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REACCEPTING THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE: A PROPOSAL FOR A NEW UNITED STATES DECLARATION

On October 7, 1985, the United States gave notice that it had opted to end its forty-year acceptance of the "compulsory jurisdiction" of the International Court of Justice (ICJ or the Court).[1] In explaining the President's decision to terminate the United States Declaration of Recognition of Compulsory Jurisdiction,[2] the State Department cited, among other things, the lack of protection afforded by extant reservations to the Court's jurisdiction, and the inability of the United States to use its own acceptance to bring other states before the Court. Perhaps the primary reason, similar to that advanced following the United States withdrawal from the litigation brought by Nicaragua against the United States,[3] is the administration's belief that the composition of the Court is essentially hostile to United States interests.[4]

This Comment analyzes the administration's cessation of its obligations under the ICJ's compulsory jurisdiction and concludes that the decision was unwarranted in failing to recognize valid alternatives which answer objections to the Court's alleged politicization. An examination of the role of compulsory jurisdiction in ICJ adjudication, United States practice under compulsory jursidiction, and the bases for the administration's decision provide an analytic foundation for the evaluation of alternatives to outright termination. Those alternatives are analyzed in light of the administration's specific grievances. The Comment recommends reconsideration of the decision and adoption of procedural innovations in the form of

1. *See* Letter from Secretary of State Schultz to the Secretary-General of the United Nations (Oct. 7, 1985), *reprinted in* 24 I.L.M. 1742 (1985).

2. United States Declaration of Aug. 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598, 1 U.N.T.S. 9 [hereinafter 1946 Declaration]. Pursuant to the terms of the 1946 Declaration, the termination became effective 6 months after deposit of the notice.

3. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Judgment of Nov. 26 on Jurisdiction and Admissibility). *See also* Military and Paramilitary Activities in and Against Nicaragua 1984 I.C.J. 169 (Order of May 10). Unless otherwise indicated, all references to the *Paramilitary Activities* case will be to the Judgment of Nov. 26.

4. *See* U.S. DEP'T OF STATE, *U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ* (Statement of Jan. 18, 1985), 85 DEP'T ST. BULL. No. 2096, at 64 (Mar. 1985) [hereinafter *Statement on Withdrawal*]; U.S. DEP'T OF STATE, *U.S. Terminates Acceptance of the ICJ Compulsory Jurisdiction* (Statement of Oct. 9, 1985), 86 DEP'T ST. BULL. No. 2106, at 67 (Jan. 1986), *reprinted in* 24 I.L.M. 249 (1985) [hereinafter *Statement on Termination*]; *The United States and the World Court, Current Policy No. 78, Statement of Dec. 4, 1985 Before the Senate Foreign Relations Committee* (statement of Dep't Legal Adviser A. Sofaer), *reprinted in* 86 DEP'T ST. BULL. No. 2106, at 67 [hereinafter *Sofaer Statement*]; Robinson, *Letter to the Editor in Chief*, 79 AM. J. INT'L L. 423 (1979); N.Y. Times, Oct. 7, 1985, at A3, col. 1; N.Y. Times, Oct. 6, 1985, at A1, col. 6.

proposed "reservations" to a future United States declaration of acceptance of the ICJ's compulsory jurisdiction.[5]

I. THE ICJ

A. *Background*

The ICJ is the principal judicial organ of the United Nations.[6] It functions pursuant to the Statute of the Court,[7] which is annexed to, but not incorporated into, the Charter of the United Nations. Although the Court's Statute is considered an integral part[8] of the Charter, the Court remains independent in the exercise of its substantive functions.[9]

The ICJ is the successor to the Permanent Court of International Justice, established in 1920 under the auspices of the League of Nations. The Statute and procedures of the present Court are substantially the same as those of the earlier body.[10] However, the organic connection between the ICJ and the members of the United Nations is more pronounced than that

5. Discussion is predicated on the assumption that the idea of compulsory jurisdiction (and, for that matter, the existence of the Court itself) is a good thing—an issue that will be noted only briefly. For more definitive analyses, see generally *Review of the International Court of Justice, Report of the Secretary-General*, 26 U.N. GAOR (Agenda Item 97) at 7–15, U.N. Doc. A/8382 (1971) [hereinafter *Report of the Secretary-General*]; C.W. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION (1964); D'Amato, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT'L L. 385, 400–05 (1985); Gross, *Conclusions*, in 1 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 729–33 (L. Gross ed. 1976) [hereinafter FUTURE OF THE ICJ]; Rogers, *The Rule of Law and the Settlement of International Disputes*, 1970 PROC. AM. SOC'Y INT'L L. 285, 286; Warren, *Toward a More Active International Court*, 11 VA. J. INTL L. 295 (1971). *But cf.* G. Scott & C. Carr, The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause (unpublished manuscript presented to the 1986 Convention of the International Studies Association, Anaheim, California) (the Optional Clause ought to be abolished); Goldwater, *Foreward* to D. KITCHEL, TOO GRAVE A RISK: THE CONNALLY AMENDMENT ISSUE 7 (1963) (the World Court holds a sinister threat for United States sovereignty).

6. U.N. CHARTER arts. 7, 92.

7. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE.

8. U.N. CHARTER art. 92.

9. For instance, the ICJ can and does have a wider membership than the United Nations itself. *See States Entitled to Appear Before the Court*, 1984–1985 I.C.J.Y.B. 47, 47–54 (1985). Liechtenstein, San Marino, and Switzerland are states not members of the United Nations that are at present parties to the ICJ Statute. *Id.* at 52.

Similarly, while the Statute can be amended in the same way as the Charter, the ICJ has drawn up its own Rules of Court pursuant to the powers conferred upon it by article 30, paragraph 1 of the Statute. *See infra* note 18.

For a general discussion of the relationship between the Court and the U.N., see Note, *The International Court of Justice: A Key to World Peace*, 14 GEO. WASH. L. REV. 480, 483–97 (1946).

10. The ICJ does not correlate perfectly with the Permanent Court. Certain technical adjustments account for the disappearance of the League, to which the former Court was an adjunct, and for the organization of the United Nations. *See* INTERNATIONAL COURT OF JUSTICE, THE INTERNATIONAL COURT OF JUSTICE 14–20 (1976); Note, *Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice*, 38 STAN. L. REV. 165, 166 & n.9. (1985).

which existed between the Permanent Court and the members of the League.[11]

The Charter of the United Nations provides that "All Members of the United Nations are *ipso facto* parties to the Statute."[12] This has the important effect of organizing the international political community into an international judicial framework. The provision perforce confers recognition of the authority of the Court in its capacity as one of the principal organs of the United Nations.[13] In theory, this enhances the linkage between international political problems and legal problems.[14] In other words, implicit in United Nations membership is the recognition that international legal disputes can be resolved by binding adjudication.[15]

B. Jurisdiction

The ICJ's jurisdiction[16] is, by statute, premised on the consent of the parties,[17] and only states may be parties in cases before the Court.[18] These

11. *See* Note, *supra* note 9, at 482–83.

12. U.N. CHARTER art. 93, para. 1. Article 93, para. 2 of the Charter provides that states which are not members of the United Nations may become parties to the Statute on conditions determined by the General Assembly on recommendation of the Security Council. *See States Entitled to Appear Before the Court*, 1984–1985 I.C.J.Y.B. 47, 51–52 (1985).

13. This does not mean, however, that membership in the United Nations requires acceptance of the Court's compulsory jurisdiction.

14. In practice, however, states regard international disputes as fundamentally political in nature. *See* Rovine, *The National Interest and the World Court*, in 1 FUTURE OF THE ICJ, *supra* note 5, at 313, 318–19. For a discussion of the importance of the law/politics dichotomy in connection with the jurisdiction of the ICJ, see G. Scott & C. Carr, *supra* note 5, at 21–27.

15. The question of the binding force of an ICJ judgment is distinct from that of enforceability, with which this Comment is not primarily concerned. On the international plane, the problem of jurisdiction is generally more important than the problem of securing compliance with decisions. As jurisdiction is based on consent, such consent implies consent to abide by the Court's decisions, which should be complied with in good faith. Article 94, paragraph 1, of the Charter provides: "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." Thus, enforcement of judgments is left primarily to the parties as a matter of legal obligation, with residual enforcement authority in the Security Council under article 94, paragraph 2, which has never been invoked. Problems involving efforts to bring about compliance have been extremely rare. Kerley, *Ensuring Compliance with Judgments of the International Court of Justice*, in 1 FUTURE OF THE ICJ, *supra* note 5, at 276. Nonetheless, it has been suggested that the degree of actual compliance is a measure of the power and importance of the court, particularly in cases involving compulsory jurisdiction. *See, e.g.*, S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 116 (2d rev. ed. 1985); Schachter, *The Enforcement of International and Arbitral Decisions*, 54 AM. J. INT'L L. 1, 5 (1960).

16. The term "jurisdiction" will be used to refer to the capacity of the ICJ to decide concrete cases with binding force.

17. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, para. 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.").

18. *Id.* art. 34, para. 1. In this respect, the Court's jurisdictional limitation incorporates a

express limitations on the Court's jurisdiction—the principles of jurisdiction *ratione materiae* and *ratione personae,*[19] respectively—confer on states merely the ability to seek judicial settlement of international disputes before the ICJ.[20] Thus, a decision to have recourse to the Court is necessarily "a deliberate political decision."[21] As such, the Court's jurisdiction depends more on recognition of international legal accountability than on the exercise of judicial power.[22]

The mutual consent of both parties to the dispute, *either for a particular case or generally for future cases,* is required for the Court to be seised of a dispute. It is this agreement *ratione materiae,* that determines the jurisdiction of the Court so far as the particular dispute is concerned.[23] The concept

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traditional tenet of international law: "[I]nternational Law is primarily concerned with the rights and duties of States . . . ; States only possess full procedural capacity before international tribunals." 1 L. OPPENHEIM, INTERNATIONAL LAW 20 (7th ed. 1948). *But see* Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 179 (Advisory Opinion) (international organizations can and do possess international personality, so as to be capable of advancing international claims, although they do not possess full procedural capacity).

Statehood itself is a necessary, but not a sufficient, condition to confer full procedural capacity before the ICJ. Membership in the United Nations, or accedence to the Statute without membership, affords an applicant or intervening party access to the Court. *See supra* notes 9 & 12. "[I]f the respondent State is not likewise qualified the Court will not be in a position to exercise jurisdiction against it." S. ROSENNE, *supra* note 15, at 267. The Court is also open to states that are not parties to the Statute upon conditions laid down by the Security Council. *See States Entitled to Appear Before the Court,* 1984–1985 I.C.J.Y.B. 47, 52–54 (1985).

Apart from its jurisdiction to deal with contentious cases, the ICJ also has the power to give advisory opinions on "any legal question" at the request of the General Assembly of the United Nations, the Security Council, Specialized Agencies, or other duly authorized bodies. U.N. CHARTER art. 92; STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, arts. 65–68; *Rules of Court,* arts. 87–91, 1978 I.C.J. Acts & Docs. No. 4, at 93, *reprinted in* 73 AM. J. INT'L L. 748 (1979), *also reprinted in* S. ROSENNE, DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 205–73 (2d ed. 1979) [hereinafter *Rules of Court*].

19. The two jurisdictional principles are the rough equivalents of the familiar concepts of personal and subject-matter jurisdiction in domestic law.

20. A third principle, "jurisdiction *ratione temporis,*" does not exist as an express independent jurisdictional requirement either in the Statute or opinions of the Permanent or present Court. The implications of time on the scope of ICJ jurisdiction are generally limited to "reservations *ratione temporis,*" which restrict the period in which states can assert otherwise valid jurisdiction against the declarant. *See infra* text accompanying notes 78–82. "This means that an objection *ratione temporis* to the jurisdiction of the Court can never be more than a secondary objection to jurisdiction." S. ROSENNE, *supra* note 15, at 329–31.

21. S. ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 65 (3d rev. ed. 1973). *See also* Fischer, *Decisions to Use the International Court of Justice,* 26 INT'L STUD. Q. 251 (1982) (discussing the bases for national decisions regarding ICJ litigation).

22. *Cf.* Justice Holmes' assertion in McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power . . . .").

23. Article 36, paragraph 1 of the Statute enunciates this general principle. *See supra,* note 17. *Cf.* U.N. CHARTER art. 36 (The Security Council, which may at any stage of a dispute recommend appropriate procedures or methods of adjustment, shall "take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice."); Corfu Channel (U.K. v. Alb.), 1948 I.C.J. 15, 26 (Preliminary Objection) (finding a recommendation by the Security

of consent in ICJ adjudication is multifaceted, because consent to ICJ jurisdiction may be conferred in a number of ways.

Article 36, paragaph 1 of the Statute contemplates two basic procedures by which a state may indicate its consent. The first procedure is where the parties bilaterally agree to submit an already existing dispute to the ICJ and thus to recognize its jurisdiction over that particular case.[24] The second procedure is where treaties or conventions in force confer jurisdiction on the Court.[25]

Another means of consenting to the Court's jurisdiction, known as the "Optional Clause,"[26] is described in paragraph 2 of Article 36 of the

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Council to this effect insufficient to confer jurisdiction on the Court independently of the wishes of the parties to the dispute).

24. Such a special agreement is generally referred to as a *compromis*. S. ROSENNE, *supra* note 21, at 68. Once a *compromis* has been duly submitted, the Court can entertain the case. *See, e.g.*, Minquiers and Ecrehos (Fr. v. U.K.), 1953 I.C.J. 47, 49 (Judgment of Nov. 17); Sovereignty Over Certain Frontier Land (Belg. v. Neth.), 1959 I.C.J. 209, 210–11 (Judgment of June 20); North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 5–7 (Judgment of Feb. 20).

25. It has become a general international practice to include, in both bilateral and multilateral international agreements, provisions stipulating that certain disputes shall, either immediately or after the failure of other means of peaceful settlement, be referred to the ICJ. Such provisions are called compromissory clauses, and their wording generally varies from one treaty to another. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. IX, 78 U.N.T.S. 277; Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, art. 19(2), 14 U.S.T. 1284, T.I.A.S. No. 5432. *See generally Chronological List of Other Instruments Governing the Jurisdiction of the Court*, 1984–1985 I.C.J.Y.B. 102, 102–118 (1985). The States signatory to such agreements may, if a dispute of the kind envisaged in the compromissory clause of the treaty arises between them, either file an application instituting proceedings against the other party or parties in the ICJ, or conclude a special agreement with such a party or parties providing for the issue to be referred to the ICJ.

A third procedure, known as *"forum prorogatum,"* occurs when a dispute is brought before the Court where at the time of the institution of the proceedings only one of the disputants has validly recognized its jurisdiction over the case in question and the other has not. The latter state may subsequently recognize the Court's jurisdiction, and the Court thereby obtains jurisdiction. This situation is quite rare in practice. *See* T. ELIAS, THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS 41–42 (citing Mavrommatis Jerusalem Concessions (Greece v. U.K.), 1927 P.C.I.J. (ser. A) No. 11; Rights of Minorities in Upper Silesia (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15; *Corfu Channel*, 1984 I.C.J. 15. *See generally* Waldock, Forum Prorogatum *or Acceptance of a Unilateral Summons to Appear before the International Court*, 2 INTL L.Q. 377 (1948).

26. The term "Optional Clause" is an inaccurate description. The original "Optional Clause" was a special protocol attached to the 1920 Protocol of Signature of the Statute of the Permanent Court, which served as a form for declarations under Article 36 of the Permanent Court's statute. The Statute of the present Court contains no protocol of signature, but provides for declarations to be deposited with the Secretary-General of the United Nations. Thus, there is no longer an Optional Clause in the former sense, and the term is now used to refer to Article 36, paragraph 2 itself. Merrills, *The Optional Clause Today*, 1979 BRIT. Y.B. INT'L L. 87, 88 n.1. The wording of the clause is almost identical to the jurisdictional provision which preceded it in the Statute of the Permanent Court. Consequently, the Permanent Court's jurisdictional interpretations of the former clause, by analogy, are accorded persuasive precedential authority in ICJ decisions. For a history of the compulsory jurisdiction of the Permanent Court, see generally M. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920–1942: A TREATISE 449–82 (1972); Loder, *The Permanent Court of International Justice and*

Statute: parties to the Statute may, by declaration, recognize the Court's compulsory jurisdiction in certain classes of international legal diputes.[27]

Although jurisdiction under the Optional Clause is referred to as an exercise of the Court's "compulsory jurisdiction," it is in reality another manifestation of the consensual basis of ICJ jurisdiction. The Court may exercise compulsory jurisdiction over only those states which have expressly consented to the Optional Clause.[28] When a state deposits a declaration with the Secretary-General of the United Nations in accordance with Article 36, paragraph 4 of the Statute,[29] it immediately[30] has the right to institute proceedings against other states which are parties to the system, and the obligation to submit to the Court's jurisdiction when it is invoked by such other states. In effect, consent to the Optional Clause system is tantamount to a waiver of a state's absolute sovereignty.[31] Thus, in theory, compulsory jurisdiction is a powerful procedure for the pacific settlement of international disputes. In practice, however, reluctance of States to deposit and maintain declarations under Article 36, paragraph 2, together with the tendency of States to qualify their acceptances with reservations,

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Compulsory Jurisdiction, 1921-1922 BRIT. Y.B. INT'L L. 6; Richards, *The Jurisdiction of the Permanent Court of International Justice*, 1921-1922 BRIT. Y.B. INT'L L. 1. For a discussion of the technical differences between the two Statutes, see S. ROSENNE, *supra* note 15, at 367–69.

27. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, para. 2. Four classes of disputes are specified:

> (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. The system of the Optional Clause enables the jurisdiction of the Court to be recognized by "unilateral adherance to a multilateral act." INTERNATIONAL COURT OF JUSTICE, THE INTERNATIONAL COURT OF JUSTICE 36 (1976).

Article 36, paragraph 5 of the Statute provides that declarations made under the Statute of the Permanent Court and still in force are deemed, as between the parties to the Statute of the ICJ, to be acceptances of the compulsory jurisdiction of the ICJ for the period in which they still have to run and in accordance with their terms.

28. For purposes of this Comment, the term "compulsory jurisdiction" will be used interchangeably with the term "Optional Clause" to refer to jurisdiction under Article 36, paragraph 2 of the Statute. In some contexts, the term refers to situations "where a conventional title of jurisdiction under Article 36(1) permits the institution of proceedings by application." S. ROSENNE, *supra* note 15, at 312 n.1.

29. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, para. 4 ("Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and the Registrar of the Court.").

30 A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance. For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned.

Right of Passage Over Indian Territory (Port. v. India), 1957 I.C.J. 125, 146 (Preliminary Objections).

31. *See* Note, Nicaragua v. United States *in the International Court of Justice: Compulsory Jurisdiction or Just Compulsion?*, 8 B.C. INT'L & COMP. L. REV. 471, 508–09 (1985).

enfeeble the ideal of the Optional Clause system.[32]

Over the years, the number of states recognizing the compulsory jurisdiction of the Court has declined both relatively and absolutely.[33] Commentators and the Court have expressed concern over this unwillingness on the part of states to make declarations under the Optional Clause.[34] This concern, in part, resulted in two revisions of the Rules of the Court.[35] Equally disturbing, and more threatening to the functioning of the Optional Clause system, is the frequent qualification of acceptances of the Optional Clause by the insertion of far-reaching reservations in declarations.[36]

C. Reservations and Conditions

By its terms, paragraph 3 of Article 36 of the Statute permits the inclusion of conditions regarding reciprocity and time limits upon the

32. *See* Waldock, *Decline of the Optional Clause*, 1957 BRIT. Y.B. INT'L. L. 244 *passim;* Merrills, *supra* note 26, at 87.

Additionally, there has been a general reluctance on the part of states to submit disputes to the two international courts. The Permanent Court dealt with 51 contentious cases in 17 years. The ICJ has dealt with approximately that number in 40 years. Of these, only a small percentage resulted in final judgment on the merits. *See* L. KREINDLER, WORLD PEACE THROUGH LAW AND LAWYERS 13 n.1 (1974); *Sofaer Statement, supra* note 4, at 68. These caseloads have been decried as "dismal." L. KREINDLER, *supra*, at 13. For discussions of this reluctance and the reasons therefore, see generally Claude, *States and the World Court: The Politics of Neglect*, 11 VA. J. INT'L L. 344 (1971); Fitzmaurice, *Enlargement of the Contentious Jurisdiction of the Court*, in 2 FUTURE OF THE ICJ, *supra* note 5, at 461; Gross, *The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the International Legal Order*, in 1 FUTURE OF THE ICJ, *supra* note 5, at 22; Jessup, *The International Court of Justice Revisited*, 11 VA. J. INTL L. 299 (1971).

33. Today, the figure has fallen to less than 30%: 47 of the 162 states entitled to accept the Court's compulsory jurisdiction now do so. *See Sofaer Statement, supra* note 4, at 68. To put it mildly, "[t]his compares very unfavorably" with the highwater mark of declarations under the Permanent Court, which in 1934 had 42 states recognizing compulsory jurisdiction out of 54 in the League. Gross, *supra* note 32, at 30; Waldock, *supra* note 32, at 245.

34. *See, e.g.*, Fitzmaurice, *supra* note 32, at 461–70; Gross, *supra* note 32; C.W. JENKS, *supra* note 5, at 2–3; Weissberg, *The Role of the International Court of Justice in the United Nations System: The First Quarter Century*, in 1 FUTURE OF THE ICJ, *supra* note 5, at 131, 161–63.

35. On May 10, 1972 the Rules of Court were amended and renumbered. On April 14, 1978 the Court adopted revised rules. For analyses of the effects of these changes, see generally Hambro, *Will the Revised Rules of Court Lead to Greater Willingness on the Part of Prospective Clients?*, in 1 FUTURE OF THE ICJ, *supra* note 5, at 365; Rosenne, *Some Reflections on the 1978 Revised Rules of the International Court of Justice*, 19 COLUM. J. TRANSNAT'L L. 235 (1981).

36. Merrills, *supra* note 26, at 87. For purposes of this Comment, the term "reservation" will be deemed to include "reservations, conditions, exclusions, exceptions or limitations on the jurisdiction recognized by the Declaration." Briggs, *Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice*, 93 RECUEIL DES COURS 223, 230 (1958–I). The term "condition" is used to describe "stipulations relating to the force of the declaration as an instrument." S. ROSENNE, *supra* note 15, at 389. Hereinafter, conditions will be subsumed usually, but not invariably, in the term "reservations."

duration of a declaration.[37] The Statute nowhere refers to the possibility or right of making reservations excluding certain disputes, matters, or parties from an acceptance of compulsory jurisdiction.[38] However, it has been generally recognized that states have an inherent right to qualify their declarations under the Optional Clause by forms of reservations other than those provided for in the Statute.[39] State practice and decisions of the ICJ have established the permissibility of particular reservations.[40] However, two overriding principles have emerged as qualifications on the scope and application of reservations: reciprocity of effect and consistency with the object and purpose of the Statute.[41]

1. The Principle of Reciprocity

A basic provision of the Statute applying to every declaration under the Optional Clause is the principle of reciprocity. This principle derives from the language of the Optional Clause itself, under which every declaration is expressed to operate only "in relation to any other State *accepting the same obligation.*"[42] Although the Court has not so stated, reciprocity is considered to be an inherent condition in every declaration under the Optional Clause, even in a declaration expressed to be made "unconditionally."[43]

37. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, para. 3 ("The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time."). In this context, a "condition of reciprocity" means a condition that a declaration will not come into force unless and until a certain number of states, or certain named states have made declarations accepting the Optional Clause. Brazil is the only state ever to use this form of condition. Waldock, *supra* note 32, at 255.

38. At the founding conferences of both the Permanent Court and the ICJ, it was seriously argued that jurisdiction should be, without exception, truly compulsory. *See* R.P. ANAND, COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 30–44 (1961).

39. *See* R.P. ANAND, *supra* note 38, at 187–89.

40. Briggs, *supra* note 36, at 233. This practice also was recognized in resolutions of the League of Nations and by the subcommittee of the San Francisco Conference.

> As is well known, the article has consistently been interpreted in the past as allowing states accepting the jurisdiction of the Court to subject their declarations to reservations. The Subcommittee has considered such interpretation as being henceforth established. It has therefore been considered unnecessary to modify paragraph 3 in order to make express reference to the right of the states to make such reservations.

Doc. 702, 13 U.N.C.I.O. 559 (1945). *See also* 10 LEAGUE OF NATIONS O.J. 1671 (1928).

41. A subsidiary principle—non-retroactivity—provides that the Court can never be divested of jurisdiction retrospectively. *See* Nottebohm (Liecht. v. Guat.), 1953 I.C.J. 111, 123 (Preliminary Objection). This principle primarily applies to situations involving termination and variation of declarations.

42. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, para. 2 (emphasis added).

43. Waldock, *supra* note 32, at 255. *But see* S. ROSENNE, *supra* note 15, at 384:

> [I]t has been suggested that Article 36(3), with its reference to 'unconditionally', makes it possible for reciprocity to be excluded if a State so wills: the implication of this view is that reciprocity is not inherent, but has to be specifically mentioned.

See also Briggs, *supra* note 36, at 239–42 (citing contrary authority).

The Court has interpreted Article 36 to require that when the Court is seised of a dispute on the basis of compulsory jurisdiction, the reservations of each declaration will be binding on both parties, in the sense that each party is entitled to invoke any relevant reservation appearing in either party's declaration.[44] In practice, this means that in a given dispute, the common jurisdictional ground upon which the parties consent is delimited by the declaration that accepts the Court's compulsory jurisdiction within narrower limits, as measured by the impact of its reservations.[45]

Although the Court's interpretations of reciprocity have been consistent over a long period of time,[46] the application of the doctrine is hardly crystallized, as demonstrated in the recent *Paramilitary Activities* case.[47] For the first time, the Court held that declarations are governed under the

44. S. ROSENNE, *supra* note 15, at 386. Compare this "principle of reciprocity" with the "condition of reciprocity", *supra* note 37 (the condition of reciprocity is a statutorily recognized reservation, as opposed to a jurisdictional doctrine).

45. In the first case to discuss the principle of reciprocity, the Court stated that its jurisdiction "only exists within the limits within which it has been accepted." Phosphates in Morocco (Italy v. Fr.), 1938 P.C.I.J. (ser. A/B) No. 74, at 27 (Preliminary Objections). The Court concluded that it did not have jurisdiction to decide the dispute, since the violation had not occurred within the temporal limits imposed by a reservation appearing in one of the declarations. The issue of reciprocity was more directly addressed in Electricity Company of Sofia and Bulgaria (Bulg. v. Belg.), 1939 P.C.I.J. (ser. A/B) No. 78, at 81 (Preliminary Objection), where the Permanent Court determined that a Belgian reservation could be invoked by Bulgaria under the doctrine of reciprocity.

The ICJ cases involving the substance of reciprocity have developed the doctrine along similar lines. In Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 23–24 the Court first noted that it would follow the jurisprudence of the Permanent Court in *Phosphates in Morocco* and *Electricity Company,* and its own judgment in Anglo-Iranian Oil Company (U.K. v. Iran), 1952 I.C.J. 93 (Preliminary Objection). The *Norwegian Loans* opinion further refined the doctrine by establishing that the principle of reciprocity operates not to enable the respondent to invoke the applicant's reservation as drafted, but to invoke its substance as applied to the respondent. *See* S. ROSENNE, *supra* note 15, at 386. This refinement continued in Right of Passage Over Indian Territory (Port. v. India), 1957 I.C.J. 125, 144 (Preliminary Objections), where the Court held that no violation of the reciprocity principle is committed by the filing of a "surprise" application, and that any jurisdictional rights which a state can claim for itself can be invoked against it for the duration of its own acceptance. The clearest definition of reciprocity appears in Interhandel (Switz. v. U.S.), 1959 I.C.J. 6, 23 (Preliminary Objections):

> Reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration. . . . Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party.

46. S. ROSENNE, *supra* note 15, at 387.

47. 1984 I.C.J. 392 (Judgment of Nov. 26).

The ICJ is not bound by the principle of stare decicis to follow its own or the Permanent Court's precedents. Article 59, as applied by Article 38, paragraph 1(d) of the Statute, limits the binding force of an ICJ decision to the parties in a particular case. Furthermore, Article 38, paragraph 1(d) relegates judicial decisions to the status of "subsidiary means for the determination of rules of law." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38, para. 1. In practice, however, the Court consistently cites its own previous judgments and those of the Permanent Court, and has created a "remarkable unity of precedent." Winiarski, 1961–1962 I.C.J.Y.B. 1, 2 (1962). *See also* S. ROSENNE, *supra* note 15, at 611–14.

treaty principle of good faith,[48] and that reciprocity does not apply to "the formal conditions of their creation, duration or extinction."[49] Accordingly, not all reservations can be reciprocally invoked.

2. *The Consistency of Reservations with Article 36: the Object and Purpose Test*

Article 36, paragraph 6 of the Court's Statute provides that: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."[50] On its face, this provision simply embodies the established principle of international law that every international tribunal has jurisdiction to determine its own jurisdiction (*compétence de la compétence*).[51] In theory, this means that Article 36, paragraph 6 provides the ICJ with a measure of judicial control over the preliminary question of the validity of reservations, and their compatibility with the object and purpose of the Optional Clause.[52] In practice, the compatibility

48. *Paramilitary Activities,* 1984 I.C.J. at 420.

49. *Id.* at 419. These findings have attracted some criticism. *See, e.g.,* Note, *supra* note 31, at 484 ("It was not until the Nicaraguan dispute arose . . . that the World Court made a dramatic shift in approach."). Judge Schwebel emphasized in his dissenting opinion in *Paramilitary Activities* that the Court had never previously come to such a conclusion. He claimed that reciprocity should apply to temporal provisions, and cited two Permanent Court decisions, one ICJ decision, and two scholarly works in support of his position. *Paramilitary Activities,* 1984 I.C.J. at 626 (Schwebel, J., dissenting) (citing *Anglo-Iranian Oil,* 1952 I.C.J. at 103; *Electricity Company,* 1939 P.C.I.J. at 81; *Phosphates in Morocco,* 1938 P.C.I.J. at 22; Waldock, *supra* note 31, at 258–61; Steinberger, *The International Court of Justice,* in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES 193 (H. Mosler & R. Bernhardt eds. 1974)). *But see* I. SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION 151 (1965) (a party cannot rely upon a condition in its opponent's declaration).

50. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, para. 6.

51. S. ROSENNE, *supra* note 15, at 439. *See also* Nottebohm (Liecht. v. Guat.), 1953 I.C.J. 111, 119 (Preliminary Objection). *See generally* I. SHIHATA, *supra* note 49.

52. In addition to adjudicatory challenge, objections to the admissibility of a reservation can be made by diplomatic means. The Secretary-General, pursuant to his Article 36, paragraph 4 function as depository of declarations, circulates all such observations sent to him by a state, regarding the terms of a declaration of another state, to all parties to the Statute. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, para. 4 ("Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court."). For an analysis of the effect of state practice on the interpretation of reservations, see Crawford, *The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court,* 1979 BRIT. Y.B. INT'L L. 63, 81.

One instance of a diplomatic challenge to a reservation on object and purpose grounds occurred in 1955. Sweden objected to the same Portuguese reservation that the Court subsequently held to be not inconsistent with the Statute. *See infra* note 77. Sweden claimed that the condition nullified "the obligation intended by the wording of Article 36, paragraph 2, of the Statute," Annexes to Preliminary Objection (Port. v. India) 1960 I.C.J. Pleadings (1 Right of Passage Over Indian Territory) 217 (Letter of Feb. 23, 1956), and was incompatible with a recognition of the compulsory jurisdiction of the Court. The Portuguese reply disputed the Swedish interpretation and stated that "[i]n any case, the Court alone is competent to pronounce on the validity of these declarations." *Id.* at 218 (Letter of July 5, 1956).

issue has received far more attention from commentators than from the Court.[53]

The foremost advocate of a strict application of compatibility review, Judge Lauterpacht,[54] maintained that the Court has a duty to consider, *proprio motu,* a reservation's validity. Judge Lauterpacht believed the Court should be guided by the principle of *compétence de la compétence* of Article 36, paragraph 6, and the principle of obligation, which he regarded as fundamental to Article 36, paragraph 2.[55] *Compétence de la compétence,* as applied to a particular reservation, dictates that a reservation cannot be used to deprive the Court of power to determine its jurisdiction.[56] The principle of obligation derives from the language "accepting the same obligation" in Article 36, paragraph 2.[57] It purportedly invalidates reservations that leave to the party making the declaration the right to determine the extent or existence of its obligation to submit to the jurisdiction of the Court.[58]

Central to Judge Lauterpacht's argument is the position that reservations are not severable from a declaration of acceptance.[59] Therefore, if a reservation is in some way invalid, the whole declaration is ineffective as an acceptance of compulsory jurisdiction. The Lauterpacht view has received significant critical acceptance,[60] but the Court itself has never wholly

53. *See, e.g.,* Crawford, *supra* note 52, at 68–83. One commentator dismisses the whole issue with a greater-includes-the-lesser argument: "Surely, if a party to the Court's compulsory jurisdiction can refuse to accept that jurisdiction altogether, it should be able to accept any lesser jurisdiction." 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, 335 (1986).

54. *See* Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 43–66 (separate opinion of Lauterpacht, J.); Interhandel (Switz. v. U.S.), 1959 I.C.J. 6, 101–19 (Lauterpacht, J., dissenting); *see also* Lauterpacht, *The British Reservation to the Optional Clause,* 10 ECONOMICA 137, 168–69 (1930).

55. Crawford, *supra* note 52, at 74–75. *See also* S. ROSENNE, *supra* note 15, at 373–74 (mutuality of obligation is an essential element of compulsory jurisdiction).

56. *Norwegian Loans,* 1957 I.C.J. at 47 (Lauterpacht, J., dissenting).

57. Crawford, *supra* note 52, at 74; S. ROSENNE, *supra* note 15, at 373.

58. *Norwegian Loans,* 1957 I.C.J. at 48. *See also Interhandel,* 1959 I.C.J. at 101:

> [I]rrespective of its inconsistency with the Statute, [a] reservation by effectively conferring upon [a state] the right to determine with finality whether in any particular case it is under an obligation to accept the jurisdiction of the Court, deprives the Declaration of Acceptance of the character of a legal instrument, cognizable before a judicial tribunal, expressing legal rights and obligations . . . .

59. *Id.* at 43–44.

60. Crawford, *supra* note 52, at 65 nn.4, 5 (contrast footnotes 4 and 5).

adopted this approach.[61] Indeed, the Court has never declared a reservation to be invalid.[62]

D. Reservations in State Practice

For purposes of conceptual differentiation, four broad categories of reservations have been recognized: reservations regarding termination and modification;[63] reservations *ratione temporis* (temporal reservations); reservations *ratione personae* (reservations as to parties); and reservations *ratione materiae* (subject-matter reservations).[64] As the history and practice of reservations has been well-documented,[65] the following will give only a brief overview of the respective categories.

Article 36, paragraph 3 of the Statute provides that declarations may be made "unconditionally . . . or for a certain time."[66] Acceptance of the Court's jurisdiction for a fixed period clearly amounts to a declaration "for a certain time," pursuant to Article 36. However, declarations may be terminated in several other ways. Declarations that do not expressly provide for termination, and those that are terminable on notice have both been subject to varying interpretations.[67]

Thirteen declarations currently contain no provision for termination.[68] Until recently, the Court had not spoken authoritatively on the issue of how

61. A dictum in the Aegean Sea Continental Shelf case referring to "the close and nessessary link that always exists between a jurisdictional clause and reservations to it," provides some confirmation of the inseverability view. Aegean Sea Continental Shelf (Greece v. Turk.), 1978 I.C.J. 1, 33 (Judgment of Dec. 19). *But see* I. SHIHATA, *supra* note 49, at 296 ("Nothing in the practice of the Court suggests that it will be inclined to follow the Lauterpacht theory.").

62. The only instance in the history of the two Courts of adjudication on the validity of a reservation occurred in Right of Passage Over Indian Territory (Port. v. India), 1957 I.C.J. 125 (Preliminary Objections). It was argued that a certain reservation was incompatible with the the Optional Clause, so that the whole declaration was invalid as an acceptance of compulsory jurisdiction. *Id.* at 141. The ICJ upheld the validity of a Portuguese reservation and therefore found it unnecessary to decide the severability issue. *Id.* at 144. The Court did, however, assert authority to "determine the meaning and the effect" of the reservation "by reference to its actual wording and applicable principles of law." *Id.* at 142. Although the "applicable principles of law" were not specified, the Court did examine the reservation's practical implications in terms of Article 36, and reached the conclusion that it was "not inconsistent with the Statute." *Id.* at 141. On applicable principles of law and interpretation of declarations, see generally S. ROSENNE, *supra* note 15, at 405–18; Crawford, *supra* note 52, at 75–83.

63. Reservations regarding termination and modification, since they relate to the force of the declaration as an instrument, are more properly termed "conditions."

64. *See* Bleicher, *ICJ Jurisdiction: Some New Considerations and a Proposed American Declaration*, 6 COLUM. J. TRANSNAT'L L. 61, 70 (1967).

65. *See generally* R.P. ANAND, *supra* note 38, at 187–248; Merrills, *supra* note 26; Waldock, *supra* note 32.

66. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, para. 3.

67. *See* Note, *Termination of Declarations Under the Optional Clause:* Military and Paramilitary Activities in and Against Nicaragua, 20 TEX. INT'L L.J. 557, 564–65 & n.61 (1985).

68. Declarations of Botswana, Colombia, Dominican Republic, Egypt, Haiti, Honduras, Malawi, Nicaragua, Nigeria, Panama, Senegal, Uganda, and Uruguay, 1984–1985 I.C.J.Y.B. 66–101 (1985).

such declarations may be terminated. In *Paramilitary Activities*[69] the majority concluded that declarations under the Optional Clause "establish a series of bilateral engagements"[70] and, by analogy to the law of treaties, are governed under the principle of good faith. Thus, such declarations are subject to an implicit requirement of "reasonable" notice.[71]

Twenty-two declarations are now effectively terminable from the moment of notification.[72] The damaging effect of instantaneously terminable declarations on the compulsory jurisdiction system has been widely recognized.[73] Although such conditions are valid,[74] their effect is limited by the *Nottebohm* principle, which provides that modification or termination of a declaration cannot deprive the Court of jurisdiction in a case of which it is already seised.[75]

Seventeen states currently reserve a right to modify the terms of their declarations with immediate effect.[76] The Court has established the proposition that the reservation of a right to vary or denounce a declaration is lawful.[77] Nonetheless, this type of reservation is clearly open to the same objections as a provision for termination on immediate notice.

Reservations *ratione temporis* limit jurisdiction by preventing the compulsory litigation of issues based on a dispute or facts arising prior to or

69. 1984 I.C.J. 392 (Judgment of Nov. 26).

70. *Id.* at 418.

71. *Id.* at 420. The Court did not elaborate on what constitutes reasonable notice, although in dictum indicated that three days notice would be insufficient. Id. at 419–20.

72. *See* declarations of Australia, Austria, Barbados, Belgium, Canada, Democratic Kampuchea, Gambia, India, Israel, Japan, Kenya, Liberia, Malta, Mauritius, Pakistan, Philippines, Portugal, Somalia, Sudan, Swaziland, Togo, and United Kingdom, 1984–1985 I.C.J.Y.B. 66–101 (1985). This is nearly one-half of the declarations currently in force.

73. D'Amato, *supra* note 5, at 389–92 (creating "hit-and-run" and "last-minute withdrawal" problems); Merrills, *supra* note 26, at 92–93 ("incompatible with a resolute commitment to the Court's jurisdiction"); Waldock, *supra* note 32, at 266–68 ("tend to undermine the whole purpose of the Optional Clause").

74. *See* Note, *supra* note 67, at 564.

75. *See supra* note 41.

76. *See* declarations of Australia, Austria, Botswana, Canada, El Salvador, Kenya, Malawi, Malta, Mauritius, New Zealand, Norway, Portugal, Senegal, Somalia, Swaziland, Togo, and United Kingdom 1984–1985 I.C.J.Y.B. 66–101 (1985). The reservations of New Zealand and Norway are limited to amendments "in light of the results of the Third United Nations Conference on the Law of the Sea in respect of the settlement of disputes." *Id.* at 88–89, 90.

77. The right to modify a declaration on notice was challenged in Right of Passage Over Indian Territory (Port. v. India), 1957 I.C.J. 125 (Preliminary Objections). The Portuguese declaration reserved the right "to exclude from the scope of the present declaration, at any time during its validity, any given category or categories of disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification." 1984–1985 I.C.J.Y.B. 93 (1985) (text of the Portuguese Declaration, para. 3). The Court upheld the reservation. *Right of Passage*, 1957 I.C.J. at 144.

There is, however, no inherent or reciprocal right to modify in the absence of a reservation. *See infra* text accompanying notes 105 & 110; Note, *supra*, note 67, at 565–66.

during specified dates. Twenty-one declarations currently contain such a limitation.[78] These reservations are intended to serve a number of different objectives.[79] One notably objectionable function is that of ensuring that only events subsequent to the filing of the declaration can be the subject of the Court's compulsory jurisdiction.[80] In international law, few controversies are without significant historical origin. Thus, these limitations have the effect, increased by the principle of reciprocity, of drastically reducing the scope of compulsory jurisdiction.[81] The Court has limited this effect by interpreting these reservations restrictively.[82]

The effect of reservations *ratione personae* is to exclude from the Court's compulsory jurisdiction disputes with certain parties. The reservations falling within this category are varied.[83] A relatively common example is the reservation of disputes among members of the British Commonwealth.[84] The Court has never had an opportunity to evaluate such a reservation.

Reservations *ratione materiae* have the effect of excluding disputes involving a specified subject matter. Included in this group are reservations covering disputes for which some other means of peaceful settlement has been agreed,[85] disputes arising out of some form of belligerency,[86] disputes arising under multilateral treaties,[87] and particularized disputes.[88] The most significant reservations in this category are those that reserve matters within the domestic jurisdiction of a state. These reservations are of two types: objective and subjective. Those in the objective form simply reserve

78. *See* declarations of Barbados, Belgium, Canada, Colombia, El Salvador, Finland, Gambia, India, Israel, Japan, Kenya, Liberia, Luxembourg, Malawi, Mexico, Netherlands, Pakistan, Philippines, Sudan, Sweden, and United Kingdom, 1984–1985 I.C.J.Y.B. 66–101 (1985).

79. *See* Merrills, *supra* note 26, at 96–101. The first objective is to prevent the litigation of stale disputes, or the reopening of past controversies. This serves the function of a statute of limitations. *Id.* at 96. A second objective is to except disputes arising out of a particular period of national history. *Id.*

80. *Id.* at 97.

81. "[W]hen combined with the right to vary or terminate the declaration without notice, [these reservations] must bring into question the seriousness of a State's commitment to the Court." Merrills, *supra* note 26, at 97. The negative effect of these conditions diminishes with the passage of time, and the condition takes on the role of preventing litigation of stale disputes.

82. *Id.* at 101. *See Interhandel*, 1959 I.C.J. at 20–22; *Right of Passage*, 1957 I.C.J. at 36.

83. *See generally* Merrills, *supra* note 26, at 101–05.

84. *See* the declarations of Canada, Gambia, India, Kenya, Malta, Mauritius, and the United Kingdom. 1984–1985 I.C.J.Y.B. 66–101 (1985).

85. *See, e.g.*, the declarations of Barbados, Israel, Liberia, and Swaziland, *id.*

86. *See, e.g.*, the declarations of El Salvador, India, Israel, and Kenya, *id.*

87. *See, e.g.*, declarations of El Salvador, India, Malta, and the Philippines, *id.*

88. *See, e.g.*, declaration of Canada, *id.* at 69–70, para. (d) ("disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coasts of Canada").

matters "exclusively"[89] or "essentially"[90] within the domestic jurisdiction.[91] These reservations leave it to the Court to decide whether the reservation is applicable to a specific dispute.[92]

The effects of the subjective form of the domestic jurisdiction reservation ("automatic reservation" or "self-judging reservation") "are among the most discussed issues in the literature of the Court."[93] Five declarations currently include a reservation in this form.[94] The reservation vests in the declarant state the power to determine whether a matter comes within its own domestic jurisdiction, to be exercised even after a dispute has been submitted to the Court. Although automatic reservations have been almost universally criticized,[95] the Court seems implicitly to have recognized their validity and effect.[96]

II. THE UNITED STATES AND COMPULSORY JURISDICTION

In 1946, the administration of President Harry S. Truman, with the advice and consent of the Senate, deposited a declaration of acceptance of the compulsory jurisdiction of the ICJ,[97] the text of which contained a number of significant reservations.[98] Throughout six successive United States administrations, the 1946 Declaration remained in its original form. Although the system of compulsory jurisdiction, as well as the ICJ itself, was often the subject of political and scholarly criticism,[99] the United States remained steadfast in its commitment to the moral and practical

89. *See, e.g.*, declaration of Barbados, *id.* at 59.

90. *See, e.g.*, declaration of Botswana, *id.* at 60.

91. The effects of the two variations are identical. Merrills, *supra* note 26, at 112–13.

92. S. ROSENNE, *supra* note 15, at 393.

93. Crawford, *supra* note 52, at 63. The reservation was originated as the "Connally Amendment" to United States Declaration of 1946, excluding "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." 1946 Declaration, *supra* note 2. *See infra* text accompanying notes 133–43.

94. Declarations of Liberia, Malawi, Mexico, the Philippines, and Sudan, 1984–1985 I.C.J.Y.B. 66–101 (1985).

95. *See* Crawford, *supra* note 52, at 64 ("resulting in a fragmented, uncertain and subjective jurisdiction capable of easy evasion"); Gross, *supra* note 32, at 38 ("expressing a lack of confidence in the Court"). In *Norwegian Loans*, 1957 I.C.J. at 43–66 (separate opinion of Lauterpacht, J.), and *Interhandel*, 1959 I.C.J. at 101–19 (Lauterpacht, J., dissenting), Judge Lauterpacht argued that the subjective domestic jurisdiction reservation is invalid and incompatible with the system of compulsory jurisdiction.

96. *See* Crawford, *supra* note 52, at 64–68.

97. 1946 Declaration, *supra* note 2.

98. *See infra* note 120.

99. Rogers, *supra* note 5, at 285.

considerations that prompted the 1946 Declaration.[100] These considerations are many and varied. Foremost is the belief that adherence to the Optional Clause system by the United States serves the national interest by promoting and stabilizing international law.[101] Additionally, voluntary submission to compulsory jurisdiction implicitly creates the appearance of adherence to these high ideals.[102] These considerations notwithstanding, the ICJ's jurisdictional decision in *Paramilitary Activities* created and exacerbated certain subsidiary, albeit serious, criticisms of the Court and of the United States commitment to compulsory jurisdiction.[103]

On April 6, 1984, three days before and presumably in anticipation of the filing of Nicaragua's application, the United States Secretary of State deposited with the Secretariat of the United Nations a letter purporting to modify, with immediate effect, the 1946 Declaration by withdrawing consent to the jurisdiction of the Court in cases arising out of "disputes with any Central American state" for a period of two years (hereinafter referred to as 1984 Notification).[104]

The United States subsequently interposed this attempted modification at the jurisdictional phase of the *Paramilitary Activities* case, claiming an inherent right to modify its declaration on notice.[105] The United States also raised technical issues disputing the existence of jurisdiction[106] and advanced a number of grounds of inadmissibility.[107] These arguments, as well

100. *See generally Strengthening the International Court of Justice, Hearings on S. Res. 74, S. Res. 75, S. Res. 76, S. Res. 77, and S. Res. 78 Before the Comm. on Foreign Relations,* 93d Cong., 1st Sess. (1973); *Compulsory Jurisdiction, International Court of Justice, Hearings on S. Res. 94 Before the Comm. on Foreign Relations,* 86th Cong., 2d Sess. (1960) [hereinafter *Hearings on S. Res. 94*]; *Compulsory Jurisdiction, International Court of Justice, Hearings on S. Res. 196 Before a Subcomm. of the Comm. on Foreign Relations,* 79th Cong., 2d Sess. (1946).

101. Rogers, *supra* note 5, at 287, 291.

102. The appearance of promoting international law is also perceived as an advantageous consideration. The United States often indicates stronger support for an active ICJ than is suggested by its history of recourse to the Court. Note, *International Conflict Resolution: The ICJ Chambers and the Gulf of Maine Dispute,* 23 VA. J. INT'L. L. 463, 475 & n.82 (1983). *See also Report of the Secretary-General, supra* note 5, at 9, para. 11 (views expressed by the United States of America); Malloy, *Developments at the International Court of Justice: Provisional Measures and Jurisdiction in the Nicaragua Case,* 6 N.Y.L. SCH. J. INT'L & COMP. L. 55, 91 & nn.217–18 (1984).

103. *See Sofaer Statement, supra* note 4, at 69 ("None of the weaknesses deriving from the Court's composition and our 1946 declaration is new.").

104. *See* Letter from Secretary of State Schultz to the Secretary-General of the United Nations (Apr. 6, 1984), *reprinted in* 23 I.L.M. 670 (1984), *also reprinted in* 1984–1985 I.C.J.Y.B. 99–100 (1985) [hereinafter 1984 Notification].

105. *See infra* text accompanying notes 159–60.

106. *Paramilitary Activities,* 1984 I.C.J. at 400.

107. *Paramilitary Activities,* 1984 I.C.J. at 429. An objection to the admissibility of a claim challenges an applicant's right to invoke jurisdiction in the circumstances of the case, as distinguished from lack of jurisdiction. *See* I. SHIHATA, *supra* note 49, at 107–12.

In pertinent part, the United States alleged that: (1) Nicaragua had failed to bring before the Court three "indispensable parties;" (2) the dispute was essentially within the competence of the United

as the majority's premises for its decision to assert jurisdiction in *Paramilitary Activities*,[108] have been well-documented and critiqued.[109] In separate votes, the Court found, by eleven votes to five, that it had jurisdiction "on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court," thereby rejecting the attempt to rely on the 1984 Notification;[110] and, by fourteen votes to two, that it had jurisdiction on the basis of provisions of the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua.[111] By a unanimous vote of sixteen judges, the Court rejected five separate grounds of alleged inadmissibility.[112] Additionally, the Court held that the Vandenberg Multilateral Treaty reservation was no preliminary bar to consideration of the merits of Nicaragua's claim.[113]

On January 18, 1985, after the Court had upheld its jurisdiction to hear the complaint, the government of the United States announced that it would not participate further in the case, stating that "[t]he Court's decision of November 26, 1984, finding that it has jurisdiction, is contrary to law and fact."[114] The United States further noted that the developments leading up to the withdrawal compelled it to "clarify our 1946 acceptance of the Court's jurisdiction."[115] On October 7, 1985, the State Department announced that the United States had terminated the 1946 Declaration submitting to the compulsory jurisdiction of the ICJ.[116]

Nations Security Council, not the Court; (3) the concept of "collective self-defence" could not be subjected to judicial examination in the midst of the conflict; (4) the limited factfinding capability of the Court in situations involving ongoing conflict rendered judicial settlement inappropriate; and (5) there is no requirement of exhaustion of regional negotiating processes as a precondition to seising the Court. *See* Briggs, Nicaragua v. United States: *Jurisdiction and Admissibility*, 79 AM. J. INT'L L. 373, 375 (1985) (summary of pleas to admissibility).

108. The Court decided, by a vote of 15 to 1, that it had jurisdiction to entertain the case. *Paramilitary Activities*, 1984 I.C.J. at 442.

109. *See, e.g.*, Briggs, *supra* note 107; Chayes, *Nicaragua, The United States, and the World Court*, 85 COLUM. L. REV. 1444 (1985); D'Amato, *Nicaragua and International Law: The "Academic" and the "Real,"* 79 AM. J. INT'L L. 657 (1985); Franck, *Icy Day at the ICJ*, 79 AM. J. INT'L L. 379 (1985); Kirgis, Nicaragua v. United States *as a Precedent*, 79 AM. J. INT'L L. 652 (1985); Malloy, *supra* note 102; Reisman, *Has the International Court Exceeded its Jurisdiction?*, 80 AM. J. INT'L L. 128 (1986); Note, *supra* note 31; Note, Military and Paramilitary Activities in and Against Nicaragua *(Nicaragua v. United States): The International Court of Justice's Jurisdictional Dilemma*, 7 LOY. L.A. INT'L & COMP. L.J. 379 (1984); Note, *Applying the Critical Jurisprudence of International Law to the* Case Concerning Military and Paramilitary Activities in and Against Nicaragua, 71 VA. L. REV. 1183 (1985); Case and Comment, 44 CAMBRIDGE L.J. 183 (1985).

110. *Paramilitary Activities*, 1984 I.C.J. at 442.

111. *Id.*

112. *Id.*

113. *Paramilitary Activities*, 1984 I.C.J. at 425–26.

114. *Statement on Withdrawal*, *supra* note 4, at 64.

115. *Id.* at 65.

116. *Statement on Termination*, *supra* note 4.

III. PROPOSALS AND ANALYSIS

If the United States is ever to submit a new declaration of acceptance under Article 36 of the Statute, it is unlikely to be in the same form as the 1946 Declaration. Before any United States administration submits such an instrument, it will need to be convinced of that instrument's effectiveness, and additional reservations will need to be demonstrably protective of the national interest.[117] On the other hand, the structure of the Statute limits the scope of permissible reservations.[118] Therefore, untested reservations must be examined in light of forty years of state practice and ICJ decisions. All reservations circumscribe the scope of compulsory jurisdiction, and in varying degrees express a lack of confidence in the Court. Therefore, from the perspective of strengthening the international rule of law and increasing the role of binding adjudication of international legal disputes, anything but an unqualified acceptance of the Optional Clause is subject to criticism.[119]

The advisability of any particular reservation is a function of balancing the benefits and risks. Part III of this Comment analyzes the reservations contained in the 1946 Declaration in order to determine whether they have any continuing vitality, and proposes several reservations to a hypothetical United States declaration that arguably would be practicable and effective. Several other proposals are examined and found to be ineffective in light of the applicable criteria. The reservations are examined for consonance with the national interest of the United States in light of a) the administration's reasons for withdrawal from the *Paramilitary Activities* case and termination of the 1946 Declaration; b) their offensive effectiveness; and c) their defensive effectiveness. Offensive effectiveness is measured by a reservation's potential for being reciprocally invoked against the United States, as applicant, to divest the Court of jurisdiction, and by the reservation's general tendency to circumscribe the operational effect of the Optional Clause. The question of whether the reservation would have prevented jurisdiction in *Paramilitary Activities* is used as a rough indicator of defensive effectiveness. As indicia of validity, the reservations are analyzed with respect to state practice and relevant Court decisions in determining compatibility with the object and purpose of the Statute.

117. Since a new declaration would be contingent on the advice and consent of the Senate, it certainly would be the subject of particularly intense scrutiny.

118. *See supra* text accompanying note 41.

119. *But see infra* text accompanying notes 170, 178 & 197 (certain reservations accommodate the functioning of the Optional Clause, or encourage states to submit declarations).

Some proposals call for unreserved compulsory jurisdiction. *See* E. DEUTSCH, AN INTERNATIONAL RULE OF LAW 1–17; Qadeer, *The International Court of Justice: A Proposal to Amend its Statute*, 5 HOUS. J. INT'L L. 35, 39–52 (1982); *see also supra* note 38.

A. *The 1946 Declaration*

The United States Declaration of August 14, 1946 incorporated four reservations and one condition.[120]

1. *Limitation to Disputes "Hereafter Arising"*

The reservation limiting jurisdiction to disputes "hereafter arising" ensured that only events subsequent to 1946 could give rise to a dispute subject to compulsory jurisdiction. Immediately prior to termination, the declaration was almost forty years old; the effect of this limitation had considerably diminished, and it functioned primarily as a statute of limitations.[121] However, if a new declaration is deposited with the "hereafter arising" limitation, it will reduce the period of time subject to the Court's compulsory jurisdiction by over forty years. This type of exclusion has been vigorously criticized,[122] although it appears to be permissible and valid. No ostensible national interest is protected by such a reduction,[123] and the Court has interpreted this type of reservation restrictively by observing that "the facts and situations which have led to a dispute must not be confused with the dispute itself."[124] The date of the dispute is a difficult question, particularly in international law. Thus, reservations employing

120. In pertinent part:

> [T]he United States of America recognizes as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising . . .
>
> *Provided*, that this declaration shall not apply to
>
> (a) disputes the solution of which the Parties shall entrust to other tribunal by virtue of agreements already in existence or which may be concluded in the future; or
>
> (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or
>
> (c) disputes arising under a multilateral treaty, unless (1) all the Parties to the treaty affected by the decision are also Parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction; and
>
> *Provided further*, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.

1946 Declaration, *supra* note 2.

121. *See supra* note 79 and accompanying text.

122. *See, e.g.*, Merrills, *supra* note 26, at 96–101; Macdonald, *The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice*, 8 CAN. Y.B. INT'L L. 3, 25–26 (1970).

123. Of course, it is arguably beneficial to foreclose litigation of issues involving certain events in United States national history, for example, the Vietnam War. However, this argument evinces a fear of litigating certain subject matters, rather than disputes during a certain time period. Such fears can be placated through the use of less intrusive subject-matter reservations. Moreover, the argument leads to a *reductio ad absurdum*, because in theory, a state could continuously update this limitation, leaving an inconsequential interval to which compulsory jurisdiction would apply.

124. *Interhandel*, 1959 I.C.J. at 22.

the "double exclusion formula,"[125] limiting the Court's jurisdiction to disputes arising both after a certain date, and with regard to situations or facts subsequent to that date,[126] have fared no better.[127]

These reservations are fully subject to reciprocity.[128] Thus, by restricting the temporal scope of cognizable disputes, they tend to seriously impair the ability of a State to use compulsory jurisdiction offensively. The United States should not include a "hereafter arising" type of reservation in a future declaration. However, to preserve the desirable statute of limitations function, it would be wise to accept compulsory jurisdiction over disputes arising after August 26, 1946.

2. *Disputes for Which Some Other Means of Settlement Has Been Agreed*

This reservation excepts "disputes the solution of which the Parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future."[129] Although the Court has never had occasion to consider this type of reservation, twenty-six of the declarations currently in force incorporate it in some equivalent form.[130] The need for such a reservation is meager, and the likelihood of it ever being invoked is small. Under Article 88 of the Rules of Court, the parties to a case are free to discontinue proceedings at any time by mutual agreement.[131] If the aim of the reservation is to exclude a dispute in which an application is filed in violation of an agreement to use some other means of settlement, then the Court ought to decline to adjudicate the matter on grounds of judicial

125. Meron, *Israel's Acceptance of the Compulsory Jurisdiction of the International Court of Justice*, 4 ISR. L. REV. 307, 327 (1969).

126. *See, e.g.*, declarations of Japan and Sudan, 1984–1985 I.C.J.Y.B. 80, 95 (1985).

127. *See* Right of Passage Over Indian Territory (Port. v. India), 1957 I.C.J. 125, 151–52 (Preliminary Objections) (joinder of Preliminary Objection to the merits); Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 5, 35 (Order of Jan. 6) (rejection of Preliminary Objection). Newer declarations of El Salvador and India have introduced formulas for an "exclusion ad infinitum," reserving "disputes prior to the date of this declaration including any dispute the foundations, reasons, facts, causes, origins, definitions, allegations or bases of which existed prior to this date . . . ." 1984–1985 I.C.J.Y.B. 73–75, 77–79 (1985). The Court has not yet interpreted this formulation, but a literal interpretation suggests that its effect could be to "reduce the compulsory jurisdiction of the Court almost to the vanishing point." Merills, *supra* note 26, at 101. It is doubtful that the Court would be more solicitous toward this limitation than towards those employing the double exclusion formula.

128. I. SHIHATA, *supra* note 49, at 151.

129. 1946 Declaration, *supra* note 2.

130. *See* the declarations of Australia, Austria, Barbados, Belgium, Botswana, Canada, Democratic Kampuchea, El Salvador, Gambia, India, Israel, Japan, Kenya, Liberia, Luxembourg, Malawi, Malta, Mauritius, Netherlands, New Zealand, Pakistan, Philippines, Senegal, Sudan, Swaziland, and United Kingdom, 1984–1985 I.C.J.Y.B. 66–101 (1985).

131. *Rules of Court*, *supra* note 16, art. 88.

propriety.[132] Although it seems hardly conceivable that the Court would adjudicate such a dispute, the maintenance of this reservation could be seen as a safety valve against judicial impropriety. Since the condition precedent to the reservation's invocation is readily determinable, the possibility of unexpected adverse reciprocity is reduced. The maintenance of this reservation would be, at worst, an instance of benign overprecaution.

3. *The Connally Amendment*

The United States automatic reservation, sometimes referred to as the Connally Amendment,[133] is a subjective domestic jurisdiction reservation[134] which excludes "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America . . . ."[135] It has often been the subject of intensely negative scholarly commentary,[136] and various sectors have called for its repeal.[137] However, the Court has consistently given the reservation effect.[138] Although the automatic reservation can be viewed as the ultimate defensive reservation because it can always be pleaded, in good or bad faith, to divest the Court of jurisdiction, the reservation has a serious drawback. Through the principle of reciprocity, other states can use the reservation to escape from actions brought by the United States. It has in fact been invoked reciprocally to the embarrassment of the United States.[139] Although the United States certainly could have

132. Briggs, *supra* note 34, at 298.

133. This is in reference to its origins in the United States Senate.

134. *See supra* text accompanying notes 93–96.

135. 1946 Declaration, *supra* note 2.

136. *See* Crawford, *supra* note 52, at 63–64; D'Amato, *supra* note 5, at 392–94; Gross, *supra* note 32, at 38–39; Humphrey, *The United States, the World Court and the Connally Amendment*, 11 VA. J. INTL L. 310, *passim* (1971); Merrills, *supra* note 26, at 113–15. *But see* D. KITCHEL, TOO GRAVE A RISK: THE CONNALLY AMENDMENT ISSUE (1963) ("The retention of the Connally Amendment . . . is essential to the ultimate victory of freedom in the present struggle [with international communism].").

137. *See Hearings on S. Res. 94, supra* note 100; *1959 Resolution of the Institute of International Law*, in 54 AM. J. INT'L L. 136 (1960); AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL AND COMPARATIVE LAW, REPORT ON THE SELF-JUDGING ASPECT OF THE UNITED STATES' DOMESTIC JURISDICTION RESERVATION WITH RESPECT TO THE INTERNATIONAL COURT OF JUSTICE (1959), *reprinted in Hearings on S. Res. 94, supra* note 100, at 281; COMMITTEE FOR EFFECTIVE USE OF THE INTERNATIONAL COURT BY REPEALING THE SELF-JUDGING RESERVATION, REPORT ON THE CONNALLY AMENDMENT: VIEWS OF LAW SCHOOL DEANS, LAW SCHOOL PROFESSORS, INTERNATIONAL LAW PROFESSORS (1961); President Eisenhower's State of the Union Message, Jan. 7, 1960, in 42 DEP'T ST. BULL. No. 1074, at 111, 118 (1960). *But see* Letter from Senator Tom Connally to Senator J.W. Fullbright (Feb. 16, 1960), in *Hearings on S. Res. 94, supra* note 100, at 164 (repeal of the Connally reservation would be unwise).

138. *See supra*, text accompanying note 96.

139. *See* Aerial Incident of 27 July 1955 (U.S. v. Bulgaria), 1960 I.C.J. 146 (Order of May 30) (Bulgaria invoked the reservation on the basis of reciprocity, and the United States requested a discontinuance of the proceedings); Gross, *Bulgaria Invokes the Connally Amendment*, 56 AM. J. INT'L

invoked the reservation to bar Nicaragua's suit in *Paramilitary Activities*, it chose not to do so because it could not, in good faith, assert that mining Nicaragua's harbors, participating in covert military incursions into Nicaragua, and backing rebels seeking to overthrow Nicaragua's government were matters within its domestic jurisdiction. Unfortunately, other states may not feel limited by, and are not required by the Court to observe, the principle of good faith.[140] It would be purposeless for this Comment to add further to the already exhaustive literature, save to argue that it would be unwise to resurrect the automatic reservation in a new declaration.

An additional question remains as to whether an *objective* reservation of domestic jurisdiction is called for. Under Article 36, paragraph 2 of the Statute, the jurisdiction of the Court is limited to the four classes of *international* legal disputes there enumerated.[141] Therefore, a state can always interpose a plea of domestic jurisdiction as an objection to the Court's jurisdiction or as a substantive defense.[142] The objective form of the domestic jurisdiction reservation merely adds a belt to the suspenders of the inherent jurisdictional limitations of the Statute.[143]

4. *The Vandenberg Multilateral Treaty Reservation*

The Vandenberg reservation excludes "disputes arising under a multilateral treaty, unless (1) all the Parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction . . . ."[144] Virtually all the commentators which discuss this reservation declare that its meaning, effect, and purpose are unclear.[145] It has even been asserted that the reservation is not consistent with the Statute.[146] Most speculation denotes a dim view of

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L. 357 (1962).

Although the State Department claimed that the United States has "never been able to use our acceptance to bring other states before the Court . . .", *Statement on Termination*, *supra* note 4, at 67, Professor D'Amato points out that fear of the Connally reservation being invoked reciprocally prevented the United States from bringing such actions. D'Amato, *supra* note 53, at 331–32.

140. *See* Waldock, *supra* note 32, at 277.

141. *See supra* note 27 and accompanying text.

142. Waldock, *The Plea of Domestic Jurisdiction Before International Legal Tribunals*, 1954 BRIT. Y.B. INT'L L. 96, 140.

143. *See* Waldock, *supra* note 32, at 113.

144. 1946 Declaration, *supra* note 2. Like the Connally Amendment, the multilateral treaty reservation was introduced into the United States Declaration in the Senate.

145. "[T]he language of the reservation betrays such confusion of thought that to this day no one is quite sure what it means." Briggs, *supra* note 36, at 307. *See also*, Briggs, *supra* note 107, at 378 ("a reservation that by its terms is nonsensical"); D'Amato, *supra* note 5, at 394 ("The wording of the reservation leaves much to be desired . . . ."); Merrills, *supra* note 26, at 107; Waldock, *supra* note 32, at 273. The legislative history of the reservation sheds little light on these questions. *Id.*

146. Briggs, *supra* note 107, at 378.

the reservation's purpose. It has been suggested that the reservation was added partly as a precautionary measure because of unfamiliarity with the Court's jurisprudence[147] and, more pragmatically, to preclude the Court from prejudging the rights of states whose rights would be "affected" within the meaning of the reservation, but are not parties to the proceedings.[148] However, Article 59 of the Statute provides that only the parties to a case are bound by the Court's decision,[149] and Article 63 creates a right of intervention by third-party states where the construction of a multilateral treaty is at issue.[150] Until recently, the apparent disutility of the Vandenberg reservation has been a matter of speculation. However, the Court's interpretation of the reservation in *Paramilitary Activities* leaves no doubt.

The United States argued that the reservation would bar jurisdiction as to all of Nicaragua's claims because the complaint relied upon multilateral treaties including the United Nations Charter, and that the alleged violations of customary international law were actually restatements of the alleged treaty violations.[151] The United States identified Honduras, Costa Rica, and El Salvador as parties to treaties that would be affected within the meaning of the reservation.[152] The majority, while declining to challenge the validity of the reservation, severely restricted its application.[153] In his

147. D'Amato, *supra* note 5, at 394.

148. Note, *supra* note 31, at 502. *But cf.* Kirgis, *supra* note 109, at 655 ("[I]t was intended to protect the United States from decisions that would place it at a disadvantage relative to its similarly situated multilateral treaty partners who could not be made parties to the proceedings.").

149. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

150. *Id.* at art. 63, paras. 1, 2. *See also Paramilitary Activities*, 1984 I.C.J. at 425 (States "affected" within the meaning of the United States Declaration have the choice of either instituting proceedings or intervening, in so far as their interests are not already protected by Article 59 of the Statute).

151. *Paramilitary Activities*, 1984 I.C.J. at 423.

152. *Id.* at 422.

153. The Court held that: (1) the reservation does not bar all of Nicaragua's claims because the asserted customary international law claims may continue to be separate violations even though also incorporated into the treaties in some respects; (2) the rights of third parties are already protected because separate proceedings may be initiated or a state may intervene under Articles 62 and 63 of the Statute; (3) the decision as to what states are "affected" within the meaning of the reservation must be made by the Court; and (4) since such a decision relates to the merits of the case, the Court is not barred from going on to the merits. *Id.* at 424–26. In fact, El Salvador was not permitted to intervene under Article 63 at the preliminary jurisdictional phase of the case, although it still had that option when the case reached the merits. *Id.* at 425.

In his dissent, Judge Schwebel pointed out that since a preliminary objection can no longer be argued at the merits phase because the procedure for joinder of a preliminary objection to the merits has been eliminated, the reservation is inoperative at the stage in which it was intended to operate. *Id.* at 608 (Schwebel, J., dissenting). However, in its judgment on the merits, the Court applied the reservation, and held that because El Salvador would be "affected" by the Court's decision, it could not entertain claims arising under the OAS Charter and the UN Charter. International Court of Justice, Communique No. 86/8, at 7–8 (27 June 1986) (unofficial report of Judgment of 27 June 1986 in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua).

dissenting opinion, Judge Schwebel pointed out that the Court's judgment effectively vitiates the reservation.[154] The decision not only incapacitates the reservation procedurally, it also implies that it can be circumvented substantively by alleging concurrent violations of customary international law. Thus, even conceding the reservation's validity, it does not provide the defensive protection for which it was originally intended, and seems to address none of the administration's current objections. For these reasons, the Vandenberg reservation need not be reconsidered for inclusion in a new declaration.[155]

5. *Six-Month Notice for Termination*

The self-imposed requirement of six-month notice for termination sought, in 1946, to demonstrate the United States resolve never to attempt to escape from the ICJ's jurisdiction in the face of an impending lawsuit.[156] That resolve was drawn into question by the United States preliminary attempt to avoid participating in the *Paramilitary Activities* litigation. By submitting the 1984 Notification,[157] the United States sought to escape the strictures of the six-month notice provision by purporting to "modify" the 1946 Declaration.[158] The United States employed several arguments in support of its position. First, declarations under the Optional Clause are unique in the law of treaties, and modification may be made at any time up until the moment an application is filed, and in any manner not inconsistent with the Statute.[159] Second, other states asserting rights of immediate termination created a fundamental change in circumstances subsequent to the United States declaration, so that it would be inequitable to deny the United States an opportunity to modify its declaration in view of that change.[160] Third, if the 1984 Notification constituted a termination, rather than a modification, the United States still could exercise the right to immediate termination based on reciprocity arising from the Nicaraguan declaration.[161] The ICJ rejected all of these arguments, holding that the six-month notice requirement must be complied with regardless of whether the

154. *Paramilitary Activities*, 1984 I.C.J. at 604–05, (Schwebel, J., dissenting).

155. Professor D'Amato has reached the same conclusion. *See* D'Amato, *supra* note 53, at 333.

156. A resolve amply demonstrated by the Senate Committee on Foreign Relations' report on the 1946 Declaration, which noted that the six-month requirement "has the effect of a renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding." S. REP. NO. 1835, 79th Cong., 2d Sess. 5 (1946).

157. *See supra* note 104.

158. *See supra* text accompanying notes 104–05.

159. *Paramilitary Activities*, 1984 I.C.J. at 415.

160. *Id.* at 415–16.

161. *Id.* at 416–17.

notification constitutes a termination or a modification,[162] and that the United States could not ignore a condition imposed by its own declaration.[163]

The 1984 Notification and the supporting arguments demonstrate a basic dissatisfaction with the limitations imposed by a lengthy notice requirement. For this reason, a far less restrictive notice provision would be necessary to satisfy the administration's objections. The United States deposited the 1984 Notification with the Secretary-General of the United Nations three days prior to the filing of the Nicaraguan Application. Only a condition providing for immediate termination or variation would have rendered that modification effective. Consequently, it seems likely that nothing less than just such a condition would be deemed acceptable in a future declaration.[164]

State practice suggests that immediately effective conditions are valid,[165] and as to modifications, the ICJ has expressly so held.[166] The dual rights of termination and modification with immediate effect allow for maximum defensive protection.[167] Additionally, as observed by the Court in *Paramilitary Activities,* such conditions are not subject to the principle of reciprocity,[168] so the declaration's offensive effectiveness would be unimpaired. While criticism of these conditions must be acknowledged,[169] the evolution of the Optional Clause system, as evidenced by state practice,

162. *Id.* at 421.

163. *Id.* at 419.

164. British practice has demonstrated the "tactical use of the power to terminate a declaration." Merrills, *supra* note 26, at 103. By reserving a right of immediate termination, the British have denounced a declaration and deposited a new one soon thereafter, incorporating new reservations therein. In the case of a United States declaration, the necessity of the advice and consent of the Senate renders such a regime impractical. However, incorporation of a right of immediate modification would have virtually the same effect as the British practice.

165. "It is well established that states may make such reservations . . . ." Gross, *supra* note 32, at 79. On the effect of state practice in determining validity of reservations, see Crawford, *supra* note 52, at 75–83; *see also supra* text accompanying note 40.

166. Right of Passage, 1957 I.C.J. at 142–48.

167. States with declarations terminable on notice enjoy a tremendous tactical advantage over other parties to the Optional Clause. However, the option of immediate denunciation tends to encourage the premature filing of applications, and is "incompatible with a resolute commitment to the Court's jurisdiction." Merrills, *supra* note 26, at 92.

168. *See supra* note 49 and accompanying text. One commentator's suggested reservation relies on a reserved right of reciprocal termination. *See* D'Amato, *supra* note 53, at 336 ("[I]n relation to any state with a shorter period between notice and modification or termination, that shorter period shall apply as well to the United States."). However, it is unclear whether this proposal is compatible with the Court's jurisprudence regarding pre-seisin reciprocity. *See generally* Comment, Nicaragua v. United States: *Pre-Seisin Reciprocity and the Race to the Hague,* 46 OHIO ST. L.J. 699 (1985). "[R]eciprocity of temporal reservations *prior to* the seisin of the Court proves untenable." *Id.* at 708 (emphasis in original). This should also hold true in the case of reservations that operate prior to seisin.

169. *See supra* text accompanying note 73; *see also* C.W. JENKS, *supra* note 5, at 108 (Such reservations "appear to be inconsistent with the effectiveness of the [Optional] Clause.").

suggests that these restrictions on the scope of compulsory jurisdiction may be necessary evils, because states are unwilling to deposit declarations without them.[170] There remains, however, the possibility that the Court will intervene to lessen the harsh impact of the operation of these conditions. Having determined that reasonable notice is an implied condition in declarations with no termination provision,[171] the Court may, if confronted with a declaration providing for immediate termination or modification, hold that although such termination or modification takes effect as of the moment of notification, the notification process itself must consume a reasonable period of time.[172] Such a holding would reduce slightly the defensive effectiveness of these conditions, but only in instances of the most precipitate, and therefore the most objectionable, modifications.

B. Proposals

The following proposal for a new United States declaration of acceptance of the compulsory jurisdiction of the ICJ (hereinafter referred to as Proposed Declaration) contains reservations that, if adopted along the given or similar lines, would better serve the national interest than the present state of nonacceptance:

> The United States of America accepts [as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation][173] the compulsory jurisdiction of the International Court of Justice, until such time as notice may be given to terminate the acceptance, in all [legal] diputes arising after 26 August 1946;
>
> *Provided,* that
>
> 1. This declaration shall not apply to disputes
>
> (a) where the acceptance of the Court's jurisdiction by another party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court; or
>
> (b) arising from measures taken by the United States of America related to or connected with facts or situations involving armed conflicts, belligerency, military occupation, the exercise of individual or collective self-defense, or the discharge of any military or peacekeeping function in accordance with

170. *See supra* notes 72 & 76 and accompanying text.

171. *See supra* note 71 and accompanying text.

172. D'Amato, *supra* note 5, at 391 n.17.

173. The bracketed portions of the proposal are not particularly important because a state is free to choose any form that adequately expresses its intention to accept compulsory jurisdiction. *See* S. ROSENNE, *supra* note 15, at 379–80.

recommendations or decisions of international bodies or regional organizations; and

2. Any case brought by any party against the United States of America in accordance with this declaration, shall, if requested by any party, be decided by a Chamber of the International Court of Justice, composed in accordance with Article 26, paragraph 2, of the Statute of the Court, whose membership includes all or some of the judges designated by both parties in accordance with Article 17, paragraph 2, of the Rules of Court, but no judge not so designated; *provided* that any party failing, within six months, to express its views regarding the composition of the Chamber in accordance with Article 17, paragraph 2 of the Rules of Court, as to, unless otherwise agreed by the parties, at least ten members of the Court, shall be deemed to have consented to the views expressed by the other parties to the case; and

3. The United States of America also reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, either to add to, amend or withdraw any of the foregoing reservations and conditions, or any that may hereafter be added; and

4. The reservations included herein are, unless amended or withdrawn in accordance with the provisions of this declaration, deemed inseverable from, and an essential basis of the consent to be bound by, this declaration.

1. Twelve-Month Exclusion

This reservation, modeled on a British exception,[174] is intended to remedy the problem of "surprise applications";[175] that is, where a state which has not accepted compulsory jurisdiction initiates a suit by filing its declaration under the Optional Clause immediately prior to filing its application. If such a declaration includes a provision for immediate termination, the state is virtually insulated from the filing of applications by other states.[176] The twelve-month exclusion precludes such unscrupulous

174. *See* declaration of the United Kingdom, 1984–1985 I.C.J.Y.B. 98–99 (1985). This reservation was introduced in the British declaration in 1957. It excludes:

> disputes in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court.

Id. at 99.

175. Merrills, *supra* note 26, at 101–02.

176. Of course, a state is vulnerable to counterclaims in a suit instituted by surprise application.

use of compulsory jurisdiction. It forces states who are contemplating offensive litigation to file their declarations at least twelve months in advance. Although eight states now include a similar reservation in their declarations,[177] it has not been invoked before the Court. Nonetheless, its validity seems assured, because it operates as a unilateral remedy to what appears to be a glaring deficiency in the Optional Clause system.[178] Reciprocity, if invoked, operates as a bar to offensive litigation during the year following the deposit of the declaration, but is not a factor thereafter.

The twelve-month exclusion, in conjunction with the right of immediate variation, obviates the need for a specific reservation protecting against the "single shot problem";[179] that is, where states file limited declarations that accept the Court's compulsory jurisdiction in contemplation of litigating a specific dispute.[180] The United States, when necessary, could rely on a reserved right of modification to defeat such limited acceptances.[181] Were such a declaration filed, the United States would, pursuant to a twelve-month exclusion, have twelve months in which to modify its declaration in response. The British declaration approaches the problem by reserving "disputes in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute."[182] This vague language is susceptible to adverse interpretation. The question of whether the jurisdiction of the Court has been accepted "only in relation to or for the purpose of the dispute" may not be readily determinable. Moreover, if a state's purpose in depositing a declaration is challenged, the question of jurisdiction may be relevant to the merits of the case,[183] in which instance the Court will not be barred from going on to the merits, as amply demonstrated in *Paramilitary Activities*.[184]

177. *See* declarations of India, Israel, Malta, Mauritius, New Zealand, Philippines, Somalia, and United Kingdom, 1984–1985 I.C.J.Y.B. 66–101 (1985).

178. *See* Merrills, *supra* note 26, at 102 (These reservations put parties "on an equal footing . . . .").

179. D'Amato, *supra* note 5, at 388–89.

180. It has been questioned whether such declarations are sufficient to qualify as acceptances under Article 36, paragraph 2. Merrills, *supra* note 26, at 102. *But cf.* Declaration of Egypt, 1984–1985 I.C.J.Y.B. 73 (1985) (a declaration of acceptance limited to disputes arising under a paragraph of a particular treaty).

181. *See* D'Amato, *supra* note 5, at 388–89. "[I]f state B, 12 months before filing suit against the United States accepts the compulsory jurisdiction of the World Court only for questions regarding Antarctica, the United States could modify its own Declaration . . . to take B's possible tactics into account." *Id.* at 388.

182. Declaration of the United Kingdom, 1984–1985 I.C.J.Y.B. 98–99 (1985).

183. S. ROSENNE, THE TIME FACTOR IN THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 22–23 (1960).

184. *See supra* note 153.

2. *Armed Conflict Reservation*

In the *Paramilitary Activities* case, the United States argued that inadmissability of disputes involving armed hostilities is an implied limitation on the Court's jurisdiction.[185] This position was first used as a justification for the deposit of the 1984 Notification. Subsequently, one of the primary public justifications given by the United States government for its refusal to participate further in the case was that the questions presented were inappropriate for judicial resolution.[186] The United States position is that international law concerning aggression, self-defense, and intervention is so highly controversial that submission to binding adjudication on such matters is likely to infringe on national sovereignty and security.[187] Also, it has been forcefully argued by jurists and commentators that the Court is ineffective in adjudicating "force cases."[188] A reservation *ratione materiae* excluding such disputes would remedy this objection.

Simple subject-matter reservations are unquestionably valid. At present, eight states include some form of armed hostility reservation in their declarations.[189] Procedurally, the armed conflict reservation is clearly effective. Although these reservations are subject to the doctrine of reciprocity, the United States should have no interest in bringing such actions as plaintiff, since the United States claims that such disputes are nonjusticiable.[190]

However, as a reservation *ratione materiae,* an armed conflict reservation is subject to several general criticisms. First, although subject-matter reservations remove certain areas of international law from the competence of the Court with respect to the reserving state, the development of general customary international law will proceed irrespective of the reservation.[191] The effect of subject-matter reservations may be to disable the reserving state from participating in cases that could determine the content of customary law.[192] Second, since reservations *ratione materiae* create

185. The Court later rejected this argument by a unanimous vote. *Paramilitary Activities,* 1984 I.C.J. at 442.

186. *Statement on Withdrawal, supra* note 4, at 64. The United States asserted that the dispute "is an inherently political problem that is not appropriate for judicial resolution" and that the ICJ is "not suited" to decide such issues. *Id.*

187. *Sofaer Statement, supra* note 4, at 70–71. *Cf.* Powell, *Judge Hardy Cross Dillard,* 69 VA. L. REV. 805, 808 (1983) ("[W]here national interests conflict with international law, it is not surprising that the former usually prevail.").

188. Note, *supra* note 10, at 190, *passim.*

189. *See* declarations of El Salvador, India, Israel, Kenya, Malawi, Malta, Mauritius, and Sudan, 1984–1985 I.C.J.Y.B. 66–101 (1985).

190. *But see infra* text accompanying note 198.

191. D'Amato, *supra* note 5, at 396–97.

192. *Id.* Since advancing this criticism, and those discussed *infra* at notes 193 and 194, Professor

"holes" in the scope of the ICJ's substantive jurisdiction, they may consequently be regarded as a serious erosion of the Court's jurisdiction.[193]

As to reservations involving the use of armed force, the first criticism is of minimal concern to the United States government. The United States has consistently regarded such conflicts as political problems which are more appropriately resolved by the U.N. Security Council or regional organizations. In *Paramilitary Activities*, the United States argued that Nicaragua's claim alleging violations of customary international law was actually "a classic case arising under chapter VII of the United Nations Charter," involving a political question to be resolved by the Security Council.[194] Additionally, the United States government often asserts that the use of armed force involving matters of high national security cannot be subordinated to rules of international law.[195] By refusing to accede to adjudication of such disputes, the United States should not be bound by the proposition that the disputes are, under customary international law, justiciable.[196] Similarly, by persistently objecting, the United States should not be bound by substantive changes in customary law.

As to the second criticism, carefully worded subject-matter reservations comprise the least constrictive type of limitation on the scope of compulsory jurisdiction, because the "holes" they create are specific. An armed conflict reservation concededly carves out of the Optional Clause a large exception in an area of international law of primary importance. Nonetheless, as a sole subject-matter reservation in a declaration, it still leaves a vast area where compulsory jurisdiction can effectively operate. Furthermore, this criticism does not recognize the potential value of subject-matter reservations. Rather than eroding the Court's jurisdiction, they may be setting the stage for more general acceptance. States which might be unwilling to submit an unqualified declaration in areas where the views on law materially differ among states, might be willing to submit

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D'Amato appears to have found the benefits of an armed conflict reservation to outweigh United States nonparticipation in the Optional Clause. Reasoning that the United States has the right to employ such an exception, D'Amato asserts that "a principled argument can be made for an armed hostilities exception." D'Amato, *supra* note 53, at 334.

193. Merrills, *supra* note 26, at 108.

194. Robinson, *Letter to the Editor in Chief*, 79 AM. J. INT'L L. 423, 423 (1985).

195. *See Sofaer Statement*, *supra* note 4, at 70–71. *Cf.* Dean Acheson's statement that the law "simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty." Acheson, *Remarks by the Honorable Dean Acheson*, 1963 PROC. AM. SOC'Y INT'L L. 14.

196. A state's acceptance of a principle of customary international law will be presumed "unless it can adduce evidence of its actual opposition to the practice in question." Waldock, *General Course on Public International Law*, 2 RECUEIL DES COURS 1, 50 (1962). *See also* Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985). *But cf.* A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 98–102 (1971) (protest does not play a significant role in the formulation of international custom).

declarations initially for a limited range of disputes and, having done so, might subsequently be willing to extend their acceptance to other types of disputes.[197]

Additional criticisms specifically address the armed force reservation. First, such a reservation would preclude the United States from resorting to the Court in cases arising out of state-supported acts of terrorism or violence, as occurred in Tehran in 1979 and led to the United States Diplomatic and Consular Staff in Tehran case.[198] Second, other disputes that have begun peacefully may be escalated into armed hostilities so as to bring the dispute under the United States reservation solely to avoid the Court's jurisdiction.[199]

The first criticism highlights a troublesome flaw in the reservation. This reservation certainly could be invoked, on the basis of reciprocity, to defeat jurisdiction in cases where the United States files claims seeking ICJ adjudication over disputes arising out of terrorist acts, or other unconventional uses of force short of all-out war. One possible solution is to add a proviso excluding just such acts of terrorism from the reservation's coverage.[200] Such a solution, however, presents more problems than it solves. "Terrorism" is a vague concept, and even attempts at more precise definition[201] leave decisions on the application of the reservation to the Court, an uncertain proposition at best. The invocation of the proviso, on the basis of reciprocity, could vitiate the purpose of the reservation itself. For example, in *Paramilitary Activities,* an armed hostility reservation would have prevented jurisdiction. However, a terrorism proviso, if invoked by Nicaragua and interpreted broadly by the Court, could have been applied to the alleged illegal acts of the United States, thereby defeating the reservation's purpose. In such a highly sensitive area, it would be wiser to err on the side of overinclusion and preclude some offensive litigation than to weaken the defensive effectiveness of the reservation.

197. Fitzmaurice, *supra* note 32, at 473. *See also* Sohn, *Step-By-Step Acceptance of the Jurisdiction of the International Court of Justice,* 1964 PROC. AM. SOC'Y INT'L L. 131. Recent declarations of the United Kingdom and Australia manifest an increased commitment in comparison to the declarations they replace. Merrills, *supra* note 26, at 116.

198. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24). *See* D'Amato, *supra* note 5, at 397.

199. D'Amato, *supra* note 5, at 397.

200. For example: "[P]rovided, however, that this reservation shall not be deemed to cover actions not justified by military necessity against ships and aircraft, diplomatic and governmental agents and government property, or private citizens and their property . . . ." Gardner, *U.S. Termination of the Compulsory Jurisdiction of the International Court of Justice,* 24 COLUM. J. TRANSNAT'L L. 421, 426–27 (1986).

201. For a discussion of the difficulty of defining terrorism, see Note, *An Analysis of the* Achille Lauro *Affair: Towards an Effective and Legal Method of Bringing International Terrorists to Justice,* 9 FORDHAM INT'L L.J. 328, 349–56 (1986).

The second criticism is based on the wholly unrealistic assumption that a state would resort to violence in order to avoid a trial on the merits. This seems highly unlikely. Rather, a state will not appear as respondent; or if a decision is unacceptable to that state, the decision will be ignored. Given the limited enforcement powers of the Court and the dormant enforcement powers of the Security Council,[202] it is inconceivable that any state would risk war with the United States in order to avoid an adverse ICJ decision.[203]

3. *Chambers Reservation*[204]

The statements accompanying both the United States notice of withdrawal from the *Paramilitary Activities* case, and the notice of termination of the 1946 Declaration, suggest that the administration's decision was based on the conclusion that the Court's handling of the *Paramilitary Activities* case indicated blatant bias, such that the possibility of a fair decision in that, or any other case, was unlikely. The notice of withdrawal stated that:

> [O]f the 16 judges now claiming to sit in judgment on the United States in this case, 11 are from countries that do not accept the Court's compulsory jurisdiction. . . . The haste with which the Court proceeded to judgment . . . adds to the impression that the Court is determined to find in favor of Nicaragua in this case. . . . We will not risk US national security by presenting . . . sensitive material . . . before a Court that includes judges from Warsaw Pact nations. . . . We have seen . . . how international

202. *See supra* note 15.

203. A broader subject-matter reservation, excluding "political disputes" from the scope of compulsory jurisdiction would also serve to eliminate disputes involving armed hostilities. Such a reservation is far less desirable. On its face, the proposal is so vague it is difficult to give it any concrete effect because vague reservations tend to be interpreted so narrowly. There are few, if any, international disputes that do not have some political dimension. *See* Malloy, *supra* note 102, at 87 ("What dispute between states reaching this court is not frought with political implications?"). There is nothing in the Statute of the Court or in the United Nations Charter that prevents the Court from deciding such cases provided it confines itself to deciding the legal issues. Indeed, Article 36, paragraph 3 of the Charter, which specifically deals with disputes that endanger international peace and security, provides that "legal disputes should as a general rule be referred by the parties to the International Court of Justice . . . ." U.N. CHARTER art. 36, para. 3. *Cf. Statement on Withdrawal, supra* note 4, at 64 ("The ICJ . . . is patently unsuited for such a role."). In *Paramilitary Activities*, the Court demonstrated its willingness to deal with the legal aspects of a case inextricably involved in a political dispute. *See*, D'Amato, *Nicaragua and International Law: The "Academic" and the "Real,"* 79 AM. J. INT'L L. 657, 658 (1985). It seems likely that the Court would interpret a "political dispute" reservation accordingly. *See generally* Sohn, *Exclusion of Political Disputes from Judicial Settlement*, 38 AM. J. INTL L. 694 (1944).

204. The author is indebted to Richard N. Gardner, Henry L. Moses Professor of Law and International Organization at Columbia University, for suggesting the possibility of this reservation. Professor Gardner first proposed the reservation, in somewhat different form, before the United States Senate Committee on Foreign Relations, on December 4, 1985. *See* Gardner, *supra* note 200, at 427 (adapted from Professor Gardner's testimony before the Committee).

organizations have become more and more politicized against the interests of the Western democracies.[205]

These statements are all apparently directed at highlighting a supposed "politicization" of the Court.[206] Assuming *arguendo* that there is a degree of truth in these allegations,[207] an effective reservation, from the administration's point of view, would minimize or eliminate this element of politicization. The Chambers reservation is one possible solution.

The source of the power to set up a special Chamber for adjudication of a particular legal dispute is found in Article 26, paragraph 2 of the Statute of the Court.[208] In order to "facilitate recourse to Chambers of the Court and concede to the parties some influence in the composition of *ad hoc* Chambers constituted under Article 26, paragraph 2, of the Statute,"[209] the Court twice revised the Chambers procedure.[210] Article 17 now allows the Court to ascertain the parties' desires for the composition of a Chamber.[211] Article 18 provides for the full Court to elect, by secret ballot, the members

205. *Statement on Withdrawal, supra* note 4. In the *Statement on Termination* and the *Sofaer Statement, supra* note 4, the reasons advanced by the administration for its secession from the Optional Clause system are essentially the same. *See, e.g., Statement on Withdrawal, supra* note 4, at 67 ("[W]e believed that . . . the Court's own appreciation of the need to adhere scrupulously to its proper judicial role would prevent the Court's process from being abused for political ends. Those assumptions have now been proved wrong."); *Sofaer Statement, supra* note 4, at 69 ("One reasonably may expect at least some judges to be sensitive to the impact of their decisions on their standing with the UN majority.").

206. It has been suggested that the statements are in accord with the administration's alleged "effort to disparage the judicial character and integrity of the Court." Chayes, *supra* note 109, at 1447.

207. The composition and membership of the Court has been criticized by commentators as well. *See* J. GAMBLE & D. FISCHER, THE INTERNATIONAL COURT OF JUSTICE: AN ANALYSIS OF A FAILURE 126 (1976) ("[T]he reputation of the Court is totally inconsistent with reality."); Dalfen, *The World Court in Idle Splendour: The Basis of State's Attitudes*, 23 INT'L J. 124, 135–36 (1967) (States will remain reluctant to submit their disputes to binding adjudication as long as they perceive a lack of impartiality and independence on the part of judges. The differences in the judges' legal and cultural backgrounds might subtly and inappropriately influence their decisions.). *But see* Chayes, *supra* note 93, at 1448 ("[I]f what is implied by 'political' is that the judges of the International Court of Justice vote their preferences in the manner of senators or that they are instructed by their governments as are delegates to the United Nations, that is simply not the case."). For a subtle analysis of this concern, see generally L. PROTT, THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE (1979).

208. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 26, para. 2 ("The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.").

209. Jiménez de Aréchaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 AM. J. INT'L L. 1, 1 (1973).

210. *See* article 26 in the 1972 *Rules of Court*, 1972 I.C.J. Acts & Docs. No. 2, at 93, *reprinted in* 67 AM. J. INT'L L. 195, 203 (1973), *also reprinted in* S. ROSENNE, DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 93–203 (2d ed. 1979). In 1978, the Court again published a set of revised rules. *See Rules of Court, supra* note 18.

211. *Rules of Court, supra* note 18, art. 17, para. 2. Article 17 in pertinent part provides that "the President shall ascertain [the parties'] views regarding the composition of the Chamber, and shall report to the Court accordingly. He shall also take such steps as may be necessary to give effect to the provisions of Article 31, paragraph 4, of the Statute."

of any Chamber.[212] This procedure remained unused until the United States and Canada invoked it in the Boundary Settlement Treaty of March 19, 1979.[213]

A clear objective of the Boundary Settlement Treaty was to permit the parties to maintain a virtually absolute veto power over the composition of the Chamber.[214] An escape mechanism eliminated the risk of the Court electing a Chamber that did not meet the parties' preferences.[215] The Court did, in fact, accede to the requests of the parties.[216] However, two vigorous dissents disagreed with the extent of the influence which the majority permitted the parties to have over the Chamber's composition.[217] The dissenters particularly criticized the escape mechanism, arguing that it incorrectly permits the parties to "dictate to the Court who should be elected"[218] and deprives the Court "of its basic and essential characteristic

212. *Id.* art. 18, para. 1.

213. Treaty to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, with Agreements, March 29, 1979, United States-Canada, T.I.A.S. No. 10204, *reprinted in* 20 I.L.M. 1378–82 (1981) [hereinafter Boundary Settlement Treaty]. Prior to the revisions of the Court's rules, no parties to a case before the Permanent Court or the ICJ had ever, in their 50-year history, resorted to a Chamber of the Court formed for a particular case. Schwebel, *New Life for World Court*, 23 VA. J. INT'L L. 375, 377 (1983).

214. Note, *Adjudication of the Maritime Boundary in the Gulf of Maine Area*, 17 CAN. Y.B. INT'L L. 292, 295 (1979). Article I of the Treaty sets forth the parties' agreement to submit the dispute to a Chamber of the ICJ according to the provisions of the Special Agreement to Submit to a Chamber of the International Court of Justice the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Special Agreement), annexed to the Boundary Settlement Treaty. Boundary Settlement Treaty, *supra* note 213, 20 I.L.M. at 1378. Article II stipulates that if the Special Agreement provisions are not carried out within six months of the entry into force of the Treaty, either party may terminate the Special Agreement, thereby automatically activating an Arbitration Agreement. *Id.* Article III of the Treaty specifies that, in addition, either party may terminate the Special Agreement if a vacancy on the Chamber is not filled to its satisfaction. *Id.* at 1379. The Special Agreement details the procedure for submitting the dispute to a Chamber, including the requirement that the composition of the Chamber shall consist of three Members of the ICJ and two *ad hoc* judges chosen by the parties. Special Agreement, *supra* at 1389

215. Note, *International Conflict Resolution: The ICJ Chambers and the Gulf of Maine Dispute*, 23 VA. J. INT'L L. 463, 483 (1983). Although Article I provides that the Court will select three judges, a party dissatisfied with the Court's selection can choose to allow the six-month termination period of Article II to elapse before notifying the Court of its choice for *ad hoc* judge. The Special agreement would then no longer be operative, and the Court would not obtain jurisdiction over the case, in which instance the Arbitration Agreement would be triggered.

216. *See* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1982 I.C.J. 1 (Order of Jan. 20). This is in accord with the predictions of commentators, who point out that "from a practical point of view, it is difficult to conceive that in normal circumstances those Members who have been suggested by the parties would not be elected." de Arechaga, *supra* note 209, at 3. If the Court were to ignore the parties' wishes "the whole purpose of the procedure would fail." Hambro, *supra* note 35, at 369.

217. *Gulf of Maine*, 1982 I.C.J. at 11, 12–13 (dissenting opinions of Morozov & El-Khani, JJ.).

218. *Id.* at 11 (Morozov, J., dissenting).

of universality . . . ."[219] Although outvoted eleven to two,[220] should the dissenters' views find wider acceptance within the Court, the flexibility intended by the revised Rules could be rendered nugatory.

The proposed Chambers reservation is intended to apply the procedure of the Boundary Settlement Treaty in the context of the Optional Clause system. By allowing the parties to express a preference for particular judges, the Chambers procedure reduces the fear that a case will be heard by partial judges.[221] However, the reservation is not conditioned on the parties' acceptance of the Chamber's composition.[222] In the context of compulsory jurisdiction, such an escape clause would, through the principle of reciprocity, allow any party to divest the Court of jurisdiction over the case. Rather, the reservation is conditioned on the selections of both parties. A Chamber composed under the procedure contemplated in the reservation is composed of mutually-selected judges, in addition to judges *ad hoc* selected in accordance with Article 31.[223] Thus, no Chamber that includes a judge unacceptable to any party, with the possible exception of a judge *ad hoc,* can confer jurisdiction over the case. While the Court retains power to elect the members of the Chamber pursuant to Article 18 of the Rules, it must do so in accordance with the common will of the parties,[224] or jurisdiction will fail.

The proviso, specifying that each party must select at least ten acceptable judges, precludes a state's attempt to avoid jurisdiction by failing to submit its preference. A state failing to designate its preferences within six months of the submission of an application effectively waives its right to choose. By requiring that each party select at least ten acceptable judges, the reservation avoids the possibility of one party selecting a small number of choices that are clearly unacceptable to another party. Because the full Court consists of fifteen judges, the minimum intersection of two parties'

219. *Id.* at 12 (El-Khani, J., dissenting).

220. *Id.* at 8.

221. Note, *supra* note 215, at 479.

222. *But cf.* Gardner, *supra* note 200, at 425 ("We could condition our acceptance of compulsory jurisdiction on a U.S. right to have any case to which we are a party decided by a chamber of the Court composed of judges acceptable to ourselves.").

223. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 31, para. 4. In pertinent part, paragraph 4 provides that "[t]he President shall request one or, if necessary, two of the members of the Court forming the Chamber to give place to the members of the Court of the nationality of the parties concerned . . . ." This procedure is incorporated by reference in Article 17, paragraph 2 of the *Rules of Court, supra* note 18.

224. The Court does maintain complete discretion within the limits of the intersection of the parties' selections.

choices is a three-judge bench.[225] Although the parties are accorded effective veto power over only five judges, the possibility of jurisdictional nullification by lack of consensus is eliminated. Finally, the reservation preserves a right for parties, by agreement, to select fewer than ten acceptable judges.

A number of criticisms can be directed at the validity of the Chambers reservation. First, it is facially invalid as a reservation purporting to affect the "functioning and organization" of the Court. Second, it does not satisfy the requirement of "reciprocity of obligation." Finally, it is incompatible with the object and purpose of the Statute because it improperly attempts to integrate extrinsic procedures into the Optional Clause system.

The facial invalidity argument was raised in dictum by Judge Lauterpacht in his separate opinion in *Norwegian Loans,* where he observed that "while the Statute as interpreted in practice permits reservations to its jurisdiction it does not permit reservations as to the functioning and the organization of the Court."[226] Although his reasoning appears to apply to the Chambers reservation, it seems unlikely that Judge Lauterpacht had in mind a reservation that specifically invokes procedures provided for in the Statute itself.[227] It is true, however, that the proviso to the reservation attempts to prescribe additional obligations with respect to the Chambers procedure as applied by the reservation. Consequently, the Lauterpacht view, which has never been endorsed by the Court, may be more readily applicable. Even so, while the proviso makes the reservation far more effective, the reservation could operate without it.[228] The effect of this limited version would be to allow either party unilaterally to divest the Court of jurisdiction by witholding its judicial selections. This would be similar in practice to, and subject to the same criticisms as, the automatic divestiture effect of the Connally Amendment: maximum defensive protection at the cost of a dramatically reduced offensive effectiveness.

225. This is necessary because under Article 31 of the Statute, if a Chamber includes no judge of the nationality of the parties, each of the parties may choose a judge to whom the members of the Court forming the Chamber are requested to give their place on the Chamber. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 31, paras. 2–4.

226. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 45 (Lauterpacht, J., dissenting).

227. The Chambers procedure not only is provided for in the Statute, it has also received the imprimatur of the Court. *See supra* text accompanying note 210. A reservation that attempted, for example, to change the location of the Court's seat would more clearly violate Judge Lauterpacht's principle. A reservation that explicitly attempted in a given case to limit the bench to judges from states who have made declarations under the Optional Clause would be equally problematic, although the same effect could be achieved under the arguably nonviolative chambers reservation.

228. *But see* paragraph 4 of the Proposed Declaration, which nullifies the declaration in case a reservation is declared invalid. An additional term could be appended to the reservation, providing that if the proviso is declared invalid, the declaration is to be automatically amended to operate without it, notwithstanding the provisions of paragraph 4 of the Proposed Declaration. *See* D'Amato, *supra* note 53, at 335 (introducing an example of a self-amending reservation).

The principle of obligation, embodied in the phrase "*ipso facto* and without special agreement"[229] purportedly mandates that the terms on which a state recognizes compulsory jurisdiction are nonnegotiable. This means that an instrument that appears to recognize compulsory jurisdiction, but which in fact requires elements of negotiation as part of it, entails no legal obligation and is not a true recognition of compulsory jurisdiction under Article 36, paragraph 2.[230] It could be argued that the Chambers reservation requires a crude form of negotiation in the selection of judges. However, negotiation on a collateral procedural point hardly violates the spirit of this principle. The parties are still bound to litigate the dispute. They are not at liberty to determine the extent or existence of their obligation to submit to the jurisdiction of the Court, which is the prohibition embodied in the principle of obligation.[231] Moreover, this argument may not be as damaging as it seems, because it is recognized that a declaration which is invalid as an Article 36, paragraph 2 jurisdictional predicate can, in a concrete case, confer jurisdiction on the basis of Article 36, paragraph 1.[232] Lastly, the Court has never invalidated a declaration on the basis of lack of obligation.[233]

Object and purpose validity[234] presents a more difficult problem. Historically, every reservation under the Optional Clause has operated to limit the scope of the Court's jurisdiction to entertain a particular dispute. The Chambers reservation, however, seeks to impose positive obligations on potentially unwilling parties after the court is seised of the dispute, by engrafting the consensual Chambers procedure onto the mandatory Optional Clause system. In this way, the reservation can operate to divest a party of the protection of the full fifteen-member Court; a protection that may well have been at least an implicit condition of that party's consent to compulsory jurisdiction.[235] In form and operational effect, this reservation is *sui generis;* foreign to the Statute and unsupported in state practice.

229. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, para. 2.

230. *See* S. ROSENNE, *supra* note 15, at 370–71; Crawford, *supra* note 52, at 83.

231. *See supra* notes 57–58 and accompanying text.

232. *See* S. ROSENNE, *supra* note 15, at 371; Crawford, *supra* note 52, at 83–85. In *Norwegian Loans,* Judge Lauterpacht argued that invalid declarations can confer jurisdiction on the basis of *forum prorogatum.* Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 60 (separate opinion of Lauterpacht, J.). *See supra* note 25. Thus, in a given case, the states could agree to litigate the dispute even after the reservation was found to be incompatible and the declaration declared invalid. Subsequently, the United States could modify its declaration.

233. For that matter, the Court has never invalidated a reservation on any basis. *See supra* note 62 and accompanying text.

234. *See supra* text accompanying notes 50–62.

235. *Cf.* Hyde, *A Special Chamber of the International Court of Justice—An Alternative to Ad Hoc Arbitration,* 62 AM. J. INT'L L. 439, 440 (1968) ("[G]overnments parties do not want to 'buy a pig in a poke,' and would rather have the entire bench than a chamber, which is elected by the Court by secret ballot and by an absolute majority of votes . . . .").

Nonetheless, object and purpose validity is little more than the ICJ's interpretation of the Statute as applied to a particular reservation. The Court is well aware of the sparsity of contentious cases and its declining jurisdictional base.[236] In fact, the Chambers procedure itself has been twice liberalized, ostensibly to "give [the Court] new life."[237] Pragmatically, it seems unlikely, in light of past unwillingness to invalidate reservations and present day international reality, that the Court would refuse to extend the utilitarian effects of Chambers to the realm of the Optional Clause.

The Chambers reservation is a fragile exception. A majority of recalcitrant judges could easily neutralize its intended effect, and a change in the Rules of Court might render the reservation useless. The composition of a particular Chamber could reduce the precedential impact of its decision.[238] Beyond this, tactical use of Chambers in an attempt to regionalize or "westernize" the ICJ's composition may call into question the integrity of the Court.[239] However, rather than indicating ineffectiveness or impracticability of the reservation itself, these criticisms call for restraint in its invocation.

4. *The Condition of Inseverability*

This condition merely serves to predetermine for purposes of the Proposed Declaration the question of whether invalid reservations nullify the whole declaration. Scholars have debated the question inconclusively,[240] and the Court, with the exception of Judge Lauterpacht,[241] has not addressed the issue. The reason for the condition is to protect the United States from jurisdiction in cases where it has relied on another reservation or condition which is subsequently declared invalid.[242]

IV. CONCLUSION

The United States termination of its acceptance of compulsory jurisdiction is a step backward in the course of international law. Even those who

236. *See supra* notes 32–33 and accompanying text.

237. Schewebel, *supra* note 213, at 377. *See also* Jiménez de Aréchaga, *supra* note 209, at 2.

238. Robinson, Colson & Rashkow, *Some Perspectives on Adjudicating Before the World Court: The Gulf of Maine Case*, 79 AM. J. INT'L L. 579, 583 (1985).

239. *See Gulf of Maine*, 1982 I.C.J. at 12 (El-Khani, J., dissenting); McWhinney, *Special Chambers Within the International Cout of Justice: The Preliminary Procedural Aspect of the Gulf of Maine Case*, 12 SYR. J. INT'L L. & COM. L. 1, 7–13 (1985).

240. See, *e.g.*, S. ROSENNE, *supra* note 15, at 397; Briggs, *supra* note 36, at 360– 61; Crawford, *supra* note 52, at 68; Preuss, *Questions Resulting From the Connally Amendment*, 32 A.B.A. J. 660, 720 (1946); Waldock, *supra* note 142, at 132–36.

241. *See supra* text accompanying note 59.

242. *Cf.* D'Amato, *supra* note 53, at 335 (automatically self-amending provisos might be appended to reservations themselves).

maintain that the termination was obliged by the national interest must acknowledge that the United States national interest is not necessarily coextensive with that of the organized international community or with advancement of the rule of international law. In this case it certainly was not. If the United States wishes to impose rules of international law upon other states, it must recognize its own accountability. If the United States wishes to be recognized for its leadership in promoting international morality through the advancement of international law, its actions must support the claim. Termination of the 1946 Declaration may be perceived, on a practical level, as a small sacrifice. It is, however, a sacrifice that so fragile an institution as the international rule of law should not be required to bear. The laudable ideals recognized in 1946 ought not to give way to transient political concerns. This action brings the United States, in its relationship to the ICJ, one step closer to that of nations such as the People's Republic of China and the Soviet Union, who have never accepted compulsory jurisdiction,[243] and whose commitment to universal principles of international law and international legal accountability leaves a great deal to be desired.

The proposed reservations attempt to strike a balance between these high ideals and the reality of an international community that is largely unwilling to accept the Optional Clause. They stem from the belief that the advantages of the system of ICJ compulsory jurisdiction outweigh its burdens. Moreover, they attempt to minimize the perceived burdens upon the United States by protecting particular national interests of the United States. The procedural minutiae upon which this Comment is predicated may seem incongruous to the lofty ideals underlying them. There is no doubt that unqualified acceptance of compulsory jurisdiction most fully achieves the moral and psychological advantages with which acceptance is associated. However, it may well be that the partial cession of sovereignty which compulsory jurisdiction requires must proceed, if at all, one step at a time. The proposals in this Comment are intended only as a non-exhaustive framework for partially retracing those steps. It is to be hoped that a limited recognition of the substantial benefits of compulsory jurisdiction inexorably will lead to unqualified willingness to stand accountable before the international community for any and all actions, under the rule of international law.

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243. Governments of the Third World have been equally lax in their utilization of the Optional Clause. *See* W. WILLIAMS, ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 21–29 (1976).