Justice (L. Gross ed. 1976) [hereinafter Future of the I.C.J.].
\end{itemize}
The major proposals include the following:

1. Make compulsory jurisdiction mandatory for all members.\textsuperscript{200}
2. Extend compulsory jurisdiction to all nations unless they specifically contract out of such jurisdiction.\textsuperscript{201}
3. Expand the contentious jurisdiction of the Court to include international organizations\textsuperscript{202} and, in some cases, individuals.\textsuperscript{203}
4. Extend the advisory opinion jurisdiction of the Court to enable its jurisprudence to develop more quickly.\textsuperscript{204}
5. Apply United Nations "law," including U.N. resolutions and declarations, as a new source of law under article 36(2).\textsuperscript{205}

None of these proposals addresses the fundamental problem of the unwillingness of states to limit their sovereignty. No procedural technique or well-conceived suggestion will change that basic fact. Both nations that have refused to accept compulsory jurisdiction and those that have developed escape devices are unlikely to champion an expansion of compulsory jurisdiction.

Similarly, neither the major Western powers\textsuperscript{206} nor the Soviet bloc\textsuperscript{207} appear willing to accept United Nations resolutions and declarations as \textit{ipso facto} binding. Such a proposal would turn the United Nations into a

\begin{itemize}
\item \textsuperscript{200} Qadeer, supra note 187, at 39-46; see also E. Deutsch, \textit{An International Rule of Law} 16 (1977) (proposing life tenure as well as renunciation of state allegiance by judges, and a two-thirds majority vote to overcome domestic jurisdiction objections).
\item \textsuperscript{201} \textit{Future of the I.C.J.}, supra note 198, at 313-14.
\item \textsuperscript{202} Cyprus, Denmark, Guatemala, the United States, Switzerland, Sweden, Austria, Argentina, Finland, Mexico, and the United Kingdom apparently all favor providing access to international organizations. Gross, \textit{Review of the Role of the International Court of Justice}, 66 Am. J. Int'l L. 487 n.45 (1972); see also \textit{Future of the I.C.J.}, supra note 198, at 302-04; Partan, supra note 199.
\item \textsuperscript{203} Qadeer, supra note 187, at 49.
\item \textsuperscript{205} Qadeer, supra note 187, at 46. \textit{But cf.} \textit{Future of the I.C.J.}, supra note 198, at 317-20.
\item \textsuperscript{206} See \textit{Digest of the United States Practice in International Law} 1975, at 85 (E. McDowell ed. 1975):
\begin{quote}
As a broad statement of U.S. policy in this regard, I think it is fair to state that General Assembly resolutions are regarded as recommendations to Member States of the United Nations.
\end{quote}
\begin{quote}
To the extent, which is exceptional, that such resolutions are meant to be declaratory of international law, are adopted with the support of all members, and are observed by the practice of states, such resolutions are evidence of customary international law on a particular subject matter.
\end{quote}
\end{itemize}
supranational legislature, limiting the sovereignty and influence of its most powerful members. Moreover, proposals that would expand the list of parties able to bring suit in the Court might increase the Court’s business, but would certainly not encourage sovereign nations to participate when they did not so desire.

C. Toward a New Model of International Dispute Resolution

There may well be no major role for the Court as presently constituted. Prior proposals and pleas to enhance the Court’s importance have been misguided. Giving international adjudication a central position in dispute resolution assumes a commitment to that process and a body of accepted legal principles, both of which are lacking in the existing international legal order. There are, however, some grounds for optimism.

1. Emerging Mutual Interests

Even though significant differences of perspective exist, a variety of factors help to create a community of interest between the developed world and the Third World. These factors may portend the evolution of legal principles acceptable to both sets of nations. They are already stimulating the development of more vital dispute settlement mechanisms.

First, these nations share, at least in part, a common legal heritage. Anglo-American common law and European civil law form the bases of most of the legal systems of Asia and Africa. Although received during the colonial era, these legal systems provide a measure of stability and conservatism. New states have tended to retain rather than reject the received systems, which have become part of their legal heritage. Retention of these systems has also involved accepting many of the major premises of the international legal system.208

Second, increased economic interdependence has created large areas of mutual interest. The prosperity of the West depends to a large degree on access to the growing market for its goods in developing countries. Forty percent of the exports of the OECD209 countries now go to developing countries.
countries. The industrial market countries need foreign markets to insure growth and imported commodities and minerals for production and consumption.

The nations of Asia, Africa, and Latin America want to increase their access to developed countries' markets, to attract foreign investment and credit, and to acquire the technology to develop themselves and become competitive in the world market. The World Bank and the International Monetary Fund (IMF), sources of development and balance of payment adjustment assistance, have emphasized the promotion of exports by developing countries as the most effective development strategy. This increased economic interdependence creates a powerful incentive to resolve commercial and political disputes.

Finally, the Third World has turned to developed nations for financial and technological assistance. The World Bank and the IMF not only provide such assistance, but, perhaps more important, promote and reinforce the Western economic model. The experience of these nations since independence has further inclined many of them toward allowing the private sector to play a greater role. Food shortages in Africa, for example, have led African governments to reduce food subsidies and increase the prices paid to farmers for their crops in order to spur production.

2. A New Model of International Dispute Resolution

The above factors do not eliminate differences of perspective or erase the colonial past, but they do suggest that the impetus for developing more useful conflict resolution mechanisms may be present. Measures to expand the compulsory jurisdiction of the Court or to enhance its adjudicatory role are unlikely to meet emerging needs. The development of international legal institutions along the following lines may prove more useful.

First, compulsory jurisdiction should be eliminated. Few nations have submitted declarations, and these declarations are so hampered by conditions and reservations that compulsory jurisdiction has become essentially consensual. The chasm between the hope of a world ruled by law

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211. See id. at 39; see also Krueger, Import Substitution Versus Export Promotion, 22 Fin. & Dev. 20 (1985) (the author is Vice-President of Economics and Research at the World Bank).
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and the reality of the current situation has led to confusion, disenchantment, and disrespect for the Court.

Second, the Court should continue to provide a forum for interested parties under its other bases of jurisdiction: special agreements and treaties referring disputes to the Court. The Gulf of Maine case, which reached the Court by way of a special agreement, and other recent boundary disputes provide evidence that the Court can perform a valuable function in the appropriate circumstances. For example, even the United States, after terminating its participation in the compulsory jurisdiction system, referred a recent dispute to the Court on the basis of a special agreement with Italy.

Third, an International Dispute Resolution Institute should be established under the auspices of the Court to offer the nations of the world a wider choice of mechanisms to resolve disputes. Depoliticized, results-oriented dispute resolution mechanisms could alleviate the problems of loss of face and uncertainty of legal principles that plague international adjudication today. An array of mechanisms, including binding and non-binding arbitration and mediation, should be put into place as appropriate modes of settling disputes.

The process of developing such institutions is already underway. The international legal order has created arbitration tribunals in a number of substantive areas to depoliticize disputes and resolve conflict. Arbitration before the International Center for the Settlement of Investment Disputes has proven effective in settling expropriation conflicts, precisely the type of cases formerly referred to the two world courts. In substantive areas where disputes are frequent and technical, more specialized tribunals should be created.


215. This adjudication succeeded for two reasons. First, both the United States and Canada wanted a third party to make the decision; a negotiated agreement would have faced significant opposition from domestic special interests. Second, the law of maritime boundaries is relatively discrete and provides parameters that limit the Court's discretion. These limitations allowed both parties to expect an acceptable decision. The decision appears to have inspired some confidence in the Court.


Conclusion

The nations of the world have rarely used either of the world courts to settle disputes. Compulsory jurisdiction, once thought to promise a world governed by the rule of law, has been used infrequently and ineffectively. Nations have simply proved unwilling to commit themselves in advance to the process of adjudication. Calling such a consensual system compulsory undermines respect for the Court and inhibits the development of alternative mechanisms that better meet the needs of states.

The Court will continue to play a valuable role in deciding disputes under its other bases of jurisdiction. Compulsory jurisdiction should, however, be eliminated, and more flexible dispute resolution mechanisms developed in its place. Only the voluntary submission of disputes to institutions that are capable of fashioning more flexible and face-saving remedies can overcome the existing disagreement on legal principles and their application.