THE FUTURE RELATIONSHIP BETWEEN A NEW ADMINISTRATION AND THE INTERNATIONAL COURT OF JUSTICE

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REMARKS

If the democrats recapture the White House and win half a dozen more seats in the Senate, it will be time to rethink and redevelop the U.S. relationship with international law. Such a reconsideration might properly begin with a review of our relation with the International Court of Justice (ICJ).

It is not my contention that U.S. foreign relations policy should be subject, first, last, and always, to the adjudicatory power of the World Court applying standards of international law. It never has been. When it comes to the residual, special, and spare role that will still need to be played by the United States in the maintenance of international peace through the deployment of preponderant force, there can be no realistic substitution for the political discretion of those empowered by the American democratic process. Certainly, although our faith in that discretion has been shaken by its recent abuse, American political discretion cannot simply be displaced by a group of fifteen world jurists, no matter how eminent.

However, I do contend that in those matters as to which the United States deliberately agrees to subordinate its discretion to a specific rule in a treaty or customary law, and then, a dispute arises as to the specific meaning of that rule, it is usually appropriate and in keeping with American traditional respect for the rule of law that this interpretative function be delegated to an impartial judicial body, rather than that the rule be left to the interpretative discretion of the United States—its political or judicial organs—as well as to the other interested parties. Otherwise, if treaties are left open, first and last, to interpretation by the disputing parties, they become essentially useless as instruments for avoiding and resolving conflict.

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All members of the United Nations (UN) are parties to the Statute of the ICJ. However, states subject themselves of the ICJ jurisdiction only to the extent they agree to do so.[1]

Under article 36(2) of the Court's Statute, states may agree to submit to ICJ jurisdiction in any matter pertaining to international law—whether in connection with one dispute or any future disputes—subject to such specific, targeted exclusions as the state may specify.[2]

While the United States, in 1945, had agreed to accept the ICJ 36(2) jurisdiction, it did so subject to the "Connally Reservation" which specifically excluded all "domestic [matters] . . . as determined by the United States of America."[3] This was a formal acceptance without real adherence, demonstrating not U.S. subordination to the rule of law but a penchant for hypocrisy and too-clever-by-half lawyering.

In April 1984, after learning that Nicaragua was about to file suit against the United States, the State Department notified the World Court that it was altering American acceptance of compulsory jurisdiction, with immediate effect, to exclude "disputes with any Central American state."[4]
On October 7, 1985, the United States dropped the other shoe, by giving notice of the termination of all acceptance of compulsory jurisdiction under article 36(2) of the Statute of the ICJ.

To a considerable extent, the multilateralists have themselves to blame. Throughout a long campaign to implement their program, they repeatedly settled for self-contradictory compromises and fictions. Once the Connally Reservation had been added, the 1946 Senate acceptance of the World Court's compulsory jurisdiction was little more than disguised rejection.

Currently, sixty-six countries have accepted some form of article 36(2) general compulsory jurisdiction.[5]

The advent of a new administration in 2009 suggests the timeliness of a reevaluation of the U.S. relationship to the ICJ, and specifically, to its

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1. Statute of the International Court of Justice, art. 36(2), June 26, 1945, 59 Stat. 1031.

2. *See id.*

3. Declaration by the President of the United States of America August 14, 1946 respecting recognition by the United States of America of the compulsory jurisdiction of the International Court of Justice, August 14, 1946, 61 Stat. 1218, T.I.A.S. 1598.

4. Bernard Gwertzman, *U.S. Voids Role of World Court on Latin Policy*, N.Y. TIMES, Apr. 9, 1984, at A1.

5. CHARTER OF THE UNITED NATIONS AND STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, DECLARATIONS RECOGNIZING AS COMPULSORY THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE UNDER ARTICLE 36, PARAGRAPH 2, OF THE STATUTE OF THE COURT, *available at* http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20I/I-4.en.pdf (last visited Jan. 24, 2009).

jurisdiction under article 36(2). I propose the following form of qualified acceptance of this jurisdiction:

> The government of the United States accepts in conformity with paragraph 2 of article 36 of the Statute of the ICJ, until such time as notice may be given to terminate such acceptance, as compulsory *ipso facto* and without special agreement, and on the basis and condition of reciprocity, the jurisdiction of the ICJ in any dispute arising after the date of this acceptance.

The acceptance of the jurisdiction of the court made by this declaration under paragraph 2 of article 36 of the Statute of the ICJ shall apply to all disputes other than disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defense, resistance to aggression, fulfillment of obligations imposed by international bodies, and other similar or related acts, measures, or situations in which the United States is, has been, or may in the future be, involved.

This limited reservation to our acceptance of the ICJ article 36(2) general jurisdiction is not something new. Twelve countries have attached similar reservations, excluding jurisdiction over military disputes. Among them are Germany, Greece, Hungary, India, Kenya, and Nigeria.

My reasons for proposing a positive reevaluation of U.S. acceptance of article 36(2) jurisdiction are the following:

a) The United States has always been a proponent of the rule of law in international relations, this being a natural extension of a foundational value in our domestic system of governance;
b) For most of its history, the United States has taken its legal obligations seriously. Despite the record of the past eight years, we are much more likely than not, in the future, to revert to our historic practice of acting in compliance with our international legal obligations, giving us little to fear and much to expect from judicial review of the law-comporting behavior of ourselves and of other states;
c) After eight years of pretending that, as the sole superpower, the United States can always and everywhere defend or advance its interests by recourse to force or the threat of force, we are learning that this is a false and self-defeating premise. In the future, when power is once again seen to be disaggregated and no one actor can credibly claim an unchallengeable preeminence of power, resort to law will be for us, as it is for other nations, a more productive strategy for advancing the multivariegated national interest than is reliance solely on the illusion of preponderant force. The next administration will administer a

> new era in which international law is again seen as serving the U.S. national interest and in which law-observant behavior again is the norm that guides decision-making in Washington. In such circumstances, a strong commitment to adjudication is the natural concomitant of a renewed commitment to the rule of law in international affairs.

In practice, in the international system, resort to law must mean recourse to the jurisdiction of international tribunals, of which the ICJ is *primus inter pares*.

If we do make this move to reposition ourselves under the jurisdiction of the ICJ in all matters pertaining to disputes arising under international treaty and customary law, it may also be necessary to address the role, in U.S. law, of decisions of the ICJ insofar as these interpret treaty rights and duties. Specifically, Congress, at a minimum, should hold hearings to determine how best to exercise its legislative power to ensure that one or several non-compliant states of the Union cannot vitiate the effect, and deny to all Americans the benefits, of treaties entered into by the President with the advice and consent of two-thirds of the Senate. How can Congress ensure that treaties, as the constitution envisages, actually are "the supreme law of the land"?[6] As matters stand, subsequent to the Supreme Court's *Medellin* decision,[7] there is no real incentive for other states to enter into treaties with us, as they would be exchanging their binding commitment for an essentially worthless promise by Washington to see what it can do to obtain the voluntary compliance of the fifty states of the Union. Such an impediment to the sovereign ability of the nation to obligate itself, and to promote the obligation of other states, is not in the national interest and must not be allowed to impede full American participation in the international legal system.

A new administration in Washington is more likely than its predecessor to see participation in a cooperative international legal system as being in its national interest. The prior administration has done much to hobble such participation. Its successor will have much to do, and to undo, if we are to resume our rightful place in a system which we cannot dominate, but in which our influence, wisely deployed, can produce significant dividends.

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6. U.S. CONST. art. VI, cl. 2.

7. *See* Medellin v. Texas, 129 S. Ct. 360 (2008).