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## Comment

# **Allowing Genocide?: An Analysis of Armed Activities on the Territory of the Congo, Jurisdictional Reservations, and the Legitimacy of the International Court of Justice**

**Dan Hammer\***

In 1994, Rwandan troops occupied the northern territory of the Democratic Republic of Congo ("DRC"), killing, massacring, and raping the native inhabitants<sup>1</sup> in the name of bringing war criminals to justice.<sup>2</sup> In 2002, over 6,000 Rwandan troops remained, supporting a Congolese rebel group which had committed a series of massacres.<sup>3</sup> By then, the militias were responsible for the deaths of over 2.5 million people, and the conflict had involved troops from seven different African countries.<sup>4</sup>

On May 28, 2002, the Government of the DRC filed a prayer for relief with the International Court of Justice ("ICJ"), alleging that Rwanda had engaged in "massive, serious and flagrant

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\* J.D., Expected 2008, University of Minnesota Law School; B.A., 2005, University of Wisconsin. The author would like to thank his editor, Ryan Schildkraut, along with the rest of the editors and staff, for their valuable assistance throughout the process.

1. Armed Activities on the Territory of the Congo, (Dem. Rep. Congo v. Rwanda), 2006 ICJ LEXIS 1, at \*12 (Order of Feb. 3, 2006).

2. Marc Lacey, *Congo Tires of War But End Not In Sight*, N.Y. TIMES, July 15, 2002, at A3.

3. *Id.*

4. Henri E. Cauvin, *Rwanda and Congo Sign Accord to End War*, N.Y. TIMES, July 31, 2002, at A8. The countries involved were the DRC, Rwanda, Uganda, Angola, Chad, Namibia, and Zimbabwe.

violations of human rights and of international humanitarian law.”<sup>5</sup> Rwanda responded by arguing that it never agreed to be subject to ICJ jurisdiction under the treaty.<sup>6</sup> In the ensuing case, *Armed Activities on the Territory of the Congo*, the ICJ agreed with Rwanda and held that Rwanda’s jurisdictional reservation<sup>7</sup> was valid.<sup>8</sup>

By ruling that jurisdictional reservations are valid, the ICJ not only dismissed the DRC’s claim against Rwanda, but also established the precedent that the ICJ will not enforce treaty obligations unless both parties have consented to ICJ jurisdiction. The decision directly affects both jurisdictional reservations under the Genocide Convention and, by extension, jurisdictional reservations in all treaties under the Vienna Convention on the Law of Treaties.<sup>9</sup> Both the Vienna Convention and the Genocide Convention allow reservations to a treaty so long as the reservations are not “incompatible with the object and purpose of the treaty.”<sup>10</sup> By ruling that

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5. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Rwanda), 2006 ICJ LEXIS 1, at \*12 (Order of Feb. 3, 2006), available at [http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw\\_ijudgment\\_20060203.pdf](http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw_ijudgment_20060203.pdf) (last visited Feb. 1, 2007).

6. *Id.* at \*24.

7. A reservation is a “formal declaration, upon signing or ratifying a treaty, that [a state’s] willingness to become a party to [a] treaty is conditioned on certain additional terms that will limit the effect of the treaty in some way.” BLACK’S LAW DICTIONARY 607 (2d pocket ed. 2001). A jurisdictional reservation, therefore, is a statement by a signatory state that it intends the jurisdictional provisions of the treaty to be understood in a particular, limited, way.

8. *Armed Activities on the Territory of the Congo*, 2006 ICJ LEXIS at \*62 (“In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfillment [sic] of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.”).

9. Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention]. The Vienna Convention is a treaty regime devoted to developing international rules for the interpretation and implementation of treaties. The Vienna Convention does not apply to the *Armed Activities* case because it had not entered into force before the DRC and Rwanda signed the Genocide Convention.

10. The Vienna Convention language is based on the same language that interprets the Genocide Convention. Compare Vienna Convention, *supra* note 9, art. 19(c) (stating that if a “reservation is incompatible with the object and purpose of the treaty” it may be invalid), with *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 ICJ 15, 24 (May 28) (“It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.”).

jurisdictional reservations do not contravene the “object and purpose” of a treaty, the ICJ’s decision will have a strong effect on the international judicial enforcement of all treaties.

This Comment argues that the ICJ correctly declined to exercise jurisdiction over Rwanda. Section I outlines the jurisdictional requirements for the ICJ and describes the developments in the international law of treaties regarding reservations. Section II reviews the Court’s reasoning in *Armed Activities on the Territory of the Congo* (“*Armed Activities*”). Section III analyzes the Court’s decision in the case and argues that that the Court’s decision was correct. This Comment concludes that despite the negative effects of declining jurisdiction over this case, the ICJ correctly held that it may only exercise jurisdiction when consented to by the parties.

## I. THE ICJ’S JURISDICTIONAL BOUNDARIES AND THE LAW ON RESERVATIONS

This section will first discuss the bases for jurisdiction under international law, and will then analyze the relevant ICJ rulings and scholarly discourse on the legality of reservations leading up to the *Armed Activities* case.

### A. STATE CONSENT IS ESSENTIAL FOR ICJ JURISDICTION

The ICJ is meant to be a voluntary dispute resolution body; therefore, the central tenet of the ICJ’s jurisdictional power is that it may only exercise jurisdiction over consenting states.<sup>11</sup> When world leaders assembled at the San Francisco Convention in 1945 to create the United Nations (“U.N.”), they explicitly rejected any form of mandatory jurisdiction for the ICJ because they wanted to leave open the possibility of other pacifistic measures, such as binding arbitration or bilateral negotiations, for states to mediate their disputes.<sup>12</sup> If mandatory jurisdiction was adopted, there was fear that the ICJ would preclude the use of other dispute resolution procedures.<sup>13</sup> To avoid this outcome, the ICJ was created as a voluntary option for willing states

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11. See generally SHABTAI ROSENNE, *THE WORLD COURT* 73 (1962) (“The International Court receives this power [jurisdiction] only from the consent of the States concerned that it should so act. Neither the Charter of the United Nations, nor any general rule of contemporary international law, imposes on States the obligation to refer their legal disputes to the Court.”).

12. *Id.* at 73–74.

13. *Id.*

rather than as a binding authority on international law.

As a result of the ICJ's non-compulsory status, there is "no general obligation requiring that a dispute be submitted to an international tribunal."<sup>14</sup> The ICJ may only exercise jurisdiction using one of three different avenues. First, the adverse States may enter into an agreement, called a *compromis*, allowing ICJ jurisdiction over their dispute.<sup>15</sup> Second, Article 36 of the ICJ statute allows for "compulsory jurisdiction."<sup>16</sup> Under Article 36, a State may choose to subject itself to the ICJ's authority in all cases where all parties to the dispute have accepted compulsory jurisdiction.<sup>17</sup> Third, and at issue in *Armed Activities*, the ICJ may exercise jurisdiction over parties based on a jurisdictional clause in a treaty.<sup>18</sup>

Each of the preceding bases for jurisdiction requires state consent. *Compromis* jurisdiction obviously requires the approval of both states. Compulsory jurisdiction is also optional: a state may choose not to be subject to compulsory jurisdiction, and, even if the state decides to enter into the compulsory jurisdiction scheme, the state may limit the extent to which the jurisdiction applies.<sup>19</sup> States may also withdraw

14. Judge Abdul G. Koroma, *Assertion of Jurisdiction by the International Court of Justice*, in *ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN LEGAL PERSPECTIVES* 190 (Patrick Capps et al., eds. 2003).

15. *Id.*

16. Eric A. Posner & Miguel F.P. de Figueiredo, *Is The International Court of Justice Biased?*, 34 *J. LEGAL STUD.* 599, 603 (2005).

17. Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1060, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm> [hereinafter ICJ Statute]. In full, Article 36(2) states:

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.

*Id.*, art. 36(2).

18. *Id.* art. 36(1) ("The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."). See also Posner, *supra* note 16, at 603.

19. Stanimir A. Alexandrov, *The Compulsory Jurisdiction of the International*

their consent at any time.<sup>20</sup> The treaty reservation system accomplishes the same result for treaty-based jurisdiction.<sup>21</sup> In short, “[n]o matter which [type of jurisdiction] is at issue, the Court’s jurisdiction depends upon State consent.”<sup>22</sup>

The ICJ, through its case law, has recognized the necessity of consent from both states in *Monetary Gold Removed from Rome in 1943* and *Anglo-Iranian Oil Company*.<sup>23</sup> In both cases, the ICJ found that it could not rule without the consent of all states affected by the ruling.

Despite the state consent rule, a state may implicitly agree to jurisdiction despite an overt rejection of jurisdiction in that specific case.<sup>24</sup> For example, in 1984, the United States contested the ICJ’s jurisdiction over a dispute with Nicaragua.<sup>25</sup> Despite the United States’ objection, the ICJ declared that the United States had agreed to compulsory jurisdiction and, therefore, was subject to jurisdiction.<sup>26</sup> Thus, the ICJ may exercise jurisdiction even in the absence of state consent if the

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*Court of Justice: How Compulsory Is It?*, 5 CHINESE J. INT’L L. 29, 31 (2006). In fact, only 67 nations and one Security Council nation (the United Kingdom) have agreed to any compulsory jurisdiction. *Id.*

20. Aman Mahray McHugh, *Resolving International Boundary Disputes in Africa: A Case for the International Court of Justice*, 49 HOW. L.J. 209, 229 (2005).

21. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, 2006 ICJ LEXIS 1, at \*12 (Order of Feb. 3, 2006), available at [http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw\\_ijudgment\\_20060203.pdf](http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw_ijudgment_20060203.pdf) (last visited Feb. 1, 2007).

22. Koroma, *supra* note 14.

23. *Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K., N. Ir., and U.S.)*, 1954 ICJ 19 (June 15); *Anglo-Iranian Oil Co. Case (U.K. v. Iran)*, 1952 ICJ 93 (July 22). *Monetary Gold* dealt with a dispute between Italy and Albania regarding the possession of gold taken by the Germans from Rome during the Second World War. *Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K., N. Ir., and U.S.)*, 1954 ICJ 19, 21 (June 15). Italy brought a case to the ICJ to determine the ownership of the gold. *Id.* at 22. Albania did not consent to the hearing, and the ICJ held that without Albania’s consent they were unable to rule. *Id.* at 32. Similarly, in *Anglo-Iranian Oil Company*, the Court was asked by the United Kingdom to adjudicate a dispute with Iran. The Iranians had seized the assets of a British oil company as they nationalized the oil industry. *Anglo-Iranian Oil Co. Case (U.K. v. Iran)*, 1952 ICJ 93, 102 (July 22). The ICJ ruled again that it could not exercise jurisdiction without the consent of Iran. *Id.* at 103.

24. ROSENNE, *supra* note 11, at 84.

25. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 ICJ 392 (Nov. 26).

26. The United States contested jurisdiction based on a purported withdrawal from Article 36 jurisdiction in disputes with Central American countries. *Id.* at 415. The ICJ, however, rejected the United States’ argument, reading a clause in the United States’ 1946 declaration of acceptance of compulsory jurisdiction to require a six-month grace period for any change. *Id.* at 421.

state is party to another agreement that implies jurisdiction. "Implied consent" through other agreements is especially important in the context of reservations because, if a reservation is held invalid, it could potentially subject the affected state to "implied consent" jurisdiction.<sup>27</sup>

## B. THE ENFORCEMENT MEASURES OF THE ICJ

If the ICJ decides that there is jurisdiction in a case and proceeds to make a ruling, its decision binds the parties under Article 94 of the U.N. Charter.<sup>28</sup> Article 94 also provides that if the losing party refuses to comply, the prevailing party may ask the Security Council to enforce the judgment.<sup>29</sup> However, the Security Council has never acted to support an ICJ decision.<sup>30</sup> Similarly, domestic courts generally do not enforce ICJ decisions.<sup>31</sup>

The ICJ's decisions are complied with approximately sixty-eight percent of the time.<sup>32</sup> Cases that involve preliminary objections to jurisdiction and substantive use of force issues have the lowest compliance rates.<sup>33</sup> Very few cases with preliminary objections or cases involving the use of force even reach a decision on the merits. Of cases that reach the merits, in only half of cases with preliminary objections and forty percent of cases regarding use of force was the ICJ decision complied with by both parties.<sup>34</sup> For example, in *Case Concerning Military and Paramilitary Activities in and against Nicaragua*,<sup>35</sup> the United States failed to comply with a ruling after it made a preliminary objection.<sup>36</sup> Similarly, in *Case*

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27. See *infra* Part III.D-E (noting that reservations could, theoretically, be held invalid if they are contrary to the "object and purpose" of the treaty).

28. U.N. Charter art. 94, para. 1 ("Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.").

29. U.N. Charter art. 94, para. 2.

30. Tom Ginsburg & Richard A. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1308 (2004).

31. See generally A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877 (2000).

32. Ginsburg & McAdams, *supra* note 30.

33. *Id.* at 1313, 1327.

34. *Id.* at 1331, 1315.

35. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1984 ICJ 392 (Nov. 26).

36. In *Military and Paramilitary Activities in and Against Nicaragua*, the Nicaraguan government accused the United States of engaging in military activities.

*Concerning United States Diplomatic and Consular Staff in Tehran*,<sup>37</sup> Iran refused to comply with an ICJ ruling contrary to its preliminary objections in a use of force case.<sup>38</sup>

### C. THE TRADITIONAL RULE DOES NOT ALLOW RESERVATIONS WITHOUT UNANIMOUS CONSENT

Both the *Tehran* and *Nicaragua* cases involved states claiming jurisdictional reservations. A reservation is a statement by a signatory state that it does not intend to be bound by a specific article or part of an article in a treaty to which it is otherwise a party.<sup>39</sup> Reservations are extremely common in large multilateral treaties.<sup>40</sup>

Prior to 1951, reservations were rare, since reservations were per se invalid without the consent of every nation that was party to a treaty.<sup>41</sup> The consent rule could be altered by adding an addendum to the treaty, but the default rule was unanimous consent.<sup>42</sup>

A competing, and less popular, reservation scheme was the Pan-American approach, which allowed any nation to make a reservation to a particular clause, and then each other signatory could choose individually whether or not to accept the reservation.<sup>43</sup> If another signatory chose not to accept the reservation, the treaty did not enter into effect between those two nations. Although the Pan-American approach had the benefits of being less collective than the unanimous consent approach, it had the downside of developing a treaty system that was not uniform—each treaty had many signatories in

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*Id.* at 397. The United States raised a preliminary objection to jurisdiction, which was overruled by the Court. *Id.* at 442. Once the Court made its judgment, the United States refused to comply. Heidi K. Hubbard, *Separation of Powers within the United Nations: A Revised Role for the International Court of Justice*, 38 STAN. L. REV. 165, 174–75 (1985).

37. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ 3 (May 24).

38. In *United States Diplomatic and Consular Staff in Tehran*, the United States brought an action against Iran during the Iranian hostage crisis. Iran made preliminary objections which were overruled. *Id.* at 43. The ICJ ruled for the United States, but Iran did not comply. Hubbard, *supra* note 36, at 174.

39. BLACK'S LAW DICTIONARY 607 (2d pocket ed. 2001).

40. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ 15, 32 (May 28).

41. Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307, 312 (2006).

42. *Id.*

43. *Id.*



different relationships with each other.<sup>44</sup>

However, in the era after the Second World War, the traditional rules of treaty interpretation became infeasible.<sup>45</sup> In human rights treaties, the amount of state signatories exploded.<sup>46</sup> As a result, it became more difficult for the growing number of signatory states to reach unanimity on most issues.<sup>47</sup>

#### D. THE EROSION OF THE TRADITIONAL RULE ON RESERVATIONS AND THE EMERGENCE OF THE MODERN RULE

The tension between the traditional rule and modern diplomatic realities culminated in 1951 when the ICJ faced its first controversy over the ability of nations to make reservations to a major treaty. In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*<sup>48</sup> the United Nations asked the ICJ to issue an advisory opinion on the rule of reservations.<sup>49</sup> Eight countries had issued reservations, and all eight of the states included reservations to the compulsory jurisdiction clause of the Genocide Convention.<sup>50</sup> The ICJ was faced with the dilemma of encouraging a large number of sovereign states to join the treaty regime, which generally meant allowing states to promulgate reservations, without allowing so many reservations that the integrity of the treaty was damaged. In the end, the ICJ ruled that a state may remain a member of the treaty in the face of an objection by another signatory, so long as "the reservation is compatible with the object and purpose of the Convention."<sup>51</sup>

##### 1. *The Sovereignty Concern*

In its opinion, the ICJ recognized the evolution of treaties from small agreements between friendly states that could be

44. *Id.*

45. Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 533-34 (2002).

46. *Id.* See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (140 parties); International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3 (155 parties).

47. Goodman, *supra* note 45, at 534.

48. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ 15 (May 28).

49. *Id.* at 16.

50. *Id.* at 31.

51. *Id.* at 29.

interpreted and enforced like contracts to multilateral compacts that often involve more than one hundred signatories.<sup>52</sup> Treaties became a product of a series of majority votes, so although the adoption of the treaty may be unanimous, each sovereign nation may find it necessary to make legitimate reservations.<sup>53</sup>

The ICJ, however, rejected the extreme sovereignty approach which states that national sovereignty mandates a nation's ability to establish reservations on any part of the treaty it finds repugnant.<sup>54</sup> The ICJ stated that a free-for-all reservation policy would damage the integrity of the treaty as many countries could be signatories but withhold reservations on all of the most integral parts.<sup>55</sup> As a result, the ICJ ruled that only reservations that were compatible with the "object and purpose" of the treaty would be valid.<sup>56</sup>

## 2. *The Breadth Concern*

The second problem that the ICJ struggled with was breadth—the concern that a restrictive reservation policy would deter many countries from joining the treaty. The ICJ realized that the drafters of the Genocide Convention desired that "as many States as possible should participate."<sup>57</sup> The ICJ argued that without the ability to promulgate reservations, many states that would have joined the treaty would feel constrained and refuse to sign.<sup>58</sup>

The inability to make reservations is a concern for states that do not want to be bound by a particular term or wish to

52. *Id.* at 21 ("as regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this [contract] principle.").

53. *Id.* at 22 ("It must also be pointed out that although the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations.").

54. *Id.* at 24.

55. *Id.* (noting that the drafters could not "have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible.").

56. *Id.* at 43.

57. *Id.* at 24.

58. Swaine, *supra* note 41, at 332. A modern day example of a restriction on reservations causing a loss of breadth is the Rome Convention, where the United States was unwilling to join the International Criminal Court without reservations. *Id.* at 329.

follow their own interpretation of a term.<sup>59</sup> Scholars contend that the breadth concern is particularly important in the human rights context because human rights treaties are supposed to be a definitive statement of international law and an increase in signatories makes it more likely that the treaty will become normative international law.<sup>60</sup> The accumulation of signatories is important because the general adherence to the newly created normative law assists the ICJ's goal of strengthening the "authority of the moral and humanitarian principles" embodied in the treaty.<sup>61</sup>

### 3. *The Integrity Concern*

In addition to the concern about breadth, the ICJ struggled with upholding the integrity of the treaty regime. Scholars contended that if the ICJ created a regime that allowed too many states to have reservations, the treaties would have many members but lose all meaning.<sup>62</sup> In short, the ICJ had "to choose between either getting as many States as possible to ratify the treaty, or to prefer the idea that the treaty constitutes a coherent and balanced package which does not allow any interference."<sup>63</sup>

Scholars argue that as each state demands more reservations, that state becomes less desirable to the other signatories on the treaty.<sup>64</sup> Excessive reservations "impair treaty integrity, uniformity, and consistency among members, and in the aggregate undermine (rather than enhance) any claim to status as customary international law."<sup>65</sup> Especially in the genocide and human rights context, the primary goal of the treaties is to set an international baseline for the handling of human rights issues.<sup>66</sup> Professor Ryan Goodman argues that,

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59. Palitha T.B. Kohona, *Reservations: Discussion of Recent Developments in the Practice of the Secretary-General of the United Nations as Depositary of Multilateral Treaties*, 33 GA. J. INT'L & COMP. L. 415, 417 (2005).

60. Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 649 (1990).

61. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ 15, 24 (May 28).

62. Jan Klabbers, *On Human Rights Treaties, Contractual Conceptions and Reservations*, in RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME 149, 155 (Ineta Ziemele ed., 2004).

63. *Id.*

64. See Swaine, *supra* note 41, at 330; Goodman, *supra* note 45, at 534.

65. Swaine, *supra* note 41, at 330 (citation omitted).

66. Goodman, *supra* note 45, at 534.

"Allowing states to join the treaty with incompatible reservations would repudiate or downgrade its normative, or standard-setting, base."<sup>67</sup> In short, scholars are concerned that excessive reservations may "ruin" a treaty.<sup>68</sup>

The ICJ attempted to allay the integrity concern by stating that "none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention."<sup>69</sup> The ICJ hoped that its policy limiting reservations to those that do not materially alter the treaty would satisfy the competing goals of sovereignty, breadth, and integrity.

#### 4. *The Imperfect Compromise*

The ICJ's 1951 compromise, however, invites almost as many problems as it resolves. Reservations are becoming increasingly common in treaties and their frequent inclusion has caused a great deal of scholarly concern.<sup>70</sup> Critics argue that the compromise approach is unfair because it allows those states who were "losers" in the negotiation about what should go in the treaty to withhold their signature from the parts that they disagreed with.<sup>71</sup> The ICJ has noted the difficulty of determining exactly what the "object and purpose" of the treaty is.<sup>72</sup> Therefore, rather than adopting a bright line test, the ICJ determines whether or not a reservation contravenes the "object and purpose" of a treaty on a case-by-case basis.<sup>73</sup> As a result, the framework that *Armed Activities on the Territory of the Congo* entered into was a flexible one.

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67. *Id.*

68. Klabbers, *supra* note 62, at 151 (quoting Liesbeth Lijnzaad, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? (1994)).

69. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ 15, 21 (May 28).

70. Klabbers, *supra* note 62, at 151.

71. *Id.* at 163.

72. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ 15, 41-44 (May 28) (dissenting opinion).

73. *Id.* at 26 ("The appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case.").

## II. ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO

On May 28, 2002, the DRC brought an action against Rwanda in the ICJ claiming “massive, serious and flagrant violations of human rights and of international humanitarian law” alleged to have been committed ‘in breach of the ‘International Bill of Human Rights’, other relevant international instruments and mandatory resolutions of the United Nations Security Council” perpetrated by Rwanda.<sup>74</sup> Most importantly for this Comment, the DRC claimed that “by killing, massacring, raping, throat-cutting, and crucifying, Rwanda is guilty of genocide against more than 3,500,000 Congolese, including the victims of the recent massacres in the city of Kisangani, and has violated the sacred right to life provided for in . . . the Convention on the Prevention and Punishment of the Crime of Genocide.”<sup>75</sup>

Rwanda responded to the DRC’s contentions with only a blanket statement that the ICJ did not have jurisdiction over the DRC’s claims because it made a reservation to Article IX of the Convention, which confers jurisdiction over disputes to the ICJ<sup>76</sup> The DRC responded by relying on the compromissory clause<sup>77</sup> in the Genocide Convention as the basis for jurisdiction at the ICJ.<sup>78</sup> The DRC also relied on procedural mechanisms<sup>79</sup>

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74. *Armed Activities on the Territory of the Congo*, (Dem. Rep. Congo v. Rwanda), 2006 ICJ LEXIS 1, at \*12 (Order of Feb. 3, 2006), available at [http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw\\_ijudgment\\_20060203.pdf](http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw_ijudgment_20060203.pdf) (last visited Feb. 1, 2007). Specifically, the DRC argued that Rwanda violated the U.N. Charter and Charter of the Organization of African Unity by committing human rights violations. *Id.* at \*20. The DRC also alleged that Rwanda violated the United Nations Charter, the Convention on International Civil Aviation, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation by shooting down a civilian airliner. *Id.*

75. *Id.* at \*20.

76. *Id.* at \*21.

77. A compromissory clause is a clause in a treaty that gives dispute resolution authority to the ICJ. See, e.g., Genocide Convention, *supra* note 46, art. IX, at 282 (“Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”)

78. *Armed Activities on the Territory of the Congo*, at \*25.

79. *Id.* at \*26. Procedurally, the DRC relied on *forum prorogatum* as well as the ICJ’s decision not to remove the case from the list in support of jurisdiction. *Forum prorogatum* is an argument that one state may accept jurisdiction even when

as well as factual arguments as to whether or not Rwanda had actually withdrawn its jurisdictional reservation to the Genocide Convention.<sup>80</sup> The ICJ eventually rejected all of the DRC's asserted bases for jurisdiction and dismissed the case.<sup>81</sup>

Specifically, the Court rejected the DRC's argument that Rwanda's reservation was incompatible with the "object and purpose" of the Genocide Convention because it excluded Rwanda from "any mechanism for the monitoring and prosecution of Genocide."<sup>82</sup> Rwanda responded that the reservation could not be contrary to the "object and purpose" of the treaty because the jurisdictional reservation was procedural in nature, and thereby could not be contrary to the substantive "object and purpose" of the treaty. Rwanda also argued that its reservation could not be contrary to the aims of the Convention since sixteen other states held the same reservation,<sup>83</sup> and because the DRC and the vast majority of the 133 signatory countries did not object to the reservation.<sup>84</sup>

The Court agreed with Rwanda. The ICJ found that it had previously ruled that reservations were compatible with the Genocide Convention, and that procedural reservations which only eliminated one method of adjudicating breaches of the treaty were not contrary to the "object and purpose" of the treaty.<sup>85</sup> The Court, therefore, rejected the DRC's claim of jurisdiction under the Genocide Convention and dismissed the case.<sup>86</sup>

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jurisdiction is not proper. The DRC argued that Rwanda, by submitting pleadings, had accepted jurisdiction under *forum prorogatum*. *Id.* The Court, however, found that Rwanda had not expressed "an unequivocal indication" to accept the jurisdiction of the Court, and denied the *forum prorogatum* argument. *Id.* at \*29. The DRC further argued that the Court had impliedly authorized jurisdiction by failing to remove the case from the List in a previous order. However, the Court rejected that argument as well, stating that the mere fact that the Court had not found a "manifest lack of jurisdiction" did not mean that there was no jurisdiction. *Id.* at \*33.

80. *Id.* at \*36. The factual arguments revolved around whether or not Rwanda had withdrawn its reservation. *Id.*

81. *Id.* at \*110.

82. *Id.* at \*55.

83. The other states holding reservations to Article IX of the Convention are Algeria, Argentina, Bahrain, Bangladesh, China, India, Malaysia, Morocco, the Philippines, Rwanda, Singapore, Spain, the United States of America, Venezuela, Vietnam, Yemen, and Yugoslavia. See List of Genocide Convention Signatories, [www.unhchr.ch/html/menu3/b/treaty1gen.htm](http://www.unhchr.ch/html/menu3/b/treaty1gen.htm) (last visited Mar. 8, 2007).

84. Armed Activities on the Territory of the Congo at \*110.

85. *Id.* at \*62.

86. *Id.* at \*63. Justice Koroma dissented, arguing that the Court's decision runs contrary to the Genocide Convention's "object and purpose" because it refused

### III. THE ARMED ACTIVITIES RULING UPHELD A DESIRABLE TREATY RESERVATIONS SYSTEM AND MAINTAINED THE COURT'S LEGITIMACY

Although the ICJ's decision in *Armed Activities* has been met with a great deal of disapproval, the criticisms are unfounded. Critics claim that the Court ignored the "punishment" aspect of the Convention and that by doing so the Court allowed nations to avoid their responsibilities under the Convention.<sup>87</sup> However, critics of the Court's decision ignore the pragmatic aspects of the resolution, which spared not only the goal of the treaty but the Court's own legitimacy.<sup>88</sup> The Court rightfully maintained that the goal of the treaty was to ascribe international norms by maintaining a wide breadth of membership.<sup>89</sup> Furthermore, the ICJ made the correct decision because, on a purely jurisdictional level, the Court may not accept jurisdiction in the absence of consent of the parties.<sup>90</sup> Lastly, even if the Court had struck down the reservation and exercised jurisdiction, its ruling would have likely been ignored, damaging the Court's legitimacy in the future.<sup>91</sup>

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to hold Rwanda to account for its breach, thereby annulling the "punishment" section of the Convention. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, 2006 ICJ LEXIS 4, at \*6 (Order of Feb. 3, 2006) (Koroma, J., dissenting) available at [http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw\\_ijudgment\\_20060203\\_dissenting\\_opinion\\_koroma.pdf](http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw_ijudgment_20060203_dissenting_opinion_koroma.pdf) (last visited Feb. 1, 2007). He continued, arguing that human rights treaties were not contractual treaties that required consent and reciprocity between states, rather, such treaties are meant to protect individuals. *Id.* at \*10. However, Justice Koroma was in the extreme minority, with the final vote for dismissal being 15-2. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, 2006 ICJ LEXIS 1, at \*110 (Order of Feb. 3, 2006), available at [http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw\\_ijudgment\\_20060203.pdf](http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw_ijudgment_20060203.pdf) (last visited Feb. 1, 2007).

87. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, 2006 ICJ LEXIS 4, at \*7 (Order of Feb. 3, 2006) (Koroma, J., dissenting) available at [http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw\\_ijudgment\\_20060203\\_dissenting\\_opinion\\_koroma.pdf](http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw_ijudgment_20060203_dissenting_opinion_koroma.pdf) (last visited Feb. 1, 2007); Alexander Orakhelashvili, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006*, 55 INT'L AND COMP. L.Q. 753 (2006).

88. See *infra* Part III.A-E.

89. See *infra* Part III.A.

90. See *infra* Part III.B.

91. See *infra* Part III.C-E.

A. THE COURT'S DECISION UPHELD THE "OBJECT AND PURPOSE" OF THE TREATY BY GUARANTEEING WIDER PARTICIPATION

The Court's decision to allow reservations upheld the "object and purpose" of the Convention by ensuring that the largest number of states possible are party to the treaty, hence increasing the chance that the treaty's precepts become normative international law. Critics of the Court's decision merely focus on the words "punishment and prevention" in the title of the treaty, and claim that allowing reservations jeopardizes that goal.<sup>92</sup> However, critics ignore the devastating effects the reduction in breadth would have on the punishment and prevention goals of the treaty. The Convention, along with all human rights treaties, benefits from having a large amount of treaty signatories. Human rights treaties, including the Convention, are created in order to build the "credibility and the capacity to become normative under customary law even for nonsignatory states."<sup>93</sup> The Genocide Convention preamble states clearly that "international co-operation is required."<sup>94</sup> In fact, the ICJ itself recognized that one of the goals of the Genocide Convention was to "maximize state participation."<sup>95</sup>

Any restriction on the right to reservations will result in a reduction in the amount of state signatories to the Convention because states will be unsure how the terms in the Convention will be defined by the ICJ.<sup>96</sup> Human rights conventions, like the Genocide Convention, involve a significant amount of burdens with few tangible benefits (compared with a commercial treaty).<sup>97</sup> Furthermore, compared to commercial treaties, human rights treaties tend to have a more sweeping scope and include terms that may be open to interpretation.<sup>98</sup> For instance, the Genocide Convention states that "complicity in

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92. *Id.* See also Genocide Convention, *supra* note 46, art. IX, at 282.

93. Cook, *supra* note 60, at 649.

94. Genocide Convention, *supra* note 46, pmb., at 278.

95. Jennifer Riddle, Note, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 And The Effectiveness Of The Reporting Process*, 34 GEO. WASH. INT'L L. REV. 605, 609 (2002); see *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 ICJ 15 (May 28).

96. Kohona, *supra* note 59, at 417 (asserting that without the power of reservation some states are barred by their own "domestic legal and political considerations" from signing a treaty).

97. Cook, *supra* note 60, at 650.

98. *Id.*



genocide" is forbidden.<sup>99</sup> Terms such as "complicity," which are open to interpretation, will drive away states that are worried about their application unless they are permitted to make reservations.<sup>100</sup> Everyone may agree that a certain thing, such as "genocide," is bad, but not every state has the same definition of the term in mind when signing the treaty.<sup>101</sup> Even though the reservation may take the form of a definitional reservation (where the state reserves its participation to a particular definition),<sup>102</sup> a state may choose to withhold jurisdiction as well to ensure that a foreign or international tribunal is not defining the terms in a way the signatory state did not intend. Any change in reservations policy that requires states to submit to an international tribunal would reduce state participation.<sup>103</sup>

Similarly, eliminating jurisdictional reservations would have a negative effect on treaty participation because of domestic political issues in signatory states. Many signatory states struggle with domestic legal and political issues when deciding whether to sign a multilateral treaty.<sup>104</sup> Those states rely on reservations in order to sign treaties that may be agreeable in most respects but impermissible in others.<sup>105</sup> Reservations allow them to accede to the agreeable parts of the treaty while not acceding to the unacceptable provisions.<sup>106</sup> Many countries do not accept ICJ jurisdiction because of concerns that they may not get a fair trial in front of the international tribunal.<sup>107</sup> Those states would likely withdraw from treaties with jurisdictional provisions, including the Genocide Convention, if the ICJ overruled Rwanda's reservation.<sup>108</sup>

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99. Genocide Convention, *supra* note 46, art. III(e), at 280.

100. Cook, *supra* note 60, at 650.

101. Klabbers, *supra* note 62, at 155.

102. *Id.*

103. *Id.*

104. Kohona, *supra* note 59, at 417.

105. *Id.*

106. *Id.*

107. For example, the USSR never agreed to ICJ jurisdiction because of the lack of communist bloc judges. Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1, 10 (2006).

108. A poignant example of a country refusing to join a treaty because of the lack of reservations is the United States' decision not to join the International Criminal Court (ICC). The Rome Statute, which created the ICC, does not allow any reservations to jurisdiction. See Rome Statute of the International Criminal Court, art. 120, 2187 U.N.T.S. 90; 37 I.L.M. 1002 (1998). As a result, the United States refused to become a signatory to the ICC. Whereas, if reservations had been allowed, the United States may have considered joining the treaty. Swaine, *supra*

Therefore, the major “object and purpose” of the Convention—to develop international cooperation against genocide—would have been significantly constrained by an ICJ ruling of compulsory jurisdiction. As stated above, breadth is extremely important to human rights treaties, because as more states become signatories the treaty develops into a stronger statement of international opinion.<sup>109</sup> If only a few countries are signatories to a human rights treaty, the statement of international opinion is much less persuasive, and therefore it is unlikely the treaty’s precepts will become normative international law.<sup>110</sup> The Genocide Convention explicitly relies on international cooperation to reach its ends.<sup>111</sup> If the ICJ had ruled in favor of the DRC, and required Rwanda to submit to jurisdiction, it is likely that the number of signatories to the treaty would decline, and the persuasive value of the treaty in international law would be lessened.

Furthermore, allowing jurisdictional reservations, as the ICJ did in *Armed Activities*, benefits the overall treaty structure by allowing for a greater breadth of state signatories. If there are a large number of signatories to the treaty, there is at least a possibility that those signatories will follow the treaty in order to be considered a reliable partner in international treaty negotiations.<sup>112</sup> Certainly, the signatory states with reservations will not comply as fully under the treaty as those without reservations. However, those states that would not become signatories if ICJ jurisdiction were mandatory may now become signatories and comply at least partially.<sup>113</sup>

Although the benefits of breadth are well defined, critics argue that with an increase in reservations the integrity and depth of a treaty may suffer.<sup>114</sup> Parties to commercial treaties may be subject to economic consequences for making certain reservations.<sup>115</sup> Human rights treaties do not have such

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note 41, at 328–329. Although the United States may have been only a partial participant, the ICC example shows the benefit of breadth over integrity. The United States is a vital signatory to any treaty and the loss of the United States as even a partial signatory jeopardizes the ICC’s chances for success. Randall Peerenboom, *Human Rights and Rule of Law: What’s the Relationship?*, 36 GEO. J. INT’L L. 809, 899 (2005).

109. Cook, *supra* note 60, at 649–50.

110. *Id.*

111. Genocide Convention, *supra* note 46, pmb., at 278.

112. Cook, *supra* note 60, at 649–650.

113. *Id.*

114. Swaine, *supra* note 41, at 330.

115. Francesco Parisi and Catherine Sevckenko, *Treaty Reservations and Article*

consequences and are, therefore, likely targets for abuse of reservations.<sup>116</sup> Reservations also damage the “integrity, uniformity, and consistency” of the treaty, as each signatory has agreed to a slightly different version of the same treaty.<sup>117</sup> Additionally, the normative power of the treaty, one of the major benefits of breadth, is reduced as more states make reservations to the substantive portions of the treaty.<sup>118</sup> Furthermore, treaty integrity may be damaged by allowing reservations to jurisdiction because signatories will not be subject to any judicial enforcement if they breach the treaty.<sup>119</sup>

Despite the criticism, the damage to treaty integrity by procedural reservations is not as great as it appears. Although the dilution of the treaty is a concern, if reservations were denied *after* the accession of the state to the treaty, it would likely have deleterious effects on the enforcement of the treaty as a whole, as many states would decide not to perform the obligations under the treaty that they reserved regardless of whether the reservation was considered valid.<sup>120</sup> The treaty would then lack integrity because the inconsistency would still exist—except states’ reservations would be implicit rather than explicit.

In addition, by declining to allow reservations, the treaty risks the loss of financial and moral support from states that disagree.<sup>121</sup> When the Human Rights Committee attempted to reduce the right to make reservations from the Human Rights Conventions, the United States threatened to withdraw financial support for human rights enforcement measures.<sup>122</sup> Therefore, it is quite likely that a treaty’s integrity could be damaged by withdrawal of support and financial resources from key players should jurisdictional reservations be overruled.

Therefore, despite the fact that an emphasis on breadth

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21(1) of the Vienna Convention, 21 BERKELEY J. INT'L L. 1, 21 (2003).

116. *Id.*

117. Swaine, *supra* note 41, at 330.

118. Goodman, *supra* note 45, at 534.

119. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2006 ICJ LEXIS 4, at \*6 (Order of Feb. 3, 2006) (Koroma, J., dissenting) available at [http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw\\_ijudgment\\_20060203\\_dissenting\\_opinion\\_koroma.pdf](http://www.icj-cij.org/icjwww/idocket/icrw/ijudgment/icrw_ijudgment_20060203_dissenting_opinion_koroma.pdf) (last visited Feb. 1, 2007).

120. Laurence R. Helfer, *Response: Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 YALE J. INT'L L. 367, 380 (2006).

121. Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L L. 277, 318 (1999).

122. *Id.* In fact, both houses of Congress passed a law withdrawing financial support, and only a veto from President Clinton prevented the threat. *Id.* at 319.

may lead to signatory states not following all of the tenets of a treaty, the benefits of breadth outweigh the costs of integrity.<sup>123</sup> A focus on integrity risks financial and moral support from key nations and jeopardizes the overall integrity of the treaty by making states' reservations implicit rather than explicit. The ICJ decision will lead to a larger amount of signatories than if the jurisdictional reservation had been denied. The larger amount of signatories increases the likelihood that the tenets of the Genocide Convention will become normative international law. Rwanda may have violated the Convention, but the damage of one or two states that violate the Convention and cannot be held to account is outweighed by the potential of many more states following the Convention and the resulting changes in normative international law. The ICJ made the correct decision that the jurisdictional reservations are within the "object and purpose" of the Convention.

**B. THE ICJ DOES NOT HAVE THE AUTHORITY TO MAKE BINDING RULINGS IN THE ABSENCE OF RWANDA'S CONSENT.**

Even if the ICJ wished to strike down Rwanda's reservation it plainly lacks the jurisdiction to do so. The ICJ relies on state consent for its jurisdiction over disputes.<sup>124</sup> Similarly, treaty provisions are only binding on those states that voluntarily agree to them.<sup>125</sup> Therefore, the ICJ, without Rwanda's consent, cannot legally exercise jurisdiction or alter treaty commitments.

It is well established that the ICJ may only exercise jurisdiction with the consent of the state parties.<sup>126</sup> States "jealously guard their sovereignty," and, therefore, the ICJ must only exercise jurisdiction judiciously.<sup>127</sup> The ICJ may only adjudicate if the parties have accepted jurisdiction either through compulsory jurisdiction under Article 36(2) of the Statute of the International Court of Justice, through a treaty obligation, or through compromis (special agreement) jurisdiction.<sup>128</sup> It is undisputed that Rwanda has not explicitly accepted jurisdiction through either compulsory jurisdiction or a compromis, and Rwanda's signature on the Genocide

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123. Cook, *supra* note 60, at 649–50.

124. Rosenne, *supra* note 11.

125. Baylis, *supra* note 121, at 287.

126. Rosenne, *supra* note 11.

127. Brandi J. Pummell, *The Timor Gap: Who Decides Who Is In Control?*, 26 DENV. J. INT'L L. & POL'Y 655, 686 (1998).

128. Koroma, *supra* note 14.

Convention included a reservation of jurisdiction. Therefore, Rwanda has not consented to ICJ Jurisdiction and jurisdiction is not proper.

The precept that the ICJ requires consent is well established in ICJ case law.<sup>129</sup> In *Case of the Monetary Gold Removed from Rome in 1943*,<sup>130</sup> the Court declined to exercise jurisdiction because the "very subject-matter" of the dispute involved Albania, which had not consented. The Court held that to exercise jurisdiction without consent "would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."<sup>131</sup> In *Anglo-Iranian Oil Company*,<sup>132</sup> the Court similarly held that "the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties. Unless the Parties have conferred jurisdiction on the Court . . . the Court lacks such jurisdiction."<sup>133</sup>

Therefore, based on tradition, previous cases, and the Statute of the ICJ, the Court is limited to exercising jurisdiction in cases where the parties have consented to jurisdiction. As Rwanda had not consented to jurisdiction, the Court made the proper decision to not exercise jurisdiction even if the reservation was contrary to the "object and purpose" of the Genocide Convention.

Similarly, state signatories may only be bound by treaty provisions to which they have agreed.<sup>134</sup> Treaties are considered in the same light as contract law: negotiation and consent are required.<sup>135</sup> The ICJ recognized this in the *Reservations* case when it stated that "[i]t is well established that in its treaty relations a State cannot be bound without its

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129. It is important to note that the ICJ's case law is not binding precedent. The founders of the ICJ wanted to allow the new institution room to develop without allowing third party observers to critique its decisions based on previous ones. The ICJ does, however, frequently use reasoning and outcomes in past decisions to make decisions in present matters, although it has no obligation to. H. Vern Clemons, Comment, *The Ethos of the International Court of Justice is Dependent Upon the Statutory Authority Attributed to its Rhetoric: A Metadiscourse*, 20 *FORDHAM INT'L L.J.* 1479, 1499 (1997).

130. *Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K., N. Ir., and U.S.)*, 1954 ICJ 19 (June 15).

131. *Id.* at 32.

132. *Anglo-Iranian Oil Co. Case (U.K. v. Iran)*, 1952 ICJ 93 (July 22).

133. *Id.* at 103.

134. *Id.* at 288.

135. Baylis, *supra* note 121, at 287 (1999).

consent.”<sup>136</sup>

Therefore, although the DRC argues that Rwanda has acceded to “implied consent” jurisdiction by signing the treaty, jurisdiction is not valid under treaty laws because it would require Rwanda to submit to jurisdiction after making a valid reservation, thereby changing the conditions on which Rwanda signed the Convention.<sup>137</sup> Indeed, “[r]atification with reservations could only be regarded as implied consent to sever the reservations if states parties were aware before ratifying that severance was a possibility.”<sup>138</sup> As sixteen other nations have already made the same reservation to this treaty, it is clear that Rwanda could not have considered severance of its jurisdictional reservation to be a possibility, and therefore, an ICJ decision severing that reservation would be contrary to international legal principles.

The ICJ might have an argument for severing the reservation if the reservation was so flagrant “as to constitute bad faith.”<sup>139</sup> That is clearly not the case here because other states have made reservations to the Convention and it is unlikely that such reservations were made in bad faith. Additionally, neither party contends that Rwanda actually *intended* to commit genocide when it ratified the treaty in 1975 with the reservation and thereby ratified the treaty in bad faith. As a result, it cannot be “implied” from Rwanda’s position as a signatory on the treaty that they consented to jurisdiction. By making a reservation, Rwanda withdrew both express and implied consent to ICJ jurisdiction and as a result, the ICJ cannot legally exercise jurisdiction over it.

#### C. THE ICJ HAS NO ENFORCEMENT MEASURES AND ANY RULING WITHOUT STATE CONSENT IS UNLIKELY TO BE FOLLOWED

The consent element is important because the ICJ’s ability to enforce its own judgments in the absence of voluntary state compliance is extremely limited. Article 94 of the Charter of the U.N. specifically addresses the effect of ICJ judgments, with the mere request that each state “undertak[e] to comply with the

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136. *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 ICJ 15, 21 (May 28).

137. Baylis, *supra* note 121, at 326.

138. *Id.*

139. *Id.* at 327.

decision.” If one party does not comply, recourse is left to the Security Council to enforce compliance.<sup>140</sup> The Security Council has never done so.<sup>141</sup> Domestic courts generally refuse to enforce ICJ judgments.<sup>142</sup> As a result, there is a low level of compliance, especially with use of force cases.<sup>143</sup> It is likely that, even had the ICJ had ruled in the DRC’s favor and exercised jurisdiction, Rwanda would have ignored the ICJ’s decision because the ICJ lacks efficient enforcement mechanisms.

Although ICJ decisions are binding on the parties to the dispute, that authority comes from the sheer force of persuasive reasoning by the ICJ and the consent of the parties, not from any particular enforcement method.<sup>144</sup> The only recourse for the prevailing party to enforce the judgment is to go to the Security Council under Article 94 of the U.N. Charter.<sup>145</sup> However, the Security Council is not obliged to actually enforce the judgment; it is merely “permitted to do so, if it thinks the step necessary.”<sup>146</sup> Furthermore, the Security Council can take that step with any action that it wishes, even if it means not enforcing the judgment in full.<sup>147</sup> Therefore, the grant of authority to the Security Council to enforce judgments is a “weak formulation” that is optional and feeble.<sup>148</sup> Requests to the Security Council for enforcement are sporadic occurrences at best.<sup>149</sup> They have *never* been enforced.<sup>150</sup> The Security Council appeal procedure, although potentially useful in principle, is anemic to nonexistent in practice, leaving ICJ decisions unenforceable through those means.<sup>151</sup>

Similarly, domestic courts have declined to apply ICJ decisions as binding precedent. Article 94 does not contemplate domestic enforcement of ICJ rulings, and therefore implies that the Security Council should be the only method of enforcement.<sup>152</sup> In the United States, there are numerous

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140. U.N. Charter, art. 94.

141. Ginsburg & McAdams, *supra* note 30, at 1308.

142. *See generally* Weisburd, *supra* note 31.

143. The historic compliance rate has been calculated at sixty-eight percent for all cases, and lower for use of force cases. Ginsburg & McAdams, *supra* note 30.

144. Clemons, *supra* note 129, at 1497–98.

145. U.N. Charter art. 94.

146. Weisburd, *supra* note 31, at 883.

147. *Id.*

148. Ginsburg & McAdams, *supra* note 30, at 1308.

149. *Id.*

150. *Id.*

151. *Id.*

152. Weisburd, *supra* note 31, at 883.

examples of courts, including the Supreme Court, ignoring ICJ decisions.<sup>153</sup> As a result of the lack of both international and domestic enforcement, “the norm adopted by the ICJ may be ignored without judicial consequence.”<sup>154</sup>

Despite the lack of judicial enforcement methods, some commentators argue that the presence of international pressure will compel adherence to the ICJ’s rulings. Because a failure to comply with an ICJ ruling would make the state involved in “illegal” activity, there are substantial “political costs” involved in an action of non-adherence.<sup>155</sup> ICJ decisions are internationally reported and publicized “thereby causing noncompliance to carry with it significant risks of public disapprobrium as well as potential reprisals or other enforcement actions.”<sup>156</sup>

However, it is unlikely that these world pressures are sufficient to enforce most ICJ decisions. The lack of ICJ enforcement methods, both internationally and domestically, prevents ICJ rulings from having any truly binding effect in lieu of the parties’ consent. Many nations have little to no incentive to be considered a reliable treaty partner and have little regard for international opinions due to an already tarnished reputation, lack of international stature, or political and economic independence.<sup>157</sup> Furthermore, even if the nation is concerned about the damage to its international opinion, it may balance the costs and benefits and decide that it is still in its best interest to breach.<sup>158</sup> As a result, international pressure is unlikely to overcome the incentive of states to breach treaties.

Therefore, even if the ICJ were to ignore international precedent and rules by extending jurisdiction over Rwanda for violating the “object and purpose” of the Genocide Convention, it would have no real leverage to enforce the ruling. Due to the lack of enforcement powers for the ICJ, Rwanda would have little to no incentive to actually follow an ICJ ruling should the ICJ assert jurisdiction. The ICJ has no enforcement mechanisms to compel Rwanda to comply and an appeal from

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153. *Id.* at 882. See also *Breard v. Greene*, 523 U.S. 371 (1998).

154. Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 *GEO. INT’L ENVTL. L. REV.* 51, 75 (2004).

155. John E. Noyes, *The Functions of Compromissory Clauses in U.S. Treaties*, 34 *VA. J. INT’L L.* 831, 875 (1994).

156. *Id.*

157. *Id.* at 877.

158. *Id.*



the DRC to the Security Council would likely fall on deaf ears, as has every appeal in the past. Although international pressure may have some effect on Rwanda, as a third world country with an unstable political system and a history of civil war and genocide, it is unlikely that Rwanda will be particularly swayed by international pressure—especially considering that it has previously refused to withdraw from the DRC despite international pressure.

#### D. IT IS UNLIKELY THAT RWANDA WOULD FOLLOW THE RULING

The contention that Rwanda would not have followed the ruling is buttressed by many examples of other states that have either refused to appear before the ICJ for hearings or not followed ICJ rulings in the past. The Court's struggles to assert jurisdiction in both "implied consent" jurisdiction and use of force cases bode poorly for the Court's ability to assert and enforce jurisdiction in *Armed Activities*. Absent consent, "the result could only be to force substantive rules on States reluctant to accept them, and that is rarely a good idea."<sup>159</sup> By one estimate, only sixty-eight percent of ICJ decisions have been complied with throughout history.<sup>160</sup>

The Court has had difficulty enforcing jurisdiction in "implied consent" cases where the losing party has contested jurisdiction. For example, in *Case Concerning Military and Paramilitary Activities in and against Nicaragua* the ICJ asserted jurisdiction over the United States despite the fact that the United States openly disputed jurisdiction by finding that the United States' reservation was not sufficient to avoid jurisdiction.<sup>161</sup> Once the United States lost its preliminary objection to jurisdiction, it rejected the ICJ's determination of "implied consent" jurisdiction by not appearing at the hearings.<sup>162</sup> The United States then refused to follow the decision of the Court once it was issued.<sup>163</sup> The result of the Nicaragua case was nothing short of a "fiasco."<sup>164</sup>

Furthermore, the ICJ has had little luck asserting

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159. Klabbers, *supra* note 62, at 153.

160. Ginsburg & McAdams, *supra* note 30.

161. *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1984 ICJ 392 (Nov. 26).

162. Jean-Marie Henckaerts, Book Review: *The Compulsory Jurisdiction of the International Court of Justice*, 27 GEO. WASH. J. INT'L L. & ECON. 265, 270 (1993).

163. Hubbard, *supra* note 36, at 174-175.

164. Posner and Yoo, *supra* note 107, at 9.

jurisdiction in use of force cases. In *Case Concerning United States Diplomatic and Consular Staff in Tehran*,<sup>165</sup> for example, the United States took Iran to the ICJ to secure the release of United States diplomatic hostages in Iran. Iran did not accept ICJ jurisdiction, did not appear, and did not release the hostages.<sup>166</sup> The United States did not even trust the ICJ enough to rely on its judgment: the United States attempted to free the hostages by military action during the ICJ deliberations.<sup>167</sup>

The ICJ has even had difficulties compelling states to appear in use of force cases. Frequently, parties in use of force cases that dispute jurisdiction either make a preliminary objection to jurisdiction and then do not appear (as in the Nicaragua case), or just do not appear altogether (as in the Iran case).<sup>168</sup> Use of force cases involve national security, an important aspect of national sovereignty. In short, as one scholar argues, “[a] force case involves a serious threat to national security and even survival, as well as to image and prestige. No state would think it in its best interest to entrust security or survival completely to a third-party adjudicator composed of judges from other states.”<sup>169</sup>

Furthermore, the problem with use of force cases is that, in most cases, “the point of seeking or desiring a legal solution has passed.”<sup>170</sup> The state that is engaging in the use of force has already enacted its own dispute resolution system—use of force.<sup>171</sup> Therefore, the opportunity for the ICJ to receive the consent necessary to obtain respect for its decision has already passed. It is unlikely that increasing the amount of compulsory jurisdiction by waiving jurisdictional reservations would solve this problem.<sup>172</sup> As a result, it is unsurprising that the ICJ has been not been able to gain state compliance in use of force cases. One study found that in the twenty-three use of force cases since the ICJ’s inception, only two rulings have been followed.<sup>173</sup> In fact, “[d]isputes involving . . . a history of armed conflict received

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165. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ 3 (May 24).

166. Hubbard, *supra* note 34, at 174.

167. *Id.*

168. *Id.* at 178.

169. *Id.* at 186.

170. *Id.*

171. *Id.*

172. *Id.* at 186–87.

173. Ginsburg & McAdams, *supra* note 30, at 1327.

the lowest level of compliance" of any kind of dispute.<sup>174</sup>

As for "implied consent" jurisdiction, or more broadly, any kind of contested jurisdiction case, the ICJ has had little success convincing states to comply with its rulings. Tom Ginsburg and Richard McAdams conducted a study that found that the most statistically significant indicator of compliance was lack of preliminary objections.<sup>175</sup> Therefore, the Court is more likely to successfully adjudicate a dispute and receive compliance from willing states than from reluctant states.

Throughout its history, the ICJ has been unable to resolve cases involving "implied consent" jurisdiction, use of force issues, and preliminary objections: therefore, it is unlikely that the ICJ will achieve compliance here. In *Armed Activities*, had the ICJ ruled on the case, it would have been asserting "implied consent" jurisdiction over preliminary objections on a use of force issue. In short, all of the elements of this case point to the fact that even if the Court was to assert jurisdiction, Rwanda would likely not appear before the tribunal and would not adhere to the ICJ's decision.

#### E. THE ICJ'S DECISION PRESERVES ITS INTEGRITY AND DECISION MAKING AUTHORITY FOR OTHER CASES

Despite the fact that the ICJ has been notoriously ineffective at solving use of force cases, the ICJ still plays an important role in dispute resolution, a role that is jeopardized if the ICJ overreaches its bounds and damages its authority by frequently being rebuked by nonconsenting states. By ruling for the DRC, the ICJ would be setting the precedent that jurisdictional reservations are void. This would open up the possibility of a large number of nonconsenting states becoming subject to ICJ jurisdiction, only to ignore the ICJ's rulings. A large volume of ineffectual ICJ rulings could damage the court's reputation and weaken its ability to successfully adjudicate cases before willing parties.<sup>176</sup>

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174. Colter Paulson, *Compliance with Final Judgments of the International Court of Justice since 1987*, 98 AM. J. INT'L L. 434, 457 (2004).

175. Ginsburg & McAdams, *supra* note 30, at 1313.

176. Additionally, the ICJ may lose its symbolic position in world affairs. The ICJ serves a symbolic role as "an important symbol of global yearning for the application of the rule of law in addressing transnational conflict." Sean D. Murphy, *Amplifying the World Court's Jurisdiction Through Counter-Claims and Third-party Intervention*, 33 GEO. WASH. INT'L L. REV. 5, 28 (2000). The ICJ continues to be a beacon of light for the hope that states can work together in "a new, more civilized

The ICJ plays an important role in the international dispute resolution framework as a consent-based advisor, arbitrator, and adjudicator of world disputes. It is not disputed that states voluntarily comply with the vast majority of ICJ decisions in consensual situations.<sup>177</sup> If the ICJ were to expand its jurisdiction, it would become increasingly marginalized and ignored by the world community, jeopardizing its vital participation in world dispute resolution.<sup>178</sup> It would lose its ability to adjudicate disputes between willing parties by creating a “general disdain for and disbelief in the effectiveness of those processes.”<sup>179</sup> Furthermore, increased participation in use of force, hostile, nonconsensual cases will enlarge the perception of the ICJ as an unfriendly adjudicator, rather than as a “consent-based . . . advisor and arbitrator.”<sup>180</sup>

The ICJ made the correct decision in *Armed Activities* because a precedent placing unwilling states under ICJ jurisdiction would merely increase the amount of noncompliance with ICJ decisions. As a result, the Court would have lost a significant amount of prestige and would have jeopardized its ability to successfully function. It is important that the Court recognize its position as a consent-based advisor and arbitrator that provides dispute resolution to disputing states willing to recognize it as authoritative. The ICJ must be careful not to assert its authority on unwilling parties by exercising jurisdiction over their objections. In *Armed Activities*, the ICJ recognized its role and opted not to attempt to extend jurisdiction into areas that may harm its legitimacy.

## CONCLUSION

The ICJ made the correct decision in the *Armed Activities* case. First, the Genocide Convention benefits from having as many countries as possible subscribe to its general tenets. The larger the number of states party to the Convention, the greater the chance that the Convention will be considered normative international law. It also increases the chances that signatory

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means of conducting world affairs.” *Id.*

177. Paulson, *supra* note 174. For instance, the court assisted in getting Libya to pull troops out of Northern Chad, and ameliorating actions between Nigeria and Cameroon. Murphy, *supra* note 176.

178. Hubbard, *supra* note 34, at 168.

179. *Id.*

180. *Id.*

nations will follow the provisions to which they have agreed. A ruling that jurisdictional reservations are void and severed, and that states are now bound to a provision of the treaty they never signed, will lead to withdrawals from the treaty, inconsistent enforcement, and damage to the treaty's overall goals. Although it seems counterintuitive that the "object and purpose" of the Convention may be served by allowing states to avoid jurisdiction should they violate it, the benefits of having a great number of signatories outweigh the costs of having one or two nations breach the treaty without consequences.

Furthermore, even if the Court held Rwanda's jurisdictional reservation void, it is unlikely that it would be enforceable. The Court only has jurisdiction over those countries that consent to jurisdiction, and Rwanda clearly has not consented to jurisdiction in this case (and is, in fact, disputing it). Therefore, on a purely legal basis, the Court had no choice but to rule against the DRC. If the Court was to override Rwanda and find that it had consented by signing the treaty, it is unlikely that Rwanda would comply. Rather, Rwanda would just ignore the Court's order and damage the Court's legitimacy, as the Court has no practical enforcement powers.

Contrary to popular belief in major powers like the United States, the Court's legitimacy is very important. The Court makes important decisions as a consent-based arbiter between states, serving as an important body for states to solve crises. However, the Court's past success and expertise will be jeopardized in the future if the Court begins to attempt to exercise jurisdiction over nations such as Rwanda, which is in a use of force dispute and has not consented. As Rwanda and other states continue to ignore the Court, its legitimacy will wane even in areas where it is currently strong. The ICJ does not need to change to be more effective in use of force disputes; it needs to recognize its role in the present international system and focus on its strengths.

The ICJ had no choice but to rule for the DRC. It was compelled to both by its own jurisdictional limits and legal interpretation as well as practical policy goals. Undoubtedly, the situation in the DRC is a tragic situation. However, the critics of the *Armed Activities* decision not only disregard the ICJ's jurisdictional rules but also the ICJ's role in the world. The ICJ was not equipped to assert jurisdiction over Rwanda in *Armed Activities*. Although the plight of the DRC and its people deserves world recognition and a peaceful solution, the answer

is not to use an institution which is not fit for solving those types of crises. Instead, the answer is to reach a world consensus and leave the ICJ doing what it does best: dispute resolution between two consenting nations.

