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Nicaragua v. United States in the International Court of Justice: Compulsory Jurisdiction or Just Compulsion?

I. INTRODUCTION

On April 9, 1984, the Republic of Nicaragua submitted a complaint to the International Court of Justice (ICJ), alleging that the United States was using military force against Nicaragua in violation of international law.¹ Three days earlier, however, the United States had notified the Secretary-General of the United Nations that its 1946 declaration of consent to the compulsory jurisdiction of the ICJ² would not apply to disputes with any Central American state.³ In a statement issued on May 10, 1984, the ICJ indicated that the case would proceed in two separate stages.⁴ First, the Court would consider the admissibility of the Nicaraguan application and determine whether it had jurisdiction to hear the case.⁵ Then, if there was in fact jurisdiction, the Court in a second proceeding would consider the merits of the case.⁶

On November 26, 1984, the ICJ completed the initial stage of the proceedings

1. Nicaraguan Application to the International Court of Justice of April 9, 1984, *quoted in* Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) 1984 I.C.J. — (Judgment of Nov. 26) [hereinafter cited as Judgment]. The Nicaraguan application stated in part that:

The United States of America is using military force against Nicaragua and intervening in Nicaragua's internal affairs, in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law. The United States has created an 'army' of more than 10,000 mercenaries . . . installed them in more than ten base camps in Honduras along the border with Nicaragua, trained them with arms, ammunition, food and medical supplies, and directed their attacks against human and economic targets inside Nicaragua . . .

Id. at 42. The alleged reason for the action by the U.S. is claimed by Nicaragua to be to harass and destabilize the Government of Nicaragua so that ultimately it will be overthrown, or, at a minimum, compelled to change those of its domestic and foreign policies that displease the United States.

Id. at 43. For the purposes of this Comment, the Case Concerning Military and Paramilitary Activities in and Against Nicaragua will be referred to as *Paramilitary Activities*. The majority opinion in *Paramilitary Activities* will be referred to as the Judgment and the separate opinions in that case will be referred to by the name of the author.

2. 1982-1983 I.C.J.Y.B. 88-89 (1983) (text of the U.S. Declaration).

3. Judgment, *supra* note 1, at 8-9; *see infra* note 270 and accompanying text.

4. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169 (Order of May 10, 1984) *reprinted in* 78 AM. J. INT'L. L. 750, 765 (1984) [hereinafter cited as Order]. *See* Judgment, *supra* note 1, at 5.

5. Order, *supra* note 4, at 765. These initial proceedings on admissibility and jurisdictional issues resulted in the Court's Judgment of November 26, 1984, which is the focus of this note.

6. *Id.* at 765. The judgment as to admissibility and the proceedings on the merits in the case are beyond the scope of this note.

by deciding the admissibility and jurisdictional issues in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Paramilitary Activities)*.⁷ Despite the contention by the United States that it would not be subject to the Court's jurisdiction, the ICJ declared that the application was admissible and that the Court had jurisdiction to hear the case.⁸ This was an unprecedented departure from the well established legal principles governing the ICJ's jurisdiction that had been nurtured for decades.⁹ In this single dramatic move, the ICJ had stretched its basis for jurisdiction far beyond the limits upon which it had historically relied.¹⁰

In its judgment, the ICJ discussed the validity of the declarations of consent to the compulsory jurisdiction of the Court made by both the United States and Nicaragua.¹¹ Such declarations, made pursuant to Article 36(2) of the Statute of the Court,¹² are necessary to enable the Court to invoke its compulsory jurisdiction over a state.¹³ The judgment also described the operation of Article 36(5) of the Statute of the Court, which made declarations of consent to the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ, applicable to the ICJ.¹⁴ The decision further addressed the issue of the validity of reservations to the consent of a state to the Court's compulsory jurisdiction.¹⁵ In addition, the

7. Judgment, *supra* note 1.

8. Judgment, *supra* note 1, at 56-57.

9. See *infra* notes 47-140 and accompanying text.

10. See *id.*

11. Judgment, *supra* note 1, at 8-10.

12. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, para. 2. Article 36, known as the Optional Clause, provides:

The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

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

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

13. Judgment, *supra* note 1, at 30. In reference to declarations made under the Optional Clause, the Court stated:

Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations.

Id.

14. Judgment, *supra* note 1, at 16-22. Article 36(5) of the Statute of the Court, provides:

Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, para. 5.

15. Judgment, *supra* note 1, at 34-38. The Court directly addressed the applicability of the U.S. reservation regarding parties to multilateral treaties (Vandenberg Reservation), but also makes broader

Court determined the effect of an attempt to modify a declaration of consent¹⁶ and discussed the possible additional basis of jurisdiction by virtue of a 1956 Treaty of Friendship, Commerce, and Navigation between the United States and Nicaragua.¹⁷

The issues raised in the ICJ's judgment of November 26, 1984, strike not only at the purpose and effectiveness of the ICJ, but also at international law itself, which is fundamentally and necessarily based on the good faith cooperation of sovereign states.¹⁸ The purpose of this Comment is to review the judgment of the Court in *Paramilitary Activities*, both within the context of the historical treatment of jurisdictional issues by the Court and under the various theories which have arisen in regard to the consent to jurisdiction.¹⁹

This Comment will begin with a brief overview of the ICJ judgment. Next, the decision will be put into context by reviewing previous PCIJ and ICJ decisions regarding jurisdiction. Once the reader has been exposed to the general principles underlying the jurisdiction of the ICJ, the author will return to the *Paramilitary Activities* decision to review the reasoning of the Court in detail. The author will analyze the Court's reasoning in a subsequent section and draw conclusions based on that analysis. Finally, the author will briefly state the implications of the decision.

II. OVERVIEW OF *Nicaragua v. United States* (JUDGMENT OF NOVEMBER 26, 1984)

The Nicaraguan application to the ICJ indicated that Nicaragua intended to rely on the compulsory jurisdiction of the ICJ under Article 36(2) of the Statute of the Court.²⁰ In order for the Court to exercise jurisdiction under that provision, both parties must have accepted the compulsory jurisdiction of the ICJ.²¹ While it was not contested that the United States had accepted the jurisdiction of the ICJ by virtue of the U.S. Declaration of Consent of 1946,²² the United States maintained that Nicaragua had not accepted the same obligation.²³ Nicaragua

statements regarding reservations in general. *Id.* The dissenting opinion of Judge Schwebel also directly discussed the United States reservation as to domestic issues (Connally Reservation). See Judgment, *supra* note 1, (Schwebel, J., dissenting) at 42-44.

16. Judgment, *supra* note 1, at 27-33. See *infra* notes 271-339 (referring to the April 6, 1984, letter from United States Secretary of State Shultz to the Secretary-General of the United Nations).

17. Treaty of Friendship, Commerce and Navigation, United States-Nicaragua, Jan. 21, 1956, 9 U.S.T. 449, T.I.A.S. No. 4024 [hereinafter cited as Treaty].

18. See generally Goldie, *The Connally Reservation: A Shield for an Adversary*, 9 UCLA L. REV. 277, 345-52 (1962).

19. While the Judgment of November 26, 1984 determined the admissibility of the Nicaraguan application to the Court, the focus of this article is the jurisdiction of the Court.

20. Judgment, *supra* note 1, at 8.

21. See *supra* note 12 and accompanying text (text of Article 36(2)).

22. See *supra* note 2.

23. Judgment, *supra* note 1, (Schwebel, J., dissenting) at 4.

conceded that it had never submitted a declaration of consent to the jurisdiction of the ICJ, but asserted that Article 36(5) of the Statute of the Court made its declaration of consent to the jurisdiction of the PCIJ valid as to the ICJ.²⁴ The Court agreed with Nicaragua, rejecting the U.S. argument that Article 36(5) did not apply since Nicaragua's declaration had never been binding under the PCIJ.²⁵ Furthermore, the Court stated that even if Article 36(5) was not applicable, the conduct of the parties and notations in the Yearbooks of the ICJ were enough to imply consent under Article 36(2).²⁶

After submitting its original application, Nicaragua added an additional basis of jurisdiction for the Court to consider.²⁷ Nicaragua claimed a complementary basis of jurisdiction under a 1956 Treaty of Friendship, Commerce and Navigation signed by both the United States and Nicaragua.²⁸ The Court agreed that this was an additional basis for jurisdiction.²⁹ The judgment went on to reject the U.S. contention that jurisdiction was precluded by a letter of modification deposited with the Court prior to the filing of Nicaragua's application.³⁰ Finally, the Court refused to allow the the U.S. reservation to consent to jurisdiction for matters involving multilateral treaties to operate to prevent the Court from exercising jurisdiction.³¹

In deciding that it had jurisdiction to hear the *Paramilitary Activities* case, the ICJ departed from the well settled approach of prior cases of both the PCIJ and ICJ, which indicate that the overriding considerations in determining the jurisdiction had been a state's actual consent to jurisdiction as well as judicial restraint. In the next section, these cases and the development of the principles of jurisdiction for the World Court are discussed.

III. BACKGROUND: DEVELOPMENT OF PRINCIPLES OF JURISDICTION FOR THE WORLD COURT

A. *Overview of the Jurisdiction of the Permanent Court of International Justice*

The first important step toward the formation of a court for the settlement of international disputes was the creation of the Hague Tribunal, which was established by the first Hague Peace Conference of 1899.³² Rather than establishing a

24. Judgment, *supra* note 1, at 9.

25. *Id.* at 56.

26. *Id.* at 22.

27. *Id.* at 39. See also *infra* notes 308-25 and accompanying text.

28. See *supra* note 17.

29. Judgment, *supra* note 1, at 56.

30. *Id.* at 33. See *infra* notes 271-321 and accompanying text.

31. Judgment, *supra* note 1, at 38. See *infra* notes 320-54 and accompanying text.

32. Clarke, *A Permanent Tribunal of International Arbitration: Its Necessity and Value*, 1 AM. J. INT'L. L. 342, 343 (1907).

true permanent court, however, the conference provided for the appointment of a temporary tribunal from a permanent panel of arbitrators.³³ The creation of the tribunal was evidence of the growing sense of internationalism and the growing desire for a world court; however, some considered its lack of permanence to be a fundamental defect.³⁴

A draft convention for the creation of a permanent court was the result of the Second Hague Peace Conference of 1907.³⁵ Although at this conference the concept of a world court was agreed upon, it had not yet become a reality. At the end of World War I, however, at the Paris Peace Conference of 1919, Article 14 of the Covenant of the League of Nations was drafted, which directed the Council of the League to formulate plans for the creation of the Permanent Court of International Justice (PCIJ).³⁶ Article 14 also provided for the Statute for the PCIJ.³⁷ Once the Statute was adopted,³⁸ the PCIJ began its first session on January 30, 1922.³⁹ The first true world court had become a reality.

Almost immediately, it became clear that the problem of jurisdiction would be a major obstacle for the PCIJ. One commentator stated in 1922 that, while the concept of having a world court was universally appealing, the court would not work in reality if states were not willing to accept its jurisdiction and that any attempt at compulsory jurisdiction would be premature.⁴⁰ Another commentator disagreed with this reasoning, stating that a court by its very nature must have compulsory jurisdiction.⁴¹ This second commentator maintained that, because the drafters of the Covenant of the League of Nations had intended to create a "court" as opposed to an "arbitral tribunal," they therefore also had intended the PCIJ to have compulsory jurisdiction.⁴²

The basis for jurisdiction of the PCIJ resulted from a compromise between the desire for compulsory jurisdiction and the desire to see the Court gain the necessary support among nations to exist as an international entity.⁴³ Article 36

33. Scott, *A Permanent Court of International Justice*, 14 AM. J. INT. L. 581, 581 (1920).

34. Clarke, *supra* note 32, at 314-47. See also Scott, *supra* note 33, at 581.

35. See Scott, *supra* note 33, at 581.

36. Hudson, *The First Year of the Permanent Court of International Justice*, 17 AM. J. INT. L. 15, 15 (1923).
LEAGUE OF NATIONS COVENANT art. 14.

37. LEAGUE OF NATIONS COVENANT art. 14.

38. 6 L.N.T.S. 391, 411 (1921). The statute was ratified by 29 nations. The members of the League of Nations which did not ratify the statute for the PCIJ were the Union of South Africa, Australia, Canada, India, New Zealand, and Serb-Croat-Slovene State. *Id.* at 411-13.

39. Hudson, *supra* note 36, at 16.

40. Richards, *The Jurisdiction of the Permanent Court of International Justice*, 2 BRIT. Y.B. 1, 2 (1921-22) (Sir Richards, Professor of Law, University of Oxford).

41. Loder, *The Permanent Court of International Justice and Compulsory Jurisdiction*, 2 BRIT. Y.B. 7-8 (1921-22). Judge Loder, President of the PCIJ, defined compulsory jurisdiction to mean that "the plaintiff can summon the defending party without previous agreement between the two, even against the latter's will, and the court is . . . competent and even bound to adjudicate, whether the offending party puts in an appearance or not." *Id.* at 11-12.

42. *Id.* at 7-8.

43. *Id.* at 23-24.

of the Statute of the Court provided for the signing of an optional protocol, by which states would consent to the compulsory jurisdiction of the PCIJ.⁴⁴ The jurisdiction of the PCIJ thereby became compulsory only as to those states which chose to make an express declaration of their consent.⁴⁵ Article 36 explicitly permitted states to attach reservations to their declarations of consent, including limitations on the duration of the consent, under the doctrine of reciprocity.⁴⁶

The concept of jurisdiction became refined through the decisions of the PCIJ. The overriding emphasis in each of the PCIJ cases addressing the jurisdictional problem was judicial restraint. For example, on February 7, 1923, the PCIJ gave the first advisory opinion that addressed the issue of the Court's jurisdiction.⁴⁷ In *Nationality Decrees Issued in Tunis and Morocco*,⁴⁸ the Court was asked to determine whether the application of nationality decrees issued in Tunis and Morocco to British subjects was solely a matter of domestic jurisdiction.⁴⁹ The PCIJ referred to Article 15(8) of the Covenant of the League of Nations, which stated that the Council was to make no recommendations as to matters which were, as determined by international law, solely within the domestic jurisdiction of a state against which a claim had been brought.⁵⁰ The PCIJ recognized that the extent to which domestic jurisdiction covers certain issues is relative to the development of international relations.⁵¹ It found that questions of nationality, which were at issue in the case, were solely within domestic jurisdiction under international law as it had developed up to that time.⁵² The Court went on to state that the test for whether an issue was an international question was not whether it was of international concern, but whether the issue was one recognized by international law.⁵³

It took very little time before the first direct challenge to the PCIJ's jurisdiction came before the Court. In *Autonomy of Eastern Carelia*,⁵⁴ the PCIJ stated that it could not grant an opinion on a matter involving Russia because that country had refused to take part in the proceedings.⁵⁵ The Court had been requested to decide whether Russia had any obligations to Finland as a result of the Dorpat Peace Treaty of 1920 and the annexed declaration regarding the autonomy of Eastern Carelia.⁵⁶ Russia, however, regarded the question of Eastern Carelia's

44. STATUTE FOR THE PERMANENT COURT OF INTERNATIONAL JUSTICE art. 36.

45. *See id.*

46. *Id.*

47. *Nationality Decrees Issued in Tunis and Morocco*, 1923 P.C.I.J., ser. B, No. 4 (Advisory Opinion of February 7).

48. *Id.*

49. *Id.* at 21.

50. *Id.* at 23 (quoting LEAGUE OF NATIONS COVENANT art. 15, para. 8).

51. *Id.* at 24.

52. *Id.*

53. *See id.* at 26.

54. *Autonomy of Eastern Carelia*, 1923 P.C.I.J. ser. B, No. 5 (Advisory Opinion of July 23, 1923).

55. *Id.* at 29.

56. *Id.* at 6.

status to be a matter of its domestic jurisdiction.⁵⁷ Russia had not previously consented to the jurisdiction of the PCIJ, nor was it a member of the League of Nations.⁵⁸ Moreover, Russia was not even recognized *de jure* by many nations at the time.⁵⁹ In its decision, the PCIJ noted that it was obligated to follow the same principles of jurisdiction in the granting of an advisory opinion as it would if it were directly resolving the dispute between the parties.⁶⁰ Thus, under these principles, "no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement."⁶¹ Since Russia had in no way consented to the proceedings, the Court decided that it could give no opinion on the Eastern Carelia question.⁶² Therefore, in the first direct challenge to the PCIJ's jurisdiction when a state had not consented, the Court displayed restraint and due respect for the sovereignty of states.

In its *Advisory Opinion of February 4, 1932, on the Treatment of Polish Nationals in Danzig*,⁶³ the PCIJ stated that the Constitution of Danzig was not within the domain of international relations.⁶⁴ Because of this, the Court concluded that questions as to the application of laws under the Danzig Constitution could not be brought before the League of Nations, since they were matters of domestic concern.⁶⁵ By giving a broad interpretation to the phrase "domestic concern," the Court effectively limited its own jurisdiction.

The first case to directly discuss the effects of reservations on consent to jurisdiction, as well as the principle of reciprocity, was the *Phosphates in Morocco* case.⁶⁶ In that case, Italy complained that the alleged "establishment of the Phosphate monopoly [was] in effect inconsistent with the obligations of Morocco and of France."⁶⁷ France objected to the exercise of jurisdiction by the Court, basing its objection on the reservation in its declaration of consent.⁶⁸ The French Declaration of April 25, 1931, contained a reservation limiting its consent to "disputes which may arise after the ratification of the present declaration and with regard to situations or facts subsequent to this ratification."⁶⁹ The Italian Declaration of September 7, 1931, did not contain such a reservation; however,

57. *Id.* at 13.

58. *Id.* at 27-28.

59. *Id.* at 13-14.

60. *Id.* at 28-29.

61. *Id.* at 27.

62. *Id.* at 28.

63. *Treatment of Polish Nationals in Danzig*, 1932 P.C.I.J., ser. A/B, No. 44 (Advisory Opinion of February 4).

64. *Id.* at 25.

65. *Id.*

66. *Phosphates in Morocco (Italy v. Fr.)*, 1938 P.C.I.J., ser. A/B, No. 74 (Preliminary Objections).

67. *Id.* at 13.

68. *Id.* at 21-22.

69. *Id.* at 22. Reservations of this type, which limit consent based on the time when the dispute or facts leading to it arose, are referred to as reservations *ratione temporis*. *Id.* at 22-23.

the Court agreed with the French contention that its reservation would apply as between the parties based on the principle of reciprocity from Article 36(2) of the Statute of the Court.⁷⁰ The Court stated that its jurisdiction “only exists within the limits within which it has been accepted,”⁷¹ and, therefore, its only duty was to determine whether the French objection was properly based on the reservation.⁷² In order for the Court to have jurisdiction under the reservation, the alleged violation of international law must have occurred after the crucial date of acceptance of compulsory jurisdiction.⁷³ The Court concluded that it did not have jurisdiction to decide the dispute, since no violation had occurred within the limits imposed by the French reservation.⁷⁴

Reciprocity was directly at issue in *The Electricity Company of Sofia and Bulgaria* case.⁷⁵ The Bulgarian declaration of consent to jurisdiction was reserved only as to reciprocity.⁷⁶ The Belgian declaration, however, contained a reservation which Bulgaria relied on through the principle of reciprocity.⁷⁷ While the PCIJ agreed that the Belgian reservation could generally be invoked under the doctrine of reciprocity, it denied this particular application since the reservation did not cover the issue that had been brought before the Court.⁷⁸ Bulgaria also argued that under Article 36 of the PCIJ Statute the case was not within the competence of the Court.⁷⁹ The Court concluded that this argument was too intertwined with the merits of the case to be decided in a preliminary objection under Article 62 of the Rules of the Court.⁸⁰ The Court found that the arguments made by Bulgaria regarding the Court’s lack of jurisdiction were not well-founded.⁸¹ Nonetheless, it upheld a final argument made by Bulgaria, declaring that the Belgian application had failed to prove that a dispute had arisen

70. *Id.* at 22. The principle of reciprocity arises from Article 36, which provides that states may “declare that they recognize as compulsory *ipso facto* and without special agreement, *in relation to any other Member or State accepting the same obligation*, the jurisdiction of the Court.” STATUTE FOR THE PERMANENT COURT OF INTERNATIONAL JUSTICE art. 36 (emphasis added).

71. *Id.* at 23.

72. *Id.* at 24.

73. *Id.* at 24-25. The PCIJ defined a violation of international law as “a definitive act which would, by itself, directly involve international responsibility.” *Id.* at 28. There was some dispute as to the “crucial date” involved in this case. The French believed the date should have been that upon which the declaration became operative in regard to Italy. *Id.* at 25. Italy, however, contended that the date should have been that of the deposit of the French declaration. *Id.* The court felt it unnecessary to decide the issue since it would not have changed the outcome of the dispute in this case. *Id.*

74. *Id.* at 29.

75. *The Electricity Co. of Sofia and Bulgaria (Bulg. v. Belg.)*, 1939 P.C.I.J., ser. A/B, No. 78 (Preliminary Objection) [hereinafter cited as *Sofia*].

76. *Id.* at 80.

77. *Id.* at 81.

78. *Id.* at 81-82.

79. *Id.* at 22. Article 36 of the PCIJ lists the general categories of disputes which the court is competent to hear. See STATUTE FOR THE PERMANENT COURT OF INTERNATIONAL JUSTICE art. 36.

80. *Sofia* at 83.

81. *Id.*

between the two countries before the complaint was filed.⁸² Thus, in *Sofia*, the PCIJ again declined to hear a case where its jurisdiction was contested, thereby refusing to stretch the limits of its jurisdictional authority.

Sofia was the last major case decided by the PCIJ regarding jurisdiction. It demonstrates that throughout its history, the PCIJ was careful to accord due respect to state sovereignty where its jurisdiction was not clearly established.

B. *Overview of the Jurisdiction of the International Court of Justice*

As an entity created under the Covenant of the League of Nations, the PCIJ was dissolved, as was the rest of the League, with the establishment of the United Nations.⁸³ It was replaced immediately, however, by the newly created International Court of Justice (ICJ).⁸⁴ Article 93 of the U.N. Charter made the member states of the United Nations *ipso facto* members of the newly created International Court of Justice (ICJ); Article 94 obligated those states to follow the Court's decisions under the enforcement power of the Security Council.⁸⁵ By virtue of both Article 93 of the U.N. Charter and Article 1 of the Statute of the Court, the ICJ is required to abide by the provisions of its Statute, which was incorporated as an integral part of the U.N. Charter.⁸⁶ Pursuant to Article 103 of the U.N. Charter, and in combination with Article 92 of the Charter and Article 1 of the Statute, obligations under the Statute of the Court are obligations of the members of the United Nations, and thus prevail over any other international agreements.⁸⁷

82. *Id.*

83. *See* U.N. CHARTER art. 3.

84. U.N. CHARTER art. 92.

85. U.N. CHARTER art. 93. Article 93 provides that:

1. All Members of the United Nations are *Ipsa Facto* parties to the Statute of the International Court of Justice.
2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

Id. *See also* U.N. CHARTER art. 94. Article 94 provides:

1. Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Id.

86. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 1. Article 1 provides:

The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present statute.

87. *See* Crawford, *The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court*, 50 BRIT. Y.B. 63, 69 (1979). U.N. CHARTER art. 103. Article 103 provides:

In the event of a conflict between the obligations of the Members of the United Nations under

Article 36 of the Statute of the ICJ, the primary jurisdictional provision, generally provides that the Court shall have jurisdiction to decide disputes brought before it by states in matters of international law.⁸⁸ The question of voluntary versus compulsory jurisdiction, first addressed at the time of the formation of the PCIJ, arose again in determining the jurisdiction of the ICJ.⁸⁹ Reflecting the consensual nature of international law and the desires of the states involved to reach a compromise, Article 36(2) was written into the Statute of the ICJ.⁹⁰ Under this provision, which became known as the Optional Clause, the Court may exercise compulsory jurisdiction only over those states which have consented.⁹¹ The wording of this clause is almost identical to the jurisdictional provision which preceded it in the Statute for the PCIJ.⁹² To encourage states to consent to the Court's compulsory jurisdiction under the Optional Clause, certain reservations to a state's consent were permitted by Article 36(3) of the ICJ Statute.⁹³

Reservations to consent to the compulsory jurisdiction of the ICJ appeared as manifestations of what one commentator referred to as the same vague sense of fear that had years before kept some states from consenting to the jurisdiction of the PCIJ.⁹⁴ States were concerned that the ICJ might use its compulsory jurisdiction to overstep the sanctity of state sovereignty in a manner to which the state had not consented. A review of the cases decided by the ICJ prior to November 29, 1984, however, reveals very little reason for states to have feared such an exercise of the Court's compulsory jurisdiction. The ICJ followed the same course set by the PCIJ, consistently adhering to a policy of judicial restraint in resolving issues of compulsory jurisdiction.

In the *Anglo-Iranian Oil Company* case,⁹⁵ the ICJ declared on July 22, 1952, that it lacked jurisdiction. The dispute arose over the nationalization of oil companies in Iran. Under the principle of reciprocity, the ICJ looked to the terms of the Iranian consent to jurisdiction, since it was the more restrictive of the two declarations involved.⁹⁶ The Iranian declaration restricted compulsory jurisdic-

the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

88. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36.

89. See *supra* notes 32-82 and accompanying text.

90. See Goldie, *supra* note 18, at 280. See *supra* note 12 (text of art. 36(2)).

91. *Id.*

92. Compare STATUTE FOR THE INTERNATIONAL COURT OF JUSTICE art. 36 with STATUTE FOR THE PERMANENT COURT OF INTERNATIONAL JUSTICE art. 36.

93. Merrills, *The Optional Clause Today*, 50 BRIT. Y.B. 87, 88 (1979); See also U.N. CHARTER art. 36, para 3. Article 36(3) provides that "[t]he 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." *Id.* See also *supra* note 12 (text of Article 36(2)).

94. See Preuss, *The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction*, 40 AM. J. INT'L. L. 720, 734 (quoting Lauterpacht, *The British Reservations to the Optional Clause, Economica*. June, 1930, at 159).

95. *Anglo-Iranian Oil Company Case (U.K. v. Iran) 1952, I.C.J. 93, (Preliminary Objection).*

96. *Id.*

tion to those disputes arising from the application of a treaty or convention.⁹⁷ The ICJ interpreted the Iranian reservation broadly where a narrow interpretation would have given the Court jurisdiction.⁹⁸

In the *Rights of Nationals of the U.S. in Morocco* case, both of the states involved had included reservations in their acceptance of the ICJ's jurisdiction.⁹⁹ Despite the presence of the reservations, both states participated in the proceedings.¹⁰⁰ Since the states fully participated, without invoking their reservations, the Court did not rely on the reservations in making its decision. This case once again emphasizes the importance of consent, and is consistent with those cases in which the Court refused to exercise jurisdiction where a state has invoked a reservation.¹⁰¹

In the *Nottebohm* case, the ICJ made several broad statements concerning its jurisdiction.¹⁰² Guatemala had objected to the ICJ's jurisdiction because its declaration of consent would expire within weeks of Liechtenstein's filing of the claim.¹⁰³ The Court rejected Guatemala's contention that the Court should not give effect to its declaration since its consent would expire before the Court could possibly come to a decision on the matter.¹⁰⁴ Guatemala further argued that Article 36(6) of the Statute of the Court did not render the Court competent to determine its jurisdiction over this dispute.¹⁰⁵ The Court rejected the argument, stating:

Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration [I]t has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.¹⁰⁶

97. *Id.*

98. *See id.* at 104.

99. *Rights of Nationals of the United States in Morocco*, (Fr. v. U.S.) 1952 I.C.J. 176.

100. *Id.* at 178-79.

101. *See generally id.* at 12-13.

102. *Nottebohm Case* (Liecht. v. Guat.), 1953 I.C.J. 18 (Preliminary Objection) [hereinafter cited as *Nottebohm*] (involved Guatemalan Naturalization procedures in regard to Nottebohm, a citizen of Liechtenstein. The ICJ later found the claim of Liechtenstein to be inadmissible). *See Nottebohm Case* (Liecht. v. Guat.), 1955 I.C.J. 4 (Merits).

103. *Nottebohm*, *supra* note 102, at 118, 120. The case had been submitted to the court on Dec. 17, 1951 while the declaration of Guatemalan consent was to expire on Jan. 26, 1952. *Id.*

104. *Id.* at 122-24. The decision on Guatemala's preliminary objection was declared on Nov. 18, 1953. *Id.* at 111.

105. *Id.* at 119. Article 36(6) of the Statute of the ICJ provides: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36 para. 6.

106. *Nottebohm*, *supra* note 102, at 119.

The Court went on to unanimously reject the preliminary objection of Guatemala, stating that it did have jurisdiction to decide the merits of the case.¹⁰⁷

In the *Case of Certain Norwegian Loans*,¹⁰⁸ France initiated proceedings against Norway in regard to the form of repayment of loans held by French nationals.¹⁰⁹ Norway invoked the French reservation as to domestic issues through the principle of reciprocity.¹¹⁰ The ICJ found that it did not have jurisdiction to decide the dispute.¹¹¹ The Court emphasized that this action was brought under Article 36(2), which requires consent by the states and, by virtue of reciprocity, limits jurisdiction to the terms of the narrower declaration of consent.¹¹² The ICJ stated that it would not be justified in finding a basis for jurisdiction, other than what was permitted by the French application, to bring the case before the Court.¹¹³ Furthermore, the Court explicitly stated that it was not deciding the validity of the French reservation itself, as it was not called upon to make such a judgment.¹¹⁴

Judge Lauterpacht wrote a separate opinion in the *Norwegian Loans* case.¹¹⁵ While he agreed that the Court was not competent to decide the case, he disagreed that the Court lacked competence based on Norway's invocation of the French reservation.¹¹⁶ Rather, Judge Lauterpacht believed that the Court could not decide the case because France had never submitted a valid declaration of consent to the jurisdiction of the Court.¹¹⁷ Lauterpacht's separate opinion stated that, if the French reservation as invoked by Norway was valid, the preliminary objection would not be subject to review by the Court.¹¹⁸ If the French reservation was valid, and Norway claimed that the issue was domestic, "[t]he Court must accept that view not because it agrees with it, but because it is the view of the Norwegian Government. Its accuracy is irrelevant."¹¹⁹

Lauterpacht went on, however, to demonstrate why he believed that reservations such as that of France were invalid.¹²⁰ In general, he wrote that reservations which permit the consenting state to decide ultimately the jurisdiction of the Court are inconsistent with Article 36(6) of the Statute of the Court.¹²¹ That

107. *Id.* at 124.

108. *Case of Certain Norwegian Loans*, (Fr. v. Nor.) 1957 I.C.J. 9 [hereinafter cited as *Norwegian Loans*].

109. *Id.* at 11.

110. *Id.* at 13-14.

111. *Id.* at 27.

112. *Id.* at 23.

113. *Id.* at 25.

114. *Id.* at 26-27.

115. *Id.* at 34. (separate opinion of Judge Lauterpacht).

116. *Id.*

117. *Id.*

118. *Id.* at 42-43.

119. *Id.*

120. *Id.* at 43-51.

121. *Id.* at 44-48.

article provides the ICJ alone with the power to determine its jurisdiction.¹²² Lauterpacht further indicated that no legal obligation should arise from a consent to jurisdiction which allows the consenting state to determine the existence of the obligation.¹²³ Nonetheless, it must be kept in mind that the Court decided that it did not have jurisdiction to hear the case. Neither Lauterpacht nor the Court would have stretched the limits of jurisdiction to allow its exercise in *Norwegian Loans*.

The case of the *Rights of Passage Over Indian Territory* included preliminary objections over a reservation to consent to jurisdiction.¹²⁴ The first preliminary objection in that case involved a 1955 Portuguese reservation which India claimed was invalid because it was "incompatible with the object and purpose of the Optional Clause."¹²⁵ The Court rejected the contention that the reservation was inconsistent with the statute and did not go on to determine whether, if the reservation had been found invalid, it would have invalidated the entire declaration of consent to jurisdiction.¹²⁶

India's fifth preliminary objection in the *Right of Passage* case was based on its reservation as to matters exclusively within the domestic jurisdiction of India.¹²⁷ The Court joined this objection with the merits of the case, stating that this issue was too closely bound up with the substance of the case to be considered without prejudging a decision on the merits.¹²⁸ Upon reaching the merits of the case, the Court overruled the objection of India as to the domestic issue.¹²⁹ The Court stated that India could not now assert that the issue was exclusively domestic after the parties had chosen to put themselves "on the plane of international law."¹³⁰ The ICJ's decision that the reservation did not preclude the Court's exercise of jurisdiction was based solely on a review of the reservation as applied to the facts.¹³¹ The Court also determined that there was no violation of reciprocity, and that states have a right to declare unique reservations to consent, but the reservations cannot be retroactive.¹³²

122. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, para. 6. See *supra* note 105 (text of art. 36(6)).

123. *Norwegian Loans*, *supra* note 108, at 48-51.

124. Case Concerning the Right of Passage over Indian Territory (Port v. India), 1957 I.C.J. 32 (Preliminary Objections) [hereinafter cited as *Right of Passage* (prelim.)].

125. *Id.* at 141. The reservation in dispute stated that: "[t]he Portuguese Government reserve the right to exclude from the scope of the present declaration, at any time during its validity, any given category of categories or disputes, by notifying the Secretary-General of the United Nations and with effect from the moment of such notification." 1982-1983 I.C.J.Y.B. 83 (1983) Portuguese Declaration para. 3).

126. *Rights of Passage* (Prelim.), *supra* note 124, at 144.

127. *Id.* at 149.

128. *Id.* at 150.

129. Case Concerning the Rights of Passage Over Indian Territory (Port. v. India) 1960 I.C.J. 82 (Judgment of Apr. 12) at 33.

130. *Id.*

131. See *id.* at 32-33.

132. *Id.* at 35.

The United States invoked a reservation in the *Interhandel Case*.¹³³ The ICJ declined to adjudicate on the merits of the case, basing its decision on Switzerland's failure to exhaust local remedies.¹³⁴ The ICJ did not reach a decision on the jurisdictional dispute.¹³⁵ Judge Lauterpacht again wrote a separate opinion, stating his belief that all automatic reservations are intrinsically invalid,¹³⁶ further developing the theory which he first used in his opinion in the *Norwegian Loans* case.¹³⁷

In the *Aegean Sea Continental Shelf Case*, the ICJ considered a Greek reservation to consent to jurisdiction.¹³⁸ The Court concluded that the dispute concerning the Turkish-Greek border was within the scope of Greece's reservation as to territorial issues and therefore the Court lacked jurisdiction.¹³⁹ While the Greek reservation also applied to domestic issues other than territorial disputes, the Court focused only on the territorial element.¹⁴⁰

From the first case considered by the PCIJ through the *Aegean Sea* case decided by the ICJ, the judges of the World Court were consistently wary of overstepping the limits of the Court's compulsory jurisdiction. It was not until the Nicaraguan dispute arose in 1984 that the World Court made a dramatic shift in approach.

IV. THE RIGHT OF NICARAGUA TO SUBMIT ITS CLAIM TO THE ICJ

A. Overview of Nicaragua's Claim of ICJ Jurisdiction

The Republic of Nicaragua initiated proceedings against the United States on April 9, 1984, by depositing an application with the Registry of the ICJ.¹⁴¹ The application to the Court charged that the United States was using military force against Nicaragua to either overthrow its government or to force it to change its policies.¹⁴² Nicaragua's application stated that it would rely on the declarations of consent to the jurisdiction of the Court which had been made by both the United States and Nicaragua in conjunction with Article 36 of the Statute of the Court.¹⁴³ The Nicaraguan application had reserved the right to supplement or to amend its application at a future date.¹⁴⁴ Nicaragua took advantage of this provision by asserting, in its Memorial to the Court of June 30, 1984, that there

133. The *Interhandel Case* (Switz. v. U.S.) 1959 I.C.J. 34 (Preliminary Objections).

134. *Id.* at 26, 30.

135. *Id.* at 23-26.

136. *Id.* at 116 (Lauterpacht, J., dissenting).

137. See *supra* notes 115-23 and accompanying text.

138. *Aegean Sea Continental Shelf Case* (Greece v. Turk.) 1978 I.C.J. 62 (Judgment of Dec. 19).

139. *Id.* at 37, 45.

140. *Id.* at 21, 37.

141. See Judgment, *supra* note 1, at 4.

142. *Id.* at 42-43. See *supra* note 1 (text of Nicaraguan application).

143. *Id.* at 8. For the text of Article 36(2) of the Statute of the ICJ see *supra* note 12.

144. Judgment, *supra* note 1, at 8.

was also a complementary basis of jurisdiction under Article XXIV, Paragraph 2, of the 1956 Treaty of Friendship, Commerce, and Navigation, which was signed by both the United States and Nicaragua.¹⁴⁵

Nicaragua asserted that its 1929 declaration of consent to the compulsory jurisdiction of the PCIJ had been automatically transferred to the ICJ by operation of Article 36(5) of the Statute of the ICJ,¹⁴⁶ and therefore, it was validly subject to the compulsory jurisdiction of the ICJ as well.¹⁴⁷ Nicaragua needed to show that it had accepted the same obligation as the United States, with respect to compulsory jurisdiction, in order to bring the United States before the ICJ under Article 36(2) of the Statute of the Court.¹⁴⁸ The ICJ found, by a vote of eleven to five, that it did in fact have jurisdiction.¹⁴⁹ Arguing against jurisdiction, the United States generally stated that Nicaragua had not filed a declaration of consent that directly applied to the ICJ under Article 36(2).¹⁵⁰ Moreover, the U.S. argued that because Nicaragua's 1929 declaration of consent to the jurisdiction of the PCIJ never actually came into force, it had not accepted the jurisdiction of the ICJ under Article 36(5).¹⁵¹

B. *Validity of the Nicaraguan Consent to the Jurisdiction of the PCIJ*

As a member of the League of Nations, Nicaragua on December 13, 1920, joined in the approval of the Statute of the PCIJ, which provided for "a Protocol of Signature whereby States would declare their 'recognition of this statute.'" ¹⁵² The protocol stated:

The present Protocol . . . is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations.¹⁵³

145. *Id.* See Treaty *supra* note 17.

146. For the text of Article 36(5) of the Statute of the ICJ see *supra* note 14.

147. See Judgment, *supra* note 1, at 9.

148. *Id.* see *supra* note 12. While Nicaragua would not have to make such a showing in order to bring a party before the Court under an independent basis of jurisdiction such as a treaty, in order to bring a party before the Court under the compulsory jurisdiction of the ICJ, Nicaragua must show that it is "a state accepting the same obligation." *Id.* For the text of Article 36(2), see *supra* note 12.

149. Judgment, *supra* note 1, at 56. The Judgment listed the following: In favour, *President Elias; Vice-President Sette-Camara; Judges Lachs; Morozov; Nagendra Singh; Ruda; El-Khani; de Lacharriere; Mbaye; Bedjaoui; Judge ad hoc Colliard.* Against: *Judges Mosler, Oda, Ago, Schwebel and Sir Robert Jennings.* *Id.*

150. See Judgment, *supra* note 1, at 4 (Schwebel, J., dissenting) [hereinafter cited as Schwebel].

151. *Id.*

152. Judgment, *supra* note 1, at 2 (separate opinion of Judge Oda) [hereinafter cited as Oda].

153. *Id.* (quoting P.C.I.J. ser. D, No. 1, at 7) (referring to the approval of the draft statute for the P.C.I.J.).

Nicaragua signed the Protocol on September 24, 1929, and made a declaration of consent to the jurisdiction of the PCIJ under the Optional Clause, but failed to deposit the necessary instrument of ratification with the League of Nations.¹⁵⁴ In order for its declaration of consent to the jurisdiction of the PCIJ to have been binding on Nicaragua, it would have been necessary for the Secretariat to have received the ratification.¹⁵⁵ Nicaragua conceded that this did not occur.¹⁵⁶ On September 16, 1942, the Acting Legal Advisor of the League of Nations sent a letter to Nicaragua indicating that the ratification had not been received, "the deposit of which is necessary to bring the obligation effectively into being."¹⁵⁷ Nicaragua, therefore, under Article 36(2), was not subject to the compulsory jurisdiction of the PCIJ.¹⁵⁸

C. *The Applicability of Article 36(5) of the ICJ Statute*

While all the judges voting on the jurisdictional issue agreed that Nicaragua was not bound by its declaration to the compulsory jurisdiction of the PCIJ, disagreement arose over whether the 1929 Nicaraguan Declaration had become binding as to the compulsory jurisdiction of the ICJ.¹⁵⁹ The question for the Court in this aspect of the case was whether the Nicaraguan Declaration of 1929, made under Article 36 of the PCIJ, was "still in force" within the meaning of Article 36(5) of the ICJ Statute, despite the fact that the declaration had lacked

154. Judgment, *supra* note 1, at 10. The Nicaraguan declaration stated:

On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice. Geneva, 24 September 1929. (Signed) T.F. Medina.

Id.

155. *Id.* at 10-11.

156. *Id.*; Oda, *supra* note 152, at 3 (quoting paragraph 86 of Nicaragua's Memorial). "In connection with this proceeding, the Government of Nicaragua has undertaken investigations in the official archives of Nicaragua. To date, no evidence has been uncovered that the instrument of ratification of the Protocol of Signature to the Statute of the Permanent Court of International Justice was forwarded to Geneva." *Id.* As an explanation for the lack of the deposit of the instrument, the agent of Nicaragua stated: "World War II, which was then in full progress, and the attacks on commercial shipping may explain why the instruments appear never to have arrived at the Registry of the Permanent Court." *Id.*

157. Schwebel, *supra* note 150, at 6 (quoting the September 16, 1942 letter from the League of Nations Archives, File No. 3C/17664/1589, published in the U.S. Counter-Memorial, Annex 26).

158. Schwebel, *supra* note 150, at 5. In his opinion, Judge Schwebel quoted the following passage from the Permanent Court of International Justice by Judge Hudson:

Clearly, the 'optional clause' does not stand on any independent basis; it is only a suggested form of the declaration which Article 36 permits to be made at the time of signing or ratifying the Protocol of Signature or at a latter moment. It is entirely subsidiary to the Protocol of Signature; a State cannot become a party to the optional clause unless it has become or becomes a party also to the Protocol of Signature, and a State which is not effectively a party to the latter does not make a binding declaration by merely signing the 'optional clause' even without conditions.

Id. (quoting M. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE at 388). See also Judgment, *supra* note 1, at 15.

159. Compare *e.g.*, Judgment, *supra* note 1, at 15 with Schwebel, *supra* note 150, at 14, 16.

any binding obligation as to the PCIJ.¹⁶⁰ The Court, therefore, looked for evidence of the meaning which was intended by the drafters of Article 36(5) of the ICJ statute.

The drafters of the ICJ statute, the Committee of Jurists, had been questioned by representatives of the United Kingdom as to what would become of the "existing acceptances of the 'optional clause,' by which a number of countries have . . . *bound themselves*." (emphasis in original)¹⁶¹ The Committee responded by calling for a provision to "be made at the San Francisco Conference for a special agreement for *continuing these acceptances in force* for the purpose of this Statute." (emphasis in original)¹⁶² While the English version of Article 36(5) was adopted using the words "[d]eclarations . . . which are still in force," the French delegation made a last minute change in the wording of the French text of that provision.¹⁶³ The original French version had been "drafted in exactly the same manner"¹⁶⁴ as the English text, including the words "*encore en vigueur*," which corresponded to the English "still in force."¹⁶⁵ The new French text, however, used the terms "*pour une durée qui n'est pas encore expirée*."¹⁶⁶ Since there was an "excellent equivalence of the expressions '*encore en vigueur*' and 'still in force[.]' the deliberate choice"¹⁶⁷ of the new phrase in the French text left room for speculation as to the intent of the French delegation in making the change.¹⁶⁸ The French stated that the change was not substantive and was "intended only to improve phraseology."¹⁶⁹

The United States asserted that Article 36(5) of the ICJ Statute would not operate to make the 1929 Declaration binding upon Nicaragua.¹⁷⁰ The United States maintained that both the English and the French versions of the provision require that a declaration made under the PCIJ statute must have been binding under that Court's statute in order for Article 36(5) to operate to make that declaration apply to the ICJ.¹⁷¹ Since the 1929 Declaration by Nicaragua was never in force as to the PCIJ, the United States concluded that the declaration

160. Schwebel, *supra* note 150, at 9.

161. *Id.* at 11 (quoting UNCIO Vol. XIV, at 318).

162. *Id.* (quoting UNCIO, Vol. XIV, at 289).

163. *Id.* at 12.

164. Oda, *supra* note 152, at 7.

165. *Id.* The French text, as finally adopted, provided:

Les déclarations faites en application de l'article 36 du Statut de la Cour permanente de Justice internationale *pour une durée qui n'est pas encore expirée* seront considérées, dans les rapports entre parties au présent Statut, *comme comportant acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée et dans les conditions exprimées par ces déclarations.*

Id. at 8 (quoting UNCIO, Vol. 13, at 486) (emphasis added).

166. *Id.*

167. Judgment, *supra* note 1, at 17.

168. *Id.* See *infra* note 171 and accompanying text.

169. Oda, *supra* note 152, at 8 (quoting UNCIO, Vol. 13, at 284).

170. Judgment, *supra* note 1, at 11.

171. *Id.*

could not become binding through Article 36(5).¹⁷² In its Counter-Memorial, the United States indicated that the belief of the U.S. delegation to the San Francisco Convention that Article 36(5) was to apply only to declarations in force for the PCIJ was evidenced by the delegation's report to the President of June 26, 1945.¹⁷³ The United States also demonstrated, through the testimony of Judge Hackworth, the principal legal advisor to the U.S. delegation to the San Francisco Convention, that Article 36(5) applied only to states which had accepted the compulsory jurisdiction of the PCIJ.¹⁷⁴ The U.S. Counter-Memorial further alleged that it was the understanding of the Department of State and the Senate at the time the United States made its declaration of consent to the jurisdiction of the ICJ "that Article 36(5) applied only to declarations that were in force under the Permanent Court's Statute . . . and . . . Nicaragua's declaration did not fall within this category."¹⁷⁵

Nicaragua interpreted Article 36(5) to encompass all declarations under the PCIJ which had not already expired.¹⁷⁶ It alleged that Article 36(5) was not limited to binding declarations under the PCIJ as suggested by the United States, and that its 1929 Declaration became effective as an obligation once Nicaragua had ratified the Statute of the ICJ.¹⁷⁷

In making its decision regarding compulsory jurisdiction in *Paramilitary Activities*, the ICJ distinguished the issue involving Article 36(5) from the issue which arose in the *Case Concerning the Aerial Incident of 27 July 1955*.¹⁷⁸ Specifically, the Court stated that the *Aerial Incident* case:

featured quite a different issue — in a nutshell, whether the effect of a declaration that had unquestionably become binding at the time of the Permanent Court could be transposed to the International Court of Justice, when the declaration in question had been made by a State which had not been represented at the San Francisco Conference and had not become a party to the Statute of the present Court until long after the extinction of the Permanent Court.¹⁷⁹

In the *Aerial Incident* case, Israel had relied on the Bulgarian declaration of consent to the jurisdiction of the PCIJ from 1921.¹⁸⁰ The Bulgarian declaration of 1921 had come into effect as to the Permanent Court.¹⁸¹ Bulgaria successfully

172. *Id.*

173. Schwebel, *supra* note 150, at 17 (quoting para. 80 of the U.S. Counter-Memorial referring to *Report to the President* of June 26, 1945 at 124).

174. *Id.* (quoting *Report to the President* at 338).

175. *Id.* at 19 (quoting U.S. Counter-Memorial, para. 85).

176. Judgment, *supra* note 1, at 11.

177. *Id.*

178. The *Case Concerning the Aerial Incident of 27 July 1955*. (Isr. v. Bulg.) 1959 I.C.J. 35 (Preliminary Objections) [hereinafter cited as *Aerial Incident*].

179. Judgment, *supra* note 1, at 16.

180. *Aerial Incident*, *supra* note 178, at 129.

181. *Id.* at 135.

argued, however, that Article 36(5) could not apply to make its 1921 Declaration binding as to the ICJ since Bulgaria had not become a member of the United Nations until 1955.¹⁸² The ICJ found for Bulgaria, holding that Article 36(5) was not satisfied.¹⁸³

The majority in *Paramilitary Activities* stated that it believed that the *Aerial Incident* case failed to "provid[e] any pointers to precise conclusions on the limited point now in issue,"¹⁸⁴ since the Bulgarian declaration had been effective under the PCIJ while the Nicaraguan declaration had not been.¹⁸⁵ The majority, therefore, did not go on to discuss any of the specifics of that case.

The dissenting opinion of Judge Schwebel, however, stated that the "*Aerial Incident Case* strikingly and decisively cuts against Nicaragua's thesis."¹⁸⁶ Schwebel stated that the *Aerial Incident* decision stressed the preservation and continuity of existing declarations:¹⁸⁷

The clear intention which inspired Article 36, Paragraph 5, was to continue in being something which was in existence, to preserve existing acceptances, to avoid that the creation of a new Court should frustrate progress already achieved; it is not permissible to substitute for this intention to preserve, to secure continuity, an intention to restore legal force to undertakings which have expired: it is one thing to preserve an existing undertaking by changing its subject-matter; it is quite another to revive an undertaking which has already been extinguished.¹⁸⁸

Judge Schwebel noted that if Article 36(5) was to operate to maintain existing obligations, then there must have been an obligation in existence upon which Article 36(5) could operate.¹⁸⁹ He concluded that there was no such obligation in the case of Nicaragua.¹⁹⁰

The separate opinion of Sir Robert Jennings in *Paramilitary Activities* also noted

182. *Id.* at 143-44.

183. *Id.* at 144.

184. Judgment, *supra* note 1, at 16.

185. *See id.*

186. Schwebel, *supra* note 150, at 20.

187. *Id.* at 21.

188. *Id.* (quoting *Aerial Incident*, *supra* note 178, at 145).

189. *Id.* at 22. Judge Schwebel charged the Court with taking quotations from *Aerial Incident* out of context in order to find support for its position. *Id.*

Judge Schwebel also criticized the Court for citing the *Aerial Incident* case in its *Order of May 10, 1984*, which rejected the U.S. request to have the case removed from the list of cases to be considered. *Id.* at 21-22. Judge Schwebel stated:

[O]n what basis does the Court there rely upon and specifically cite the *Aerial Incident* Judgment? Moreover, today's Judgment, while endeavoring to distinguish the facts at bar in the *Aerial Incident* case from the instant case, renews (with a suggestive lack of vigour) its reliance upon the Judgment in the *Aerial Incident* case and so gives fresh point to this question.

Id.

190. *Id.* at 22.

that the decision in the *Aerial Incident* case was relevant to the present decision.¹⁹¹ Judge Jennings referred to the fact that the Bulgarian declaration of 1921 had no limit as to its duration.¹⁹² Judge Jennings then questioned how the Court, in *Paramilitary Activities*, could apply Article 36(5) where no obligation existed, after having refused in *Aerial Incident* to allow that provision to operate on an obligation which was still running by its own terms.¹⁹³ Jennings further quoted a passage from *Aerial Incident* which he considered "most apposite to the present case:"¹⁹⁴

Accordingly, the question of the transformation of an existing obligation could no longer arise so far as they were concerned: all that could be envisaged in their case was the creation of a new obligation binding upon them. To extend Article 36, Paragraph 5, to those States would be to allow that provision to do in their case something quite different from what it did in the case of the signatory States.¹⁹⁵

Judge Jennings interpreted this passage as having foreclosed any possibility of Article 36(5) giving rise to "a new obligation, not existing under the old Court — which is precisely what the present Judgment does in respect of Nicaragua."¹⁹⁶

Nicaragua claimed that the *Barcelona Traction*¹⁹⁷ and *Temple*¹⁹⁸ cases indicated that the Court had adopted the position taken by the dissent in the *Aerial Incident* case.¹⁹⁹ Judges Lauterpacht, Koo, and Spender dissented in *Aerial Incident*, interpreting Article 36(5) as excluding only those declarations to the PCIJ which had already expired.²⁰⁰ Judge Schwebel, in *Paramilitary Activities*, however, maintained that the *Barcelona Traction* decision lent little support to Nicaragua's position, since the Court in *Barcelona Traction* "emphasized that the purpose of Article 37, like Article 36, paragraph (5), was to maintain continuity between the jurisdiction given to the Permanent Court and that given to the new court."²⁰¹ Thus, once again, the Court was not willing to advocate the creation of a new obligation.²⁰² Judge Schwebel also indicated that the Court's decision in *Temple* did not support Nicaragua's position in *Paramilitary Activities*, since *Temple* actu-

191. *Paramilitary Activities*, *supra* note 1. (separate opinion of Judge Jennings) at 7-8 [hereinafter cited as Jennings].

192. *Id.* at 8.

193. *Id.*

194. *Id.*

195. *Id.* (quoting *Aerial Incident*, *supra* note 178, at 138).

196. Jennings, *supra* note 191, at 8.

197. Case Concerning the Barcelona Traction, Light and Power Company, Limited, (Belg. v. Spain) 1964 I.C.J. 6 (Preliminary Objections).

198. Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) 1961 I.C.J. 17 (Preliminary Objections).

199. Schwebel, *supra* note 150, at 25.

200. *Aerial Incident*, *supra* note 178, (Joint Dissent) at 161.

201. Schwebel, *supra* note 150, at 27.

202. *Id.*

ally reaffirmed the majority position from *Aerial Incident*.²⁰³ He noted that the Court in *Temple* held that the 1950 Declaration of Thailand was effective under Article 36(2), not Article 36(5), because the latter "did not contemplate the making of new declarations [and] . . . was concerned with the preservation of declarations for the period which they still had to run."²⁰⁴

Nicaragua asserted that its interpretation of Article 36(5), which would exclude only declarations which had expired, was also supported by evidence from U.N. publications as well as the conduct of both parties and non-parties to *Paramilitary Activities*.²⁰⁵ The judgment noted that the last report of the PCIJ listed Nicaragua among states which had signed the Optional Clause but had not ratified the Protocol of Signature, and did not list Nicaragua among the states bound by the Clause.²⁰⁶ The first ICJ Yearbook, however, listed Nicaragua as having accepted the compulsory jurisdiction of the Court, its declaration being noted as still in force.²⁰⁷ Nonetheless, a footnote in the Yearbook indicated that the registry had not yet been notified whether the Nicaraguan ratification had ever been received.²⁰⁸ Nicaragua continues to be listed among states which have accepted the compulsory jurisdiction of the Court up to the time of the filing of the application in *Paramilitary Activities*.²⁰⁹ Beginning with the ICJ Yearbook of 1955-56, a footnote has been included indicating that it appears as if no instrument of ratification was ever received.²¹⁰ Nicaragua pointed out, however, that the annual report sent to the U.N. General Assembly by the ICJ since 1968 has listed Nicaragua among states accepting the compulsory jurisdiction of the ICJ.²¹¹

The United States maintained that Nicaragua could not refer to the ICJ Yearbooks as authoritative, since they contained a disclaimer indicating that the

203. *Id.* at 28.

204. *Id.*

205. Judgment, *supra* note 1, at 11-12.

206. *Id.* at 12.

207. *Id.*

208. See 1946-1947 I.C.J.Y.B. 210 (1947); Judgment, *supra* note 1, at 12.

209. Judgment, *supra* note 1, at 12-13.

210. *Id.* at 13. The footnote from the 1955-1956 Yearbook of the ICJ stated:

According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. It does not appear, however, that the instrument of ratification was ever received by the League of Nations.

1955-1956 I.C.J.Y.B. 195 (1956); Judgment *supra* note 1, at 13.

211. Judgment, *supra* note 1, at 13. Nicaragua also claimed that support for its position could be found in: "The Second Annual Report of the Secretary-General to the General Assembly; the annual volume entitled *Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General Acts as Depository*; the Yearbook of the United Nations; and 'certain ancillary official publications.'" *Id.*

Yearbooks were not intended to be authoritative.²¹² This disclaimer also affected the other sources relied on by Nicaragua since they invariably rely on the Yearbooks.²¹³

In addressing whether the Yearbooks' list of nations accepting the compulsory jurisdiction of the Court were intended to be authoritative, the ICJ stated that the lists "attest to a certain interpretation of Article 36, Paragraph 5 (whereby that provision would cover the declaration of Nicaragua), and the rejection of an opposite interpretation (which would refuse to classify Nicaragua among the States covered by that Article)."²¹⁴

Three judges disagreed with the judgment of the Court regarding the relevance of the Yearbooks. Judge Oda, in his separate opinion, pointed out that the publication of the Yearbook was an administrative function of the registrar, not an interpretative judicial function as if the Yearbook were prepared by the Court.²¹⁵ Furthermore, a qualification was always attached in regard to the status of Nicaragua in the Yearbooks.²¹⁶ Sir Robert Jennings stated in his separate opinion that, "[i]n my view, thus to allow considerable, even decisive, effect to statements in the Court's *Yearbook* is mistaken in general principle; and is in any event not sufficiently supported by the facts in the present case."²¹⁷ Judge Jennings noted that the Yearbook always contained a disclaimer as well, but even if not wrong in general principle, and even if there had been no disclaimer, the Yearbooks left sufficient question regarding Nicaragua's status so as to lend little support to its position in the present case.²¹⁸ Judge Schwebel also disagreed with the Court's reliance on the Yearbooks as support for Nicaragua's position, stating that "when the Court provides information in an administrative capacity, not only may it err and repeatedly err, but . . . it cannot be thought to be making a judgment in law or of a legal effect."²¹⁹

The Court linked the support provided from these publications to the conduct of Nicaragua and other states.²²⁰ The notice provided by the publications was seen to indicate that Nicaragua had ample opportunity to reject the application of Article 36(5) which was referred to therein, but nevertheless did not do so.²²¹

212. *Id.* at 13-14. The disclaimer has been included in the Yearbooks since 1955-56 and states:

The texts of declarations set out in this Chapter are reproduced for convenience of reference only. The inclusion of a declaration made by any State should not be regarded as an indication of the view entertained by the Registry, or, *a fortiori*, by the Court, regarding the nature, scope or validity of the instrument in question.

Id. at 14.

213. *Id.*

214. Judgment, *supra* note 1, at 20.

215. Oda, *supra* note 152, at 12.

216. *Id.* at 15.

217. Jennings, *supra* note 191, at 9.

218. *Id.* at 10.

219. Schwebel, *supra* note 150, at 35.

220. Judgment, *supra* note 1, at 21.

221. *Id.*

While Nicaragua did not express that it was bound under this provision during the time prior to this case, the Court interpreted Nicaragua's silence as acceptance.²²² Not only did Nicaragua fail to object, but other states did not object to any indications that Nicaragua might be bound under the operation of Article 36(5).²²³ The Judgment referred to the reliance of Honduras, in the *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906*,²²⁴ on Nicaragua's Declaration of 1929, as indicia of Honduras' belief that Nicaragua was bound under the Optional Clause.²²⁵ Finally, the Court stated that the April 6, 1984, letter from U.S. Secretary of State Schultz to the Secretary-General of the United Nations, which sought to exclude disputes arising from Central America from the jurisdiction of the Court, indicated that the United States believed Nicaragua to be bound by its 1929 Declaration.²²⁶

Judge Oda's separate opinion once again referred to the fact that the publications involved noted the defect in Nicaragua's acceptance of jurisdiction, and he indicated that such a formal defect cannot be overlooked, even if the intent was "constant and demonstrable."²²⁷ Judge Schwebel also disagreed with the Judgment in this respect, stating that a lack of protest by other states proves very little since they had no reason to question Nicaragua's position while they were not considering bringing a suit against Nicaragua.²²⁸ The dissent of Judge Schwebel also cited a memorandum of a December 21, 1955, conversation between U.S. State Department officials and the Nicaraguan Ambassador to the United States, Guillermo Sevilla-Sacasa, during which it was represented to the United States that "Nicaragua had never agreed to submit to compulsory jurisdiction."²²⁹ Judge Schwebel further suggested that the conduct of Honduras in the *King of Spain* case actually runs counter to Nicaragua's argument.²³⁰ The United States submitted in its Counter-Memorial that Honduras had sent a memorandum to the United States on June 15, 1955, which stated that Honduras believed that

222. *Id.*

223. *Id.*

224. *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906*, (Hond. v. Nic.) 1960 I.C.J. 39.

225. *See Judgment, supra* note 1, at 22.

226. *Id.* This letter, referred to as the 1984 notification, is discussed *infra* notes 268-74 and accompanying text.

227. Oda, *supra* note 152, at 4.

228. Schwebel, *supra* note 150, at 37.

229. *Id.* at 38 (quoting the U.S. Counter-Memorial at 4 and its appendix K at 2). The memorandum stated:

Reference was made to the fact that the matter had not been previously referred to the Court because Nicaragua had never agreed to submit to compulsory jurisdiction.

Ambassador Sevilla-Sacasa indicated that an agreement between the two countries would have to be reached to overcome this difficulty.

Id.

230. Schwebel, *supra* note 150, at 37. *See supra* note 224.

Nicaragua had *not* accepted the compulsory jurisdiction of the ICJ.²³¹ This memorandum was sent in connection with the *King of Spain* case, which both Nicaragua and the Court cite as evidence of other states' belief that Nicaragua was bound under the Optional Clause.²³²

The Court ultimately concluded that, although the Nicaraguan Declaration of 1929 was not originally binding, it had become a valid obligation as soon as Nicaragua ratified the Statute of the ICJ.²³³ This was possible, according to the Court, since Nicaragua could have limited the duration of that declaration, but did not, thereby preserving the potential of the declaration to become binding.²³⁴ The Court found evidence in both the *travaux préparatoires* of Article 36(5) and in the change made in the French text,²³⁵ to indicate that the provision could apply to declarations which had not been binding under the PCIJ.²³⁶ The Court referred to the fact that the overall intent of the drafters of Article 36(5) was to avoid losing ground in the progress that had been made toward obtaining compulsory jurisdiction for the settlement of international disputes and stated that even those declarations which had been non-binding were steps toward obtaining compulsory jurisdiction.²³⁷ The Court found support for the application of Article 36(5) to the Nicaraguan Declaration in the fact that neither Nicaragua, nor any other states, objected to publications which indicated that Nicaragua was bound by its declaration.²³⁸ The Court, therefore, found Nicaragua to have taken the same obligation as the United States within the meaning of Article 36(2), such that it could bring the United States before the Court, under the compulsory jurisdiction of the ICJ, by virtue of the Nicaraguan Declaration of 1929 and the operation of Article 36(5).²³⁹

Even though the Court found that it could exercise its compulsory jurisdiction pursuant to the operation of Article 36(5), the Court nevertheless went on to take the unprecedented position that consent to the compulsory jurisdiction of the Court could be binding *by implication* under Article 36(2).

D. *Independent Basis of Consent to Jurisdiction by Nicaragua Under Article 36(2)*

The Court viewed the evidence from publications and conduct, which was noted earlier as support for the application of Article 36(5), as a basis for

231. Schwebel, *supra* note 150, at 37-38 (quoting the U.S. Counter-Memorial Annex 34, at 2). The memorandum stated in part: "Nicaragua has refused until now to recognize the compulsory jurisdiction of the International Court of Justice so that the Court could take cognizance of and resolve the case which Honduras has considered filing against Nicaragua." *Id.*

232. *See supra* notes 224-25 and accompanying text.

233. Judgment, *supra* note 1, at 15.

234. *Id.*

235. *See supra* notes 161-69 and accompanying text.

236. Judgment, *supra* note 1, at 17.

237. *Id.* at 18.

238. *Id.* at 21. *But see supra* notes 215-19 and accompanying text.

239. Judgment, *supra* note 1, at 56.

concluding that, in addition to its obligation by virtue of Article 36(5), Nicaragua also had an independent source of jurisdiction under Article 36(2).²⁴⁰ The Court agreed with Nicaragua's contention that the conduct of Nicaragua and the United States "over a period of 38 years unequivocally constitutes" the recognition of Nicaragua's consent to jurisdiction, regardless of any formal defect in its 1929 Declaration.²⁴¹ The Court stated that, although the only formality required for acceptance of compulsory jurisdiction under Article 36(2) is the deposit of a declaration, Nicaragua was in an exceptional position: it had relied on publications and conduct of others which indicated that it had accomplished the necessary formalities for acceptance.²⁴² The Court therefore found, independent of its finding of jurisdiction under Article 36(5), that Nicaragua had accepted the compulsory jurisdiction of the ICJ by virtue of Article 36(2).²⁴³

While Judge Ruda, in his separate opinion, agreed with the Judgment in finding jurisdiction under Article 36(5), he disagreed that there could be any independent basis under Article 36(2).²⁴⁴ Judge Ruda stated his belief that the publications referred to tend to support only that Nicaragua had acquiesced to being considered as bound under Article 36(5),²⁴⁵ but not that it had accepted jurisdiction directly under Article 36(2).²⁴⁶ Judge Ruda noted, "[t]he consent of a State to be bound by international obligations assumed under a treaty, should be given in accordance with the procedure laid down in the treaty."²⁴⁷ Article 36(2) requires the deposit of an instrument of ratification with the Secretary-General of the United Nations in order for a state to be directly bound under that provision independently.²⁴⁸ Nicaragua did not make such a deposit and, therefore, was not directly bound by Article 36(2) operating independent of Article 36(5).²⁴⁹

The separate opinion of Judge Mosler also criticized the Court's characterization of Nicaragua's conduct as a sufficient basis for direct acceptance of jurisdic-

240. *Id.* at 22. For the text of Article 36(2), see *supra* note 12.

241. Judgment, *supra* note 1, at 22-23.

242. *Id.* at 23.

243. *Id.* at 24. The Court stated in its judgment that:

It considers therefore that, having regard to the origin and generality of the statements to the effect that Nicaragua was bound by its 1929 declaration, it is right to conclude that the constant acquiescence of that State in those affirmations constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court under Article 36, Paragraph 2, of the Statute, and that accordingly Nicaragua is, vis-à-vis the United States, a State accepting the "same obligation" under that Article.

Id.

244. *Paramilitary Activities*, *supra* note 1, at 7 (separate opinion of Judge Ruda) [hereinafter cited as Ruda].

245. *Id.* at 9. See also *supra* notes 205-11 and accompanying text.

246. Ruda, *supra* note 244, at 9.

247. *Id.* at 8.

248. *Id.* See also *supra* note 12 and accompanying text.

249. Ruda, *supra* note 244, at 8.

tion under Article 36(2).²⁵⁰ Judge Mosler stated that the Court's approach is similar to that of

acquisitive prescription, a general principle of law within the meaning of Article 38, Paragraph 1(c), of the Statute, by which lapse of time may remedy deficiencies of formal legal acts. If one follows this theory the facts and conduct must be absolutely unequivocal and must not leave room for any doubt.²⁵¹

In demonstrating that the conduct of Nicaragua has been far from "absolutely unequivocal,"²⁵² Judge Mosler referred to the *King of Spain* case, in which Nicaragua insisted on having the case decided only on the basis of jurisdiction provided through a *Compromis* between Nicaragua and Honduras, while Honduras attempted to base the case also on the compulsory jurisdiction of the Court.²⁵³ Judge Mosler also pointed out that Nicaragua was aware of the defect in its declaration of acceptance to the compulsory jurisdiction of the Court, by virtue of the very publications to which it looked in the present case for support, and yet made no attempt to remedy the defect.²⁵⁴

The dissent of Judge Schwebel, also disagreeing with the Court's finding of an independent basis of jurisdiction under Article 36(2), echoed Judge Mosler by stating that "the deposit of an instrument of ratification is no mere optional formality."²⁵⁵ Nicaragua, if it had in fact wished to be bound directly under Article 36(2), only needed to deposit an instrument of ratification; however, it never did so.²⁵⁶ Judge Schwebel, like Judge Ruda,²⁵⁷ went further than Judge Mosler in stating that, not only under the facts of *Paramilitary Activities*, but in all cases, valid consent under Article 36(2) cannot be created without fulfilling the requirements as provided by the Statute.²⁵⁸

Despite the disagreement of several judges, the Court concluded that it could exercise jurisdiction based on Nicaragua's consent under Article 36(2). It was still necessary, however, to determine whether the United States had also validly consented to the compulsory jurisdiction of the ICJ.

250. *Paramilitary Activities*, *supra* note 1, (separate opinion of Judge Mosler) at 3-4 [hereinafter cited as Mosler].

251. *Id.* at 3.

252. *Id.* at 3-4.

253. *Id.* at 4. See *supra* note 244.

254. Mosler, *supra* note 250, at 4.

255. Schwebel, *supra* note 150, at 37.

256. *Id.* at 36-37. Judge Ago also stated that compulsory jurisdiction can exist only where there has been the deposit of an instrument of ratification. *Paramilitary Activities*, *supra* note 1, at 6 (separate opinion of Judge Ago) [hereinafter cited as Ago]. Judge Ago suggested that Nicaragua purposefully allowed its consent to remain ambiguous in order to avoid being brought before the ICJ over its border dispute with Honduras. *Id.* at 7-8.

257. See *supra* note 244-48 and accompanying text.

258. Schwebel, *supra* note 150, at 36-37.

V. THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE
OVER THE UNITED STATES

A. *Compulsory Jurisdiction Under Article 36(2)*

The Nicaraguan application to the Court in *Paramilitary Activities* stated that it would rely on the 1946 declaration by the United States under Article 36(2) of the ICJ Statute as the basis for compulsory jurisdiction of the Court over the United States.²⁵⁹ Judge Schwebel's dissent recounted much of the detail surrounding the formulation of the U.S. declaration, referring to the Senate Foreign Relations Committee reports to indicate how the jurisdiction consented to by the United States was to be "carefully defined and limited."²⁶⁰ In addition to the general limitation of consent to legal disputes, the condition of reciprocity was described as "any limitation imposed by a state in its grant of jurisdiction thereby also becomes available to any other state with which it might become involved in proceedings, even though the second state had not specifically imposed the limitation."²⁶¹ The U.S. consent also included reservations limiting the Court's jurisdiction to disputes "hereafter arising,"²⁶² reserving the freedom to entrust a dispute to other tribunals, and limiting consent to disputes arising under international law.²⁶³ The U.S. declaration expressly stated that it was subject to a six-month notice of termination.²⁶⁴ The declaration of 1946 also included proviso (b), the Connally Amendment, which states that consent to jurisdiction is excluded as to "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."²⁶⁵ The United States did not invoke this reservation in *Paramilitary Activities*.²⁶⁶ An additional reservation, which was invoked by the United States in *Paramilitary Activities*, is proviso (c), the Vandenberg Multilateral Treaty Reservation, which excludes from the acceptance of the compulsory jurisdiction of the Court "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specifically agrees to jurisdiction."²⁶⁷

While the United States did not contend that its 1946 declaration was invalid, it did assert that, by virtue of the Vandenberg Multilateral Treaty Reservation, the

259. See *supra* notes 143-44 and accompanying text.

260. Schwebel, *supra* note 150, at 61.

261. *Id.* (quoting S. REP. NO. 1835, 79 Cong. 2d Sess. 5).

262. Schwebel, *supra* note 150, at 61.

263. *Id.*

264. Judgment, *supra* note 1, at 8.

265. Schwebel, *supra* note 150, at 42-43.

266. Judgment, *supra* note 1, at 34.

267. Schwebel, *supra* note 150, at 44.

United States had not consented to the ICJ's jurisdiction in this case.²⁶⁸ Moreover, the United States contended that it was excluded by the terms of the April 6, 1984, notification by the United States.²⁶⁹ The "1984 notification" refers to a letter signed by U.S. Secretary of State Shultz and deposited with the Secretary-General of the United Nations on April 6, 1984, which stated that the 1946 declaration of consent to the compulsory jurisdiction of the ICJ

shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.

Notwithstanding the terms of the aforesaid declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic, and security problems of Central America.²⁷⁰

Nicaragua agreed that the Court would be without jurisdiction in this dispute if the 1984 notification was valid and effective against Nicaragua's application, which was filed three days after the 1984 notification.²⁷¹ Nicaragua contended, however, that the 1984 notification was ineffective because the U.S. declaration did not reserve for the United States any right of unilateral modification.²⁷² If the 1984 notification was not an ineffective modification, Nicaragua contended, then it must have been a termination of the 1946 declaration and a replacement under new terms.²⁷³ Nicaragua argued this would also have been ineffective.²⁷⁴ The 1984 notification would be ineffective under the latter analysis because the 1946 declaration required six months notice for termination.²⁷⁵ Nicaragua maintained that declarations were not inherently terminable, and that its own declaration was made without a time limit.²⁷⁶ In any event, Nicaragua argued that the United States could not rely on reciprocity to allow termination of its own declaration, since reciprocity is not applicable to the duration of declarations.²⁷⁷

The United States supported its argument for the effectiveness of the 1984 notification by stating that declarations under the Optional Clause are *sui generis* and that the Court has recognized the right to modify declarations up until the moment an application is filed.²⁷⁸ Furthermore, the United States referred to a

268. Judgment, *supra* note 1, at 35.

269. *Id.* at 27.

270. *Id.* at 8-9.

271. *Id.* at 27.

272. *Id.*

273. *Id.* at 28.

274. *Id.*

275. *Id.* See *supra* note 264 and accompanying text.

276. Judgment *supra* note 1, at 29.

277. *Id.*

278. *Id.* at 27.

fundamental change in circumstances, after the United States made its declaration, created by other states asserting rights of immediate termination and claimed that it would be inequitable to deny the United States an opportunity to modify its declaration in view of that change.²⁷⁹ According to the United States, the 1984 notification was a modification rather than a termination, and thus the six-month notice requirement of the declaration did not apply.²⁸⁰ The United States argued that modification may be made at any time, “and in any manner not inconsistent with the statute.”²⁸¹ The United States further argued that even if the 1984 notification constituted a termination, it still could exercise the right to immediate termination based on the Nicaraguan declaration and reciprocity.²⁸²

The ICJ held that the 1984 notification was ineffective against the Nicaraguan application of April 9, 1984.²⁸³ It stressed that the six-month notice requirement contained in the U.S. declaration must be complied with, regardless of whether the notification constitutes a termination or a modification.²⁸⁴ Since the 1984 notification sought to “secure a partial and temporary termination,” it made no difference whether it was categorized as either strictly a modification or a termination.²⁸⁵ The Court also pointed out that even though declarations under the Optional Clause are unilateral acts, they nonetheless “establish a series of bilateral engagements”²⁸⁶ and, therefore, must be governed under the principle of good faith.²⁸⁷ On this basis, the Court concluded that the United States could not ignore the six-month notice requirement included in its own declaration.²⁸⁸

The Court rejected the U.S. contention that it could rely on the principle of reciprocity to give effect to its 1984 notification, and concluded that the principle does not apply to “the formal conditions of their creation, duration or extinction.”²⁸⁹ Moreover, the United States could not invoke reciprocity as to Nicaragua’s lack of a reservation under any circumstances.²⁹⁰ Even if the United States could invoke the principle, it would have to show that Nicaragua’s declara-

279. *Id.* at 27-28.

280. *Id.* at 28.

281. *Id.*

282. *Id.* at 29.

283. *Id.* at 33.

284. *Id.*

285. *Id.* at 30.

286. *Id.*

287. *Id.* at 30-31. The Court continued by quoting that:

Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

Id. at 31 (quoting the *Nuclear Test Case*, 1974 I.C.J. 58 at 268, 473).

288. Judgment, *supra* note 1, at 33.

289. *Id.* at 31.

290. *Id.* at 32.

tion was immediately terminable and that the three days between the filing of the notification and the filing of the application was a reasonable period of time under the principle of good faith.²⁹¹ The ICJ found that neither showing was made in *Paramilitary Activities*.²⁹² Finally, quoting the *Right of Passage over Indian Territory*,²⁹³ the Court noted that reciprocity requires the presence of two parties to a case and a defined issue between them.²⁹⁴ Neither requirement from the *Right of Passage* case could exist in a case such as *Paramilitary Activities*, where a state would invoke the principle before the court was seized of the case.²⁹⁵

From the perspective of Judge Oda, the 1984 notification merely constituted a new reservation to the U.S. declaration.²⁹⁶ He wrote:

In the light of the practice concerning reservations to the Optional Clause throughout the period of the Permanent Court of International Justice and the International Court of Justice, the reservations made by the United States in 1984 cannot be held so exceptional or extraordinary as to fall outside the purview of permissibility.²⁹⁷

Judge Oda referred to the Australian declaration of February 5, 1954, and to India's declaration of September 15, 1974, as examples of "reservations made in regard to disputes which were about to occur."²⁹⁸ He also noted that the declarations of Paraguay in 1938 and Columbia in 1937 had been terminated although no right to do so had been reserved, contrary to the assertions of Nicaragua in the present case that a state must reserve the right to immediately terminate a declaration of consent.²⁹⁹ In 1956, Portugal established the precedent of reserving the right of immediate termination of consent as to any category of disputes.³⁰⁰ Since 1956, despite the protest of Sweden in the *Right of Passage* case,³⁰¹ the right of immediate amendment has been reserved by fifteen states.³⁰² Taking these events into account, Judge Oda stated, "it is quite untenable to argue that those declarations without any reference to duration . . . can never be terminated or amended because of the lack of a clause concerning the period of validity of

291. *Id.*

292. *Id.*

293. *Right of Passage* (Prelim.), *supra* note 124.

294. Judgment, *supra* note 1, at 32-33. The Court stated that:

The Court is not convinced that it would be appropriate, or possible, to try to determine whether a State against which proceedings had not yet been instituted could rely on a provision in another State's declaration to terminate or modify its obligations before the Court was seized.

Id. at 32.

295. *Id.*

296. Oda, *supra* note 152, at 17-18.

297. *Id.* at 22.

298. *Id.* at 21.

299. *Id.* at 30. See *supra* note 272 and accompanying text.

300. Oda, *supra* note 152, at 38.

301. See *supra* notes 124-32 and accompanying text.

302. Oda, *supra* note 152, at 39.

the declarations."³⁰³ Thus, Judge Oda concluded that, if Nicaragua did in fact have standing, the 1984 notification was sufficient to exclude the case from the jurisdiction of the Court.³⁰⁴

Like Judge Oda, Sir Robert Jennings also concluded that the 1984 notification was effective to deprive the Court of jurisdiction.³⁰⁵ Jennings' approach, however, placed the issue in the context of state practice.³⁰⁶ He wrote:

In the period of the Permanent Court and even in 1946 when the United States declaration was made, an important proportion of States had subscribed to the Optional Clause system. Today that is no longer the case. The Optional Clause States are distinctly in the minority and very many of the most important and powerful States have not accepted compulsory jurisdiction.³⁰⁷

Judge Jennings recognized the existence of inequality between states which have reserved an immediate right of termination and those states which have consented unconditionally to the jurisdiction of the Court.³⁰⁸ He emphasized, however, that this must be viewed in light of the even greater inequality between states which have consented to jurisdiction of the Court and those which have not consented at all.³⁰⁹ He further claimed that reciprocity should not be used as a basis to decide an issue where the result would be contrary to state practice.³¹⁰ He wrote, "I believe there is ample evidence that States belonging to the Optional Clause system have now generally the expectation that they can lawfully withdraw or alter their declarations of acceptance at will, provided only that this is done before seisin."³¹¹ Next, Judge Jennings listed the fifteen states which have reserved the right to modify with immediate effect, and then noted the eleven "instances of modifications made in the absence of any expressly reserved right to do so."³¹² Six of the eleven instances, Judge Jennings indicated, were specifically to avoid an anticipated case.³¹³ Judge Jennings concluded that any such dispute should be decided by denying jurisdiction.³¹⁴ Specifically, he quoted from the Court's decision in *Aerial Incident*:

It should, as it said in the case of the *Monetary Gold Removed from Rome in 1943*, be careful not to "run counter to the well-established princi-

303. *Id.* at 40.

304. *Id.* at 43.

305. Jennings, *supra* note 191, at 21.

306. *Id.* at 16-18.

307. *Id.* at 16.

308. *Id.* at 17.

309. *Id.*

310. *Id.* at 18.

311. *Id.*

312. *Id.* at 19.

313. *Id.* at 19.

314. *Id.* at 21.

ple of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."³¹⁵

Judge Schwebel reached the same conclusion as Judges Oda and Jennings, that the 1984 notification was effective to deny the Court jurisdiction in this case, but based his conclusion on the principle of reciprocity.³¹⁶ While the Judgment had stated that reciprocity does not apply to temporal provisions, Judge Schwebel indicated that the Court had never previously come to such a conclusion.³¹⁷ He claimed that reciprocity should apply, and found support in two PCIJ decisions and one ICJ decision as well as in various scholarly works.³¹⁸ Drawing an analogy to treaty law, Judge Schwebel stated that the Court had taken a flexible approach to treaty reservations in the past "to gain wider adherence to treaties," and that such an approach to reciprocity should have been taken in *Paramilitary Activities* to allow pre-seisin reciprocity "in the interests of maintaining and widening the extent . . . of the Court's compulsory jurisdiction."³¹⁹

Even if the 1984 Notification was ineffective, the United States contended that the jurisdiction of the Court was excluded in this case by virtue of proviso (c), the multilateral treaty reservation, of the 1946 U.S. Declaration. Proviso (c) states that the United States would not accept the compulsory jurisdiction of the ICJ in "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America agrees to jurisdiction."³²⁰

The United States argued that Nicaragua's complaint relied on multilateral treaties including the U.N. Charter.³²¹ The multilateral treaty reservation is based on the intention of the United States to avoid prejudging the rights of states which are parties to the treaty in dispute, but are not parties to the suit itself.³²² The United States identified Honduras, Costa Rica, and El Salvador as states whose rights would be "affected" within the meaning of the reservation.³²³ This reservation would bar jurisdiction as to all of Nicaragua's claims because, under the U. S. interpretation, even alleged violations of customary international

315. *Id.* at 22 (quoting *Aerial Incident supra* note 178, at 142).

316. Schwebel, *supra* note 150, at 68.

317. *Id.*

318. *Id.* at 68-70. Judge Schwebel found support for his assertion in:

(1) *Phosphates in Morocco, supra* note 66, at 22.

(2) *Sofia, supra* note 75, at 81.

(3) *The Anglo-Iranian Oil Co. Case, supra* note 95, at 93, 103.

(4) Waldock, *Decline of the Optional Clause*, 32 BRIT. Y.B. at 258-61 (1957).

(5) Steinberger, *The International Court of Justice*, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES (Mosler and Bernhardt eds. 1974).

319. Schwebel, *supra* note 150, at 71.

320. Judgment, *supra* note 1, at 34.

321. *Id.* at 35.

322. *Id.*

323. *Id.*

law are actually no more than restatements of the alleged treaty violations.³²⁴

While denying that its customary international law claims were no more than restatements of treaty violations, Nicaragua stated that the U.S. reservation actually imposed no limitations on jurisdiction.³²⁵ It also asserted that the reservation was intended to affect only the specific situation in which not all parties bringing suit are members of the Court, and that even if the U.S. interpretation of the reservation was correct, it was unworkable.³²⁶

The Court noted that the United States interpreted its reservation to require only those parties to the treaty that are themselves affected by the decision to be parties to the suit.³²⁷ The Judgment then stated that the reservation could 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.³²⁸ The Court stated that the rights of third parties were already protected, because separate proceedings may be initiated or a state may intervene under Articles 62 and 63 of the Statute of the Court.³²⁹ The Judgment points out that the decision as to what states are "affected" within the meaning of the reservation must be made by the Court.³³⁰ Since such a decision relates to the merits of the case, the Court is not barred from going on to the merits.³³¹ Article 79(7) of the Rules of the Court requires that objections which would bar the Court from proceeding with the merits "must be of an exclusively preliminary character."³³² The Court also noted, however, that the procedural technique for joining preliminary objections to the merits of a case had been abolished in 1972.³³³

Judge Ruda stated, in his separate opinion, that the U.S. multilateral treaty reservation did not apply to the present dispute.³³⁴ He agreed with the U.S. interpretation that the purpose of the U.S. reservation was to avoid a situation where the United States would be obligated to the jurisdiction of the Court in regard to a treaty, while other parties to the same treaty would not.³³⁵ Judge Ruda pointed out that *Paramilitary Activities* referred only to claims against the

324. *Id.*

325. *Id.* at 36.

326. *Id.*

327. *Id.* at 37.

328. *Id.*

329. *Id.* at 37-38. Although El Salvador was unable to intervene under Article 63 at the jurisdictional stage of the case, it still has that option when the case reaches the merits. *Id.* at 38. See also STATUTE FOR THE INTERNATIONAL COURT OF JUSTICE art. 63.

330. Judgment, *supra* note 1, at 38.

331. *Id.*

332. *Id.*

333. *Id.*

334. Ruda, *supra* note 244, at 6.

335. See *id.*

United States and would not prejudice any rights which states may have against Nicaragua.³³⁶

While Judge Mosler agreed with the holding of the judgment that Article 79(7) of the Rules of the Court allows the Court to proceed to the merits of the decision, he noted that the U.S. multilateral treaty reservation "has been deplored as very far-reaching and unclear."³³⁷ He quoted one commentator who said that it seemed "only to have been inspired by vague fears and misconceptions as to the working of the optional clause in a case arising under a multilateral treaty."³³⁸ Judge Mosler quoted another commentator, who wrote that "the language of the reservation betrays such confusion of thought that to this day no one is quite sure what it means."³³⁹

Judge Schwebel, in his dissent, referred to some of the Court's conclusions regarding the reservation as being misconceived.³⁴⁰ Judge Schwebel contended that it was irrelevant that, under the reservation, other states could intervene or institute proceedings on their own, because the reservation required by its own terms that such states are in fact parties to the suit, and not that they merely could be parties.³⁴¹ Judge Schwebel agreed that it should be up to the Court to determine which states would be affected by its decision.³⁴² Nonetheless, he questioned the value of a reservation to jurisdiction where it would permit the Court to go on to the merits.³⁴³ Judge Schwebel analogized the situation to treaty law, stating that a Court cannot interpret a reservation such that there follows "a result which is manifestly absurd or unreasonable."³⁴⁴ The Court must give effect to "the close and necessary link that always exists between a jurisdictional clause and reservations to it."³⁴⁵ Advocating that the Court determine the states which would be affected by the decision prior to going on to the merits, the Schwebel dissent noted that Article 62 of the Statute used the phrase "affected" in the same form as did the U.S. reservation.³⁴⁶ The dissent further noted, however, that the Court had not suggested that the determination could not be made prior to the merits of the case with regard to Article 62.³⁴⁷ The pleadings of the parties clearly demonstrate that Honduras, El Salvador, and Costa Rica would be affected by the decision on the merits in Judge Schwebel's opinion.³⁴⁸

336. *Id.*

337. Mosler, *supra* note 250, at 7-8.

338. *Id.* at 7 (quoting Waldock, *The Decline of the Optional Clause*, 32 BRIT. Y.B. 275 (1956)).

339. Mosler, *supra* note 250, at 7 (quoting Briggs, *Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice*, 93 RECUEIL DES COURS 307 (1958)).

340. Schwebel, *supra* note 150, at 46.

341. *Id.*

342. *Id.*

343. *Id.* at 53.

344. *Id.* at 46.

345. *Id.* (quoting *Aegean Sea Continental Shelf*, *supra* note 138, at 33).

346. Schwebel, *supra* note 150, at 47.

347. *Id.*

348. *Id.* at 48.

Judge Schwebel also pointed out the existence of a contradiction in the Judgment.³⁴⁹ Specifically, the Judgment refused to challenge the validity of the reservation, and yet it declared that the reservation was inoperative at the stage in which it was intended to operate.³⁵⁰ The Schwebel dissent referred to the statements in the Judgment concerning Article 79(7) of the Rules of the Court, and to the change in the Rules of the Court to disallow joinder of preliminary objections to the merits, as seeming to imply "an extraordinary procedure which could be used not only to vitiate this reservation, but all sorts of reservations."³⁵¹ If an objection were claimed to be not strictly preliminary, it could not be argued at the preliminary stage due to Article 79(7); however, a preliminary objection could not be argued at the merits either, because the procedure for joinder of a preliminary objection to the merits had been eliminated.³⁵² Since the Court did not apply Article 79(6) of the Rules of the Court, which required that an objection be made at the preliminary stage, Judge Schwebel concluded that the United States must be permitted to argue its objection with the merits.³⁵³ Finally, in regard to the Court's holding that the reservation could not bar all Nicaraguan claims that were based on customary international law, Judge Schwebel reserved judgment as to the aspects of customary international law which were not covered by the treaties involved here, but questioned how the Court could possibly make a judgment without regard to treaties which would be excluded by the terms of the reservation.³⁵⁴

B. *Jurisdiction Under the 1956 Treaty of Friendship,
Commerce and Navigation*

The judgment of the Court regarding the effect of the U.S. multilateral treaty reservation was inconclusive at this preliminary stage due to the operation of Article 79(7) of the Rules of the Court.³⁵⁵ Article 79(7) of the Rules provides that an objection which is not exclusively preliminary in nature will not bar the Court from going forward with the proceedings.³⁵⁶ Since findings in regard to that reservation could potentially bar the Court from basing its jurisdiction on the Optional Clause, the Court went on to review the effect of the 1956 Treaty of Friendship, Commerce and Navigation, a basis of jurisdiction to which Nicaragua had referred independent of the operation of the Court's compulsory

349. *Id.* at 53-54.

350. *Id.*

351. *Id.* at 54.

352. *Id.*

353. *Id.* at 56.

354. *Id.* at 58-59. Judge Schwebel specifically questioned how an issue of the scope of self defense could be resolved under international law without regard to Article 51 of the U.N. Charter. *Id.* See U.N. CHARTER art. 51.

355. Judgment, *supra* note 1, at 38-39.

356. *Id.* at 38.

jurisdiction.³⁵⁷ Although the Nicaraguan application to the Court did not refer to the treaty, Nicaragua invoked it as an additional basis of jurisdiction in its Memorial.³⁵⁸ The 1956 treaty provides that “[a]ny dispute between the Parties as to interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.”³⁵⁹ Nicaragua alleged specifically that this treaty had been violated by the United States in regard to Articles XIX, XIV, XVII, and XX, through the military and paramilitary activities complained of in the Nicaraguan application to the Court.³⁶⁰

The United States asserted that Nicaragua could not amend its application with an additional basis of jurisdiction and that Nicaragua presented no claims of violation of the treaty which could give rise to jurisdiction.³⁶¹ The United States further argued that the treaty required an initial attempt be made to adjust the dispute by diplomacy.³⁶²

The Judgment stated that the Court may take into account a basis of jurisdiction which was not originally stated in the application, provided that “the applicant makes it clear that he intends to proceed on that basis,”³⁶³ and that “the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character.”³⁶⁴ The Court held that the dispute did arise in connection with a violation of the treaty, and that the dispute was not one “satisfactorily adjusted by diplomacy.”³⁶⁵ The Court therefore determined that, under the 1956 treaty, it had jurisdiction.³⁶⁶

While concurring with the judgment, Judge Singh wrote that he would have based the jurisdiction on the 1956 treaty, rather than compulsory jurisdiction, so as to limit the dispute to specific issues of treaty violations.³⁶⁷ Judge Jennings, who also agreed that there was jurisdiction under the treaty, pointed out that the jurisdictional clause in this 1956 treaty was identical to that on which the Court placed its reliance in *United States Diplomatic and Consular Staff in Tehran*.³⁶⁸ Judge

357. *Id.* at 39. See Treaty *supra* note 17 and accompanying text.

358. Judgment, *supra* note 1, at 8.

359. *Id.* at 40 (quoting Treaty, *supra* note 17).

360. Judgment, *supra* note 1, at 41. See also *supra* note 1 and accompanying text.

361. Judgment, *supra* note 1, at 39-40.

362. *Id.* at 40.

363. *Id.* at 40 (quoting *Norwegian Loans*, *supra* note 108, at 25).

364. *Id.* (quoting *Société Commerciale de Belgique (Belg. v. Greece)* 1939 P.C.I.J., ser. A/B, No. 78, at 173 (Judgment of June 15)).

365. *Id.* at 41.

366. *Id.* at 42.

367. *Paramilitary Activities*, *supra* note 1, at 1, 7 (separate opinion of Judge Singh) at 1, 7 [hereinafter cited as Singh].

368. Jennings, *supra* note 141, at 24. See *United States Diplomatic and Consular Staff in Tehran*, (U.S. v. Iran) 1980, I.C.J. 26. Judge Ago considered *Tehran* to be directly applicable to the *Paramilitary Activities* judgment, supporting jurisdiction under the treaty. Ago, *supra* note 256, at 5-8.

Mosler noted that he would base the jurisdiction of the Court in this case solely on the 1956 treaty.³⁶⁹

Judges Ruda and Schwebel were the only judges who disagreed with the Judgment by finding that the 1956 treaty was not a basis of jurisdiction.³⁷⁰ Judge Ruda did not believe that the treaty was a basis for jurisdiction since, by its own terms, the treaty violations must have been subject to prior negotiation.³⁷¹ Judge Ruda distinguished this case from *Tehran*, claiming that, while in *Tehran* negotiations were not possible, in *Paramilitary Activities* they had not been attempted.³⁷² Judge Schwebel, like Judge Ruda, also claimed that Nicaragua had failed to meet the requirements of the treaty. He similarly distinguished *Paramilitary Activities* from *Tehran* on the basis that negotiations were still possible in *Paramilitary Activities*.³⁷³ Judge Schwebel noted that he could find no distinction between the issues presented in *Paramilitary Activities* and those in the *Norwegian Loans* case,³⁷⁴ in which the Court rejected the invocation of two treaties by France in the proceedings on the preliminary objections.³⁷⁵ He also stated that the 1956 treaty involved in *Paramilitary Activities* was commercial in nature, and that nothing in the Nicaraguan application, as deposited, alleged violations of such a treaty.³⁷⁶

Thus, by a vote of fourteen to two, the Court accepted the assertion that it had jurisdiction under the 1956 treaty.³⁷⁷

VI. SUMMARY OF THE FINDINGS OF THE COURT

The ICJ found that it had jurisdiction to hear the complaint based on the compulsory jurisdiction of the court under Article 36 of its statute.³⁷⁸ While the overall vote was eleven judges in favor of compulsory jurisdiction and five opposed, two of the judges voting with the majority qualified their votes in separate opinions.³⁷⁹ One of these judges, Judge Singh, stated that he would have based the Court's jurisdiction solely on the 1956 Treaty, rather than exercising compulsory jurisdiction in this case.³⁸⁰ Judge Ruda, taking a different approach, found no independent basis of jurisdiction under Article 36(2), as did the rest of those voting in favor of compulsory jurisdiction.³⁸¹ Five judges found no basis whatsoever for the Court to exercise compulsory jurisdiction.³⁸²

369. Mosler, *supra* note 250, at 1.

370. Ruda, *supra* note 244, at 2; Schwebel, *supra* note 150, at 73.

371. Ruda, *supra* note 244, at 2.

372. *Id.* at 3. See *supra* note 368 and accompanying text.

373. Schwebel, *supra* note 150, at 72-73.

374. *Id.* See *Norwegian Loans supra* note 108.

375. *Id.* at 72. See *supra* note 363 and accompanying text.

376. Schwebel, *supra* note 150, at 78.

377. Judgment, *supra* note 1, at 56.

378. *Id.*

379. *Id.* See also *supra* note 149.

380. Singh, *supra* note 367, at 1. See also *supra* note 367 and accompanying text.

381. Ruda, *supra* note 244, at 7-8. See also *supra* note 244 and accompanying text.

382. Judgment, *supra* note 1, at 56. See also *supra* note 149.

The judgment also found an additional basis for jurisdiction, independent of the existence of compulsory jurisdiction under Article 36, in the 1956 Treaty between the parties.³⁸³ The vote was fourteen judges for jurisdiction under the treaty, and two votes against, with only Judges Ruda and Schwebel disagreeing with this specific finding.³⁸⁴

VII. ANALYSIS

A. *The Importance of Consent to Compulsory Jurisdiction: The Judgment Regarding Article 36*

Both the PCIJ and the ICJ have been institutions torn between two fundamental concepts of world justice: state sovereignty and binding adjudication.³⁸⁵ The community of nations is currently far from ready to disregard such a basic tenet of international law as state sovereignty.³⁸⁶ Nevertheless, the very nature of the ICJ's work makes it impossible for the Court to accord respect to the principle of state sovereignty in its purest form.³⁸⁷ Absolute state sovereignty, in the most simple terms, would allow a state to go about its own affairs without outside interference.³⁸⁸

A fundamental conflict of principle, which the court must resolve, has come to the forefront of international law. While the ICJ must regard states as sovereign, it must also make judgments which necessarily interfere with the conduct of those states. As an international court, the ICJ must decide disputes, and therefore effectively dictate what sovereign states may and may not do.³⁸⁹ This tension was the underlying reason for the failure of the Hague Conference of 1907 to create a world court.³⁹⁰ It is what caused some commentators to claim that compulsory jurisdiction would never work in reality for the PCIJ.³⁹¹ Without the consent of sovereign states, there could be no world court.³⁹²

Article 36 of the Statute for the PCIJ, requiring the consent of a state before it

383. Judgment, *supra* note 1, at 56. See also *supra* note 366 and accompanying text.

384. Judgment, *supra* note 1, at 56-57. See also *supra* notes 370-76 and accompanying text.

385. See *supra* notes 40-46 and 89-94 and accompanying text.

386. See, e.g., U.S. State Department, *U.S. Withdrawal From the Proceedings Initiated by Nicaragua in the International Court of Justice*, reprinted in *New York Times*, Jan. 19, 1985, at A4, col. 1-6. See also *Scorning the World Court*, *New York Times*, Jan. 20, 1985, at E22, col. 1-3.

387. See *supra* notes 41-42.

388. See *generally Scorning the World Court*, *N.Y. Times*, Jan. 20, 1985, at E22, col. 1-3.

389. This has led at least one state to ignore the judgment of the Court after a finding which would have required the state to pay reparations to another state. See *The Corfu Channel Case*, (G.B. v. Alb.) 1949 I.C.J. 244. (After the Court had found against Albania in its judgment on the merits, 1949 I.C.J. 4, Albania asserted that the Court's jurisdiction did not extend to awarding damages. The Court disagreed and held for Great Britain).

390. See *supra* note 32 and accompanying text.

391. See *supra* note 40 and accompanying text.

392. See *supra* note 43 and accompanying text.

could sue or be sued under the Court's compulsory jurisdiction, was born of this realization.³⁹³ The importance of the procedures for filing the declaration of consent, therefore, was not merely for administrative convenience.³⁹⁴ Consent was so absolutely essential to the entire makeup of the PCIJ that a state was required to expressly consent to jurisdiction, so that such consent was clear to all the other members of the system.³⁹⁵ The realities of the world community demanded this clarity because, in effect, a state was giving up a portion of its sovereignty.³⁹⁶ The PCIJ was given a license to tread on the essence of the state by virtue of the consent to compulsory jurisdiction.³⁹⁷

1. Nicaraguan Consent to Compulsory Jurisdiction

Nicaragua never effectively consented to the compulsory jurisdiction of the PCIJ.³⁹⁸ This fact was never contested.³⁹⁹ Recognizing the importance of Nicaragua's failure to consent, one judge expressly admonished against treating this failure as a mere administrative oversight.⁴⁰⁰ Nicaragua was repeatedly advised that it would not be considered to have validly consented to compulsory jurisdiction until its instrument of ratification was received by the registry.⁴⁰¹ Nicaragua never took action to rectify the situation.⁴⁰²

The tension between state sovereignty and the adjudicatory function of the PCIJ remained throughout that Court's existence.⁴⁰³ The cases which the PCIJ decided regarding its jurisdiction indicate that the judges were well aware of the delicate balance that they had to maintain for the PCIJ to remain as a viable world court.⁴⁰⁴ The members present at the San Francisco Conference for the creation of the ICJ were similarly aware of the vital importance of the consent of sovereign states.⁴⁰⁵ The entire purpose of Article 36(5) was to allow the ICJ to begin functioning with an already existing body of states that had previously

393. See *supra* notes 43-46 and accompanying text.

394. Schwebel, *supra* note 150, at 8 (quoting Blix, *The Requirement of Ratification*, 30 BRIT. Y.B. at 370 (1953)). Prof. Blix noted that: "what the Courts have established with increasing clarity is merely that in law the procedure of ratification is not a ceremonial formality but an act by which a State becomes bound." *Id.*

395. Schwebel, *supra* note 150, at 8.

396. See *generally Scorning the World Court*, N.Y. Times, Jan. 20, 1985, at E22, col. 1-3.

397. *Id.* The author characterized the consent to compulsory jurisdiction as: "Nations aspiring to live less like beasts in the jungle hesitatingly submit to the Court and try by the force of their example, to prove that rational argument and codes of conduct can to some extent become a substitute for international pillage, piracy and murder." *Id.*

398. Judgment, *supra* note 1, at 11. See *supra* notes 155-58 and accompanying text.

399. Judgment, *supra* note 1, at 11. See *supra* note 156 and accompanying text.

400. Schwebel, *supra* note 150, at 8.

401. *Id.* at 6-7.

402. Judgment, *supra* note 1, at 10-11.

403. See *supra* notes 43-82 and accompanying text.

404. *Id.*

405. See *supra* notes 89-93 and accompanying text.

consented to the compulsory jurisdiction of the PCIJ.⁴⁰⁶ Article 36(5), however, has no application to states such as Nicaragua which had never consented to the compulsory jurisdiction of the PCIJ.⁴⁰⁷ To argue that Article 36(5) created new rights would be to claim that its purpose was to create consent.⁴⁰⁸ This idea, that consent may arise by something other than an official act of consent by the state itself, is contrary to the very meaning of consent and to well-established principles of international law.⁴⁰⁹ The consent of a third party can never be created by the actions of others.⁴¹⁰

Just as Nicaragua had not consented to the compulsory jurisdiction of the PCIJ, Nicaragua had also never consented to the compulsory jurisdiction of the ICJ under the requirements of Article 36(2).⁴¹¹ It never submitted a declaration of consent to the ICJ, ratified and filed with the registry, as required.⁴¹² As with the PCIJ, these requirements for the ICJ were not mere formalities.⁴¹³ Consent is the heart of the Court's existence.

The Statute of the ICJ nowhere speaks of a binding *implied* consent to compulsory jurisdiction.⁴¹⁴ To recognize such a possibility is contrary to the purpose of the Optional Clause⁴¹⁵ and prior cases decided by both the PCIJ and the ICJ.⁴¹⁶ Nicaragua did not cite a case, nor does one exist, from either the PCIJ or the ICJ where the Court has recognized an implied consent to compulsory jurisdiction.⁴¹⁷ To the contrary, even in cases where there has been explicit consent, the Court had, until *Paramilitary Activities*, been extremely cautious not to overstep the limits on its compulsory jurisdiction.⁴¹⁸

Nicaragua did not consent to the compulsory jurisdiction of either the PCIJ or

406. See Schwebel, *supra* note 150, at 9-16; Mosler, *supra* note 250, at 1-3; Oda, *supra* note 152, at 9-10; Jennings, *supra* note 191, at 4-7.

407. See Schwebel, *supra* note 150, at 16.

408. See *id.*

409. See *supra* notes 385-97 and accompanying text.

410. See *id.* See Schwebel, *supra* note 140, at i-ii.

411. Ruda, *supra* note 244, at 8.

412. See *id.*

413. See Schwebel, *supra* note 150, at 8-9.

414. See *supra* notes 12-13 and accompanying text. See Ruda, *supra* note 244, at 8. Although Judge Ruda went along with the court on finding jurisdiction on other grounds, he made the following statement in regard to the Court implying consent under Article 36(2):

My disagreement is based on my reading of the Statute of the Court, where it is provided that the only condition necessary to make operative a declaration accepting the jurisdiction of the Court under Article 36, Paragraph 2 of the Statute, is, in accordance with Paragraph 4 of the same Article, the deposit of the declaration with the Secretary-General of the United Nations. The consent of a State to be bound by the international obligations assumed under a treaty, should be given in accordance with the procedure laid down in the treaty.

Id.

415. See *supra* notes 393-97, 406 and accompanying text.

416. See *supra* notes 47-82, 95-140 and accompanying text.

417. See *id.*

418. See *supra* note 315 and accompanying text.

the ICJ under the terms of the Optional Clause.⁴¹⁹ Since Nicaragua did not validly consent, it could not bring a claim under the Court's compulsory jurisdiction.⁴²⁰ Thus, because Nicaragua had no right to invoke compulsory jurisdiction, the issues regarding the U.S. declaration of consent should never have been reached by the Court.⁴²¹

2. U.S. Consent to Compulsory Jurisdiction

If Nicaragua had a right to invoke the compulsory jurisdiction of the Court, the 1984 notification would not have been sufficient to deny its exercise over the United States.⁴²² In *Paramilitary Activities*, the U.S. reliance on a change of circumstance and reciprocity to deny the exercise of jurisdiction would prove too much.⁴²³ While things have changed for the ICJ regarding the extent of consent to its compulsory jurisdiction, to simply allow a state, which had validly consented without having reserved a right of immediate termination, to secure termination by simply citing other instances of such conduct⁴²⁴ would leave the Court truly impotent. The vital importance of consent to the compulsory jurisdiction of the Court dictates that this principle must not only be guarded by determining that consent had been given initially,⁴²⁵ but also by seeing that consent has binding legal effect once given.⁴²⁶ It is the consent to be bound by the compulsory jurisdiction of the Court that is vital, not the *ad hoc* agreement to be sued in a particular dispute. The purpose of compulsory jurisdiction is to avoid a case by case decision by each state, absent an applicable reservation.⁴²⁷ The United States included a provision requiring a six-month notification of termina-

419. See Ruda, *supra* note 244, at 8.

420. See Schwebel, *supra* note 150, at i. Article 36(2) requires explicitly that jurisdiction must be only "in relation to any other state accepting the same obligation." See *supra* note 12 and accompanying text.

421. See Schwebel, *supra* note 15, at 42. In the U.S. State Department statement, *U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice*, the United States took the position that:

The Court chose to ignore the irrefutable evidence that Nicaragua itself never accepted the Court's compulsory jurisdiction. Allowing Nicaragua to sue where it could not be sued was a violation of the Court's basic principle of reciprocity, which necessarily underlies our own consent to the Court's compulsory jurisdiction. On this pivotal issue in the November 26 decision — decided by a vote of 11-5 — dissenting judges called the Court's judgment 'unintenable' and 'astonishing' and described the U.S. position as 'beyond doubt'. We agree.

U.S. WITHDRAWAL FROM THE PROCEEDINGS INITIATED BY NICARAGUA IN THE INTERNATIONAL COURT OF JUSTICE, U.S. State Dept. (unsigned statement of Jan. 18, 1985), reprinted in N.Y. Times, Jan. 19, 1985, at A4, col. 1-6 [hereinafter cited as U.S. WITHDRAWAL].

422. See *supra* notes 283-88 and accompanying text.

423. See *supra* notes 279, 289 and accompanying text.

424. See *supra* notes 298-302 and accompanying text.

425. See *supra* notes 393-401 and accompanying text.

426. See, e.g., Schlesinger, *The Connally Amendment — Amelioration by Interpretation*, 48 VA. L. REV. 685 at 695-96.

427. See *supra* note 105. Even where a reservation is applicable, the reservation itself may be found to be inconsistent with the statute of the court, which in Article 36(6) indicates that the Court itself must be the ultimate judge over its own jurisdiction. *Id.*

tion, and therefore should be bound by its own provision under the principle of good faith.⁴²⁸

Reciprocity would have allowed the United States to invoke a reservation included in the Nicaraguan consent to jurisdiction, but Nicaragua had no reservation allowing for immediate termination.⁴²⁹ Even if such a reservation had been present, the United States would have been required to overcome the obstacles of applying reciprocity prior to the Court being seized of the case and the doubtful applicability of reciprocity to reservations regarding duration.⁴³⁰ In *Paramilitary Activities* the United States did not overcome these obstacles.⁴³¹ Rather than "maintaining and widening the extent of the Court's compulsory jurisdiction,"⁴³² as stated by Judge Schwebel in his analogy to treaty reservations, to recognize a right of a state to rely reciprocally on reservations which do not exist, stretches that principle beyond reason.⁴³³

The fact that the multilateral treaty reservation failed to prevent the case from going to the merits appears to be more a function of the confusing nature of the reservation itself than of any failure in the Court's reasoning.⁴³⁴ There is general agreement that it is the ICJ, not the United States, which would have to decide what states would be affected by the decision.⁴³⁵ Where the reasoning of the Judgment becomes puzzling is in regard to whether the reservation would be considered at the stage of the proceedings reaching the merits of the case.⁴³⁶ It would do away with all reservations of a partially preliminary character to claim that they could be argued neither at the preliminary stage nor at the stage on the merits.⁴³⁷ The judgment, however, implies that the reservation would be heard at the proceedings on the merits by virtue of its going on to consider the additional basis of jurisdiction under the 1956 treaty. This step would have been unnecessary if there was no way to deny subsequently the exercise of compulsory jurisdiction under Article 36.⁴³⁸

B. *Jurisdiction Under the 1956 Treaty*

The ICJ would have had jurisdiction over the parties to this dispute under the 1956 Treaty of Friendship, Commerce and Navigation if that basis had been

428. See *supra* note 287 and accompanying text.

429. See *supra* note 290 and accompanying text.

430. See *supra* notes 289-94 and accompanying text.

431. *Id.*

432. See *supra* note 319 and accompanying text.

433. See *id.*

434. See *supra* notes 337-39 and accompanying text.

435. Only Judge Ruda might have taken exception to this. See *supra* notes 334-36 and accompanying text.

436. See *supra* note 333 and accompanying text.

437. See *supra* notes 351-53 and accompanying text.

438. See Judgment, *supra* note 1, at 39.

raised in Nicaragua's application to the Court.⁴³⁹ The ICJ also would have had jurisdiction if the treaty, although brought before the Court after the initial application had been filed, had been the clear basis upon which Nicaragua intended to proceed and if the treaty had not "transformed the dispute brought before the Court by the application into another dispute which is different in character."⁴⁴⁰ None of these conditions were fulfilled in *Paramilitary Activities*. Therefore, the treaty could not be a basis for the Court's jurisdiction in this dispute.⁴⁴¹

Since Nicaragua raised the treaty as a basis of jurisdiction after its application to the Court had been filed, the Judgment stated that two requirements had to be met.⁴⁴² First, the applicant would have to make clear that it intended to proceed on that basis.⁴⁴³ In *Certain Norwegian Loans*, which the judgment cited for this requirement, the Court stated:

If the French Government has intended to proceed upon that basis it would expressly have so stated. As already shown, the application of the French Government is based clearly and precisely on the Norwegian and French Declarations under Article 36, Paragraph 2, of the Statute. In these circumstances, the Court would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application and by reference to which the case has been presented by both Parties to the Court.⁴⁴⁴

The Court failed to show any reason why *Paramilitary Activities* should have been treated absolutely contrary to the case which it referred to as providing a condition to be met by Nicaragua.⁴⁴⁵

Second, the Judgment stated that the character of a dispute may not be transformed by the additional basis of jurisdiction.⁴⁴⁶ Nicaragua's initial application to the Court alleged that the United States was using military force against Nicaragua to either overthrow its government or to compel Nicaragua to change its policies.⁴⁴⁷ The 1956 treaty was a commercial treaty.⁴⁴⁸ The judgment failed to

439. Even the dissent of Judge Schwebel seems to concede this, provided that specific violations of the treaty were also stated in the application. See Schwebel, *supra* note 150, at 80.

Judge Ruda would disagree, maintaining that diplomatic resolution must first be pursued under the terms of the treaty. See Ruda, *supra* note 244, at 2.

440. See Judgment, *supra* note 1, at 40.

441. See Schwebel, *supra* note 150, at 80.

442. Judgment, *supra* note 1, at 40.

443. *Id.*

444. Schwebel, *supra* note 150, at 72 (quoting *Norwegian Loans*, *supra* note 108, at 25).

445. See Schwebel, *supra* note 150, at 71-72. Judge Schwebel pointed out the striking similarity between the jurisdictional question raised in *Norwegian Loans* and in *Paramilitary Activities* regarding treaties later raised as a basis of jurisdiction. *Id.*

446. Judgment, *supra* note 1, at 40.

447. See *supra* note 1.

448. See Schwebel, *supra* note 150, at 74 (quoting *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958)).

explain how the new basis of jurisdiction under a commercial treaty would not change the character of a dispute concerning an alleged attempt of a military overthrow. Since the two conditions for allowing consideration of an additional basis of jurisdiction were not met in *Paramilitary Activities*, the Court should have found that there could not be jurisdiction based on the 1956 treaty.

VIII. IMPLICATIONS OF THE JUDGMENT

On January 18, 1985, the U.S. State Department released a statement indicating that the United States would refuse to participate in any further proceedings involving the Nicaraguan claim.⁴⁴⁹ The statement indicated that the United States regarded the case to be a "blatant misuse of the Court for political and propaganda purposes" and the decision on jurisdiction to be "erroneous as a matter of law and . . . based on a misreading and distortion of the evidence and precedent."⁴⁵⁰ This represented the first time that the United States had ever turned its back on ICJ proceedings.⁴⁵¹

Whatever the true conduct of the United States which gave rise to the claim, the assertions which were made created a political climate in which it appeared to be the ideal opportunity for the ICJ to become an advocate of strengthening its compulsory jurisdiction.⁴⁵² The United States appeared to many as an international outlaw, and it was generally thought that the ICJ could simply step in as a world policeman.⁴⁵³ Even if the United States had acted in violation of international law, the ICJ is not a domestic criminal court with compulsory jurisdiction, much less an international policeman. Regardless of the legal realities, the ICJ

449. U.S. WITHDRAWAL, *supra* note 421, col. 1. The State Department noted: "The Court's decision of Nov. 26, 1984, finding that it has jurisdiction, is contrary to law and fact. With great reluctance, the United States has decided not to participate in further proceedings in this case."

Id.

450. *Id.* at col. 4-5. "The decision of Nov. 26 represents an overreaching of the Court's limits, a departure from its tradition of judicial restraint and a risky venture into treacherous political waters." *Id.* at col. 6.

451. N.Y. Times, Jan. 19, 1985, at A1, col. 6.

452. See, e.g., Boston Globe, Oct. 15, 1984, at 17, col. 1-4. In this article, Lawrence Tribe, Tyler Professor of Constitutional Law at Harvard University, used the following language to describe the U.S. Policy in Nicaragua:

The President's Nicaragua policies are especially vulnerable under long-settled international legal standards.

This attempt to point a finger [at Congress] fits well with the Teflon techniques and myopic methods of the Reagan administration: manipulating facts to evade accountability at the bar of politics and responsibility under the rule of law.

Listening implies restraint, a posture which this astonishingly lawless administration emphatically rejects.

Id.

453. A quote from an attorney representing Nicaragua was quoted as best illustrating this misconception. Referring to the U.S. withdrawal from proceedings he stated: "It's like Al Capone saying he refuses to recognize the jurisdiction of the criminal court." N.Y. Times, Jan. 19, 1985, at A1, col. 6 and A4, col. 4.

could not have been in a much stronger position in terms of general public opinion.

It is difficult to fault the ICJ for desiring to enhance its compulsory jurisdiction. The case of *Paramilitary Activities* arose at a time when the Court had spent decades watching its compulsory jurisdiction erode.⁴⁵⁴ As noble as its action may have been, if regaining lost ground in jurisdiction was an underlying motivation for the Court's decision, it was misplaced in this particular legal dispute. The ICJ may well have appeared stronger to some by virtue of this decision, but a thorough reading of the case indicates that it gained only a facade of strength at the price of sound legal reasoning. Whether or not the substantive allegations of the Nicaraguan complaint were true, there was simply no legal basis for jurisdiction.

The U.S. statement of withdrawal from the proceedings noted that "a politicized Court would mean the end of the Court as a serious, respected institution."⁴⁵⁵ Even if the decision in this case was not politically motivated, the overreaching by the Court in *Paramilitary Activities* placed it in an extremely precarious position. It is regrettable that the United States chose to withdraw from these proceedings. Nonetheless, if states are not given reason to trust that the Court will be guided only by principles of legal reason, the world court may cease to exist. Adverse decisions will always be difficult for sovereign states to accept without complaint, but where the decisions are made on common principles of legal reasoning, the chance for the rule of law remains. The potential effects of this decision are frightening. The International Court of Justice, despite its weaknesses, is the closest the world has ever come to ensuring that reason and law will prevail beyond a state's borders. If the ICJ should insist on following the precedent set by its decision in *Paramilitary Activities*, the Court itself could all too easily and too quickly be swept away.

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454. Jennings, *supra* note 191, at 16. As Judge Jennings pointed out in his separate opinion: In the period of the Permanent Court and even in 1946 when the United States declaration was made, an important proportion of States had subscribed to the Optional Clause system. Today that is no longer the case. The Optional Clause States are distinctly in the minority and very many of the most important and powerful states have not accepted compulsory jurisdiction and shown little indication of any ambition to do so.

Id.

455. N.Y. Times, Jan. 19, 1985, at A4, col. 6.