

THE INTERNATIONAL COURT OF JUSTICE: IS IT TIME FOR A CHANGE?

I. INTRODUCTION

Despite the increasing growth of international business and trade and the legal problems that necessarily follow, the International Court of Justice (ICJ) continues to play a very minor role directly in the administration of international disputes.¹ The ICJ rarely has more than three or four cases pending at any time.² The ICJ's function is to settle disputes concerning international law,³ but this role is sometimes difficult.

This comment describes major problems concerning the ICJ. It then analyzes proposals and possible solutions to these problems. The goal is to offer workable ideas for providing the ICJ with the power it needs to live up to its mandate. The future of international transactions is threatened without a judicial system designed effectively to deal with international disputes.

II. PROBLEMS AFFECTING THE ICJ

A. *Reservations to Acceptance of the ICJ's Jurisdiction*

Dramatic events of the past two years have focused the world's attention on the ICJ. In April of 1984, Nicaragua appeared before the ICJ and charged that the United States "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."⁴ The United States, sensing that such a charge was imminent, had previously announced that for the following two years it would not recognize the Court's jurisdiction concerning issues in Central America.⁵ The United States claimed that it did not mean to show disrespect for the Court, but the effect of the United States action was to

1. Schwebel, *Widening the Advisory Jurisdiction of the International Court of Justice Without Amending Its Statute*, 33 CATH. U.L. REV. 355 (1984) [hereinafter cited as Schwebel].

2. *Id.*

3. STAT. I.C.J. art. 38.

4. The charge further stated that the U.S. was supplying money and training to the rebel forces fighting the Sandinista government in Nicaragua's civil conflict. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169, 170 (Order of May 10). See also *Why the U.S. Snubs the World Court*, U.S. NEWS & WORLD REP., Apr. 23, 1984, at 12 [hereinafter cited as *Why the U.S. Snubs the World Court*].

5. Letter from Secretary of State of the United States to the United Nations Secretary-General (April 6, 1984) (concerning the nonapplicability of compulsory jurisdiction of the

demonstrate one of the ICJ's perceived weaknesses.⁶

Approximately two years have passed since the United States delivered its initial announcement of nonrecognition concerning the ICJ's jurisdiction in Central American affairs. Subsequently, the Court has upheld its jurisdiction to hear the case and to proceed upon the merits.⁷ This confrontational posture between the ICJ and the United States raises questions regarding the ICJ's compulsory jurisdiction over matters of international concern.

The uncertainty regarding the ICJ's compulsory jurisdiction exists by virtue of article 36 of the ICJ governing statute. Article 36(2) of that statute provides that states may declare at any time that they will recognize as compulsory *ipso facto*, and without special agreement, the jurisdiction of the Court in all legal disputes concerning:

- (a) treaty interpretation;
- (b) international law questions;
- (c) facts which, if established, would amount to a breach of an international obligation;
- (d) reparations made for the breach of an international obligation.⁸

Article 36(2) appears merely to discourage actions such as that of the United States. Most states have refused to accept compulsory jurisdiction, since such acceptance is optional.⁹ Many of the states that have implemented article 36(2) have done so with stringent reservations.¹⁰ Further, article 36, paragraph 3 of the ICJ statute provides that jurisdiction may be accepted unconditionally, on condition of reciprocity with other states, or for a particular time period.¹¹ Arguably, the net effect of

International Court of Justice with regard to U.S. disputes with Central American states), reprinted in 23 I.L.M. 670 (1984).

6. *Why the U.S. Snubs the World Court*, supra note 4, at 12. This situation is very similar to the ICJ cases of 1980 in which the Court denounced Iran's takeover of the U.S. Embassy in Tehran. The Court called for Iran to release immediately the Embassy and the hostages and to pay the U.S. for damages. Iran refused to comply with the order, again exposing the weakness of the ICJ. Although the ICJ order did not lead to an immediate hostage release, the ICJ action possibly enhanced the bargaining process between Iran and the U.S., indirectly leading to the hostage release. See *United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (Judgement of May 24).

7. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Judgment of Nov. 26). For a discussion of the significance of the jurisdictional phase of *Nicaragua v. United States*, see Kirgis, *Nicaragua v. United States as a Precedent*, 79 AM. J. INT'L L. 652 (1985).

8. STAT. I.C.J. art. 36 para. 2.

9. Comment, *Allowing Federal Courts Access to International Court of Justice Advisory Opinions: Critique and Proposal*, 6 HASTINGS INT'L & COMP. L. REV. 745, 749 n.28 (1983) [hereinafter cited as Comment, *Allowing Federal Courts Access*].

10. *Id.*

11. STAT. I.C.J. art. 36, para. 3, cited in Merrills, *The Optional Clause Today*, 50 BRIT. Y.B. INT'L L. 87 (1979) [hereinafter cited as Merrills].

this option under the ICJ statute is that states can decide when they will and when they will not subject themselves to the compulsory jurisdiction of the ICJ.

However, article 36, paragraph 6 of the ICJ statute provides that in a matter where there exists a dispute as to the Court's jurisdiction, the Court itself must decide the jurisdictional issue.¹² Moreover, such a jurisdictional decision is final and cannot be appealed.¹³ Because the ICJ statute is automatically adopted by any state that ratifies the United Nations charter,¹⁴ the United States as a United Nations' member is legally precluded from resisting ICJ jurisdiction once the Court finds it has such jurisdiction. In light of article 36(3) of the ICJ statute, the ICJ determines whether it has jurisdiction to hear a case by looking at the individual states' reservations upon the Court's jurisdictional power.

The United States has accepted the ICJ's compulsory jurisdiction, but it has also adopted an expansive reservation.¹⁵ The reservation, known as the Connally amendment, states that the United States will not accept ICJ compulsory jurisdiction on matters which are essentially within the domestic jurisdiction of the United States as determined by the United States.¹⁶ Although the United States does have other reservations upon ICJ compulsory jurisdiction,¹⁷ the Connally amendment most severely limits the ICJ's jurisdiction over matters involving the United States. Essentially, if taken literally, this reservation would mean that the United States accepts the compulsory jurisdiction of the ICJ whenever it is in the best interest of the United States to do so.¹⁸

The ICJ was created to serve as an arbiter of international disputes. However, the ICJ is hamstrung in this role by the limited scope of its

12. STAT. I.C.J. art. 36, para. 6.

13. STAT. I.C.J. art. 59.

14. U.N. CHARTER art. 93.

15. Comment, *Allowing Federal Courts Access*, *supra* note 9, at 749-50.

16. *Id.* at 749 n.29.

17. For a discussion of other U.S. reservations to ICJ jurisdiction, see J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 60-61 (2d ed. 1981).

18. Despite this apparently broad U.S. power, the right to assert compulsory jurisdiction is subject to challenge by virtue of the Court's 1957 decision in *France v. Norway*. In that case, the ICJ found that a comparison between the reservations of France and Norway on ICJ jurisdictional power showed that the French acceptance was within much narrower limits than the Norwegian acceptance declaration. As such, the Court believed that the basis of its jurisdiction was defined by these narrower limits of the French reservation. The Court held that in accordance with the condition of reciprocity upon which compulsory jurisdiction is based under article 36(3) of the ICJ statute, Norway was entitled to except from the compulsory jurisdiction of the Court those disputes which would fall within France's reservation upon ICJ jurisdiction. *Case of Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. 9 (Judgment of July 6) [hereinafter cited as *France v. Norway*].

jurisdiction. The Court will remain of little potent force so long as parties involved decide whether or not the Court has jurisdiction to hear the controversy.

The domestic jurisdiction principle used by the United States to escape the ICJ's compulsory jurisdiction is only one of many rationales used by states in creating reservations on the Court's jurisdiction.¹⁹ The first reservation placed upon the jurisdictional power of the world court occurred in 1921: the Netherlands declared that disputes which could be resolved by other peaceful means were exempt from the Court's jurisdiction.²⁰ The League of Nations encouraged this use of reservations because it supported the idea of a world court.²¹ Many states have subsequently followed the Netherlands' lead in establishing a reservation characterized by self-interest. As a result, there are many different types of reservations to the acceptances of jurisdiction currently in force.

A typical reservation places a time limit on a state's acceptance. Many states have adopted provisional acceptances that terminate upon immediate notice.²² States that retain a right of immediate termination appear to enjoy a tremendous advantage over states which declare unconditional acceptance of the ICJ's compulsory jurisdiction.²³ Nations that retain these immediate termination rights can anticipate potential legal uncertainties with other states and avoid the ICJ's compulsory jurisdiction.²⁴

Although an immediate termination reservation may have been advantageous in the past, this advantage has largely disappeared as a result of the ICJ decision in *France v. Norway* which strengthened the idea of reciprocal reservations.²⁵ Under this theory of reciprocity, a state involved in a dispute before the ICJ has the right to take advantage of the other disputant's reservation clauses.²⁶ This rule is intended to put all states on an equal jurisdictional basis in proceedings before the ICJ. If a state foresees potential ICJ litigation and expects an adverse judgment to be rendered against its interests, that state must withdraw its acceptance

19. For an exhaustive discussion of such reservations, see Merrills, *supra* note 11.

20. *Id.* at 89. This 1921 reservation limited the power of the Permanent Court of International Justice (PCIJ), a predecessor to the current ICJ. The PCIJ remained in effect until 1945 when the ICJ was created under the ICJ's statute.

21. *Id.*

22. For the authority to use time limit reservations, see STAT. I.C.J. art. 36, para. 3, *cited in* Merrills, *supra* note 11, at 91.

23. *Id.* For a discussion of advantages that follow from a right of immediate termination, see Waldock, *Decline of the Optional Clause*, 32 BRIT. Y.B. INT'L L. 244 (1955-56).

24. Qadeer, *The International Court of Justice: A Proposal To Amend Its Statute*, 5 HOUS. J. INT'L L. 35, 40 (1982) [hereinafter cited as Qadeer].

25. For a discussion of *France v. Norway* and the idea of reciprocity see *supra* note 18 and accompanying text.

26. See *supra* note 18 and accompanying text.

of ICJ jurisdiction through its reservations before the other party files the case with the ICJ.²⁷ By notifying the relevant parties that it no longer accepts the ICJ's compulsory jurisdiction, such a state can reject the ICJ's jurisdiction when it is favorable to do so.

Other types of reservations are similarly effective in limiting the Court's power. The arbitrariness of these reservations renders the concept of the ICJ's compulsory jurisdiction largely illusory. In the past, a typical reservation allowed states to vary acceptance of compulsory jurisdiction in any manner. Portugal adopted this type of reservation clause in 1955.²⁸ India objected to Portugal's use of the reservation, but the ICJ held that such clauses are lawful.²⁹ The ICJ, by upholding the right to use the clause placed a limitation on its own power.

It is not altogether clear that such self-serving clauses would be upheld today. The Court in *France v. Norway* held that reservations upon ICJ jurisdictional power must be compatible with article 36 of the ICJ statute.³⁰ However, the Court refused to decide whether a domestic jurisdiction reservation similar to the United States Connally amendment was compatible with this section of the statute.³¹

Many types of self-serving reservations have been devised. Some states have adopted reservations that accept the ICJ's compulsory jurisdiction at a future date.³² States utilizing these types of reservations have the advantage of surprise whereby they may accept the ICJ's compulsory jurisdiction only for the duration of a particular dispute. Other states, to prevent surprise applications directed at them, have employed reservations to prevent this type of ICJ adjudication.³³

Past potential abuses of compulsory jurisdiction have included cases in which one party to a dispute was subject to the ICJ's jurisdiction while the other party was not. This problem could be handled through reciprocal arrangements allowing both parties to the controversy to agree to the

27. See *Nottebohm Case (Liechtenstein v. Guat.)*, 1952 I.C.J. 4 (Order of Jan. 26).

28. The reservation allowed Portugal to exclude any dispute from the scope of the ICJ's authority by notifying the Secretary-General of the United Nations. The reservation was to take effect immediately upon such notification. This type of reservation reaches the same result as reservations which terminate immediately. Merrills, *supra* note 11, at 94.

29. *Right of Passage over Indian Territory (Fr. v. India)*, 1957 I.C.J. 125 (Judgment of Nov. 26).

30. *France v. Norway*, *supra* note 18.

31. *Id.*

32. This type of restriction on the ICJ's jurisdiction has some advantages. Prevention of stale disputes is an obvious reason to use this type of reservation. A second advantage is in keeping certain periods of a state's history, such as wars, out of the ICJ's reach. The effect of such a reservation is to ensure that only future disputes are subject to the ICJ's review. Merrills, *supra* note 11, at 96-97.

33. Merrills, *supra* note 11, at 101.

ICJ's jurisdiction before the ICJ is allowed to hear the case.³⁴ This particular problem has largely disappeared in light of the Court's view of reciprocity first espoused in *France v. Norway*.³⁵

The use of reservations significantly limits the jurisdiction of the ICJ. Under article 36(6) of the ICJ statute, the Court has the statutory power to settle disputes between states regarding its jurisdiction. However, by refusing to hold that certain reservation clauses are contrary to the ICJ statute, the Court is seemingly sanctioning the right to exclude certain matters from the ICJ's jurisdiction.³⁶

B. Enforcement of the ICJ's Decisions

The United Nations has no mechanism to guarantee effective enforcement of ICJ decisions. Some may believe that this is not a problem. One commentator argues that the ICJ as a world court is supposed to decide cases and that these decisions should be respected and given the force of law.³⁷ Indeed, the role of the ICJ is not that of an enforcer of the law.³⁸ However, enforcement must be provided somehow. Article 94 of the U.N. Charter provides an enforcement mechanism, but it is subject to the veto power of the UN Security Council.³⁹ It is highly unlikely that voting Security Council states such as the Soviet Union or the United States, especially in light of the United States' expansive reservations of the ICJ's power, would vote for increasing the ICJ's influence.

One commentator suggests that the developed states will never be in favor of accepting full ICJ jurisdiction over international disputes.⁴⁰ Rather, if the law favors them, these states will attempt to persuade the developing countries, either diplomatically or militarily, to accept the ICJ's jurisdiction; conversely, if the law is not favorable, these developed states can either refuse to accept the ICJ's jurisdiction or utilize their

34. The possibilities are endless for this type of reservation. Some states have employed reservations which enable them to ignore disputes as nonexistent if potential adjudication would be harmful to their cause. *Id.* at 104.

35. See *supra* note 18 and accompanying text.

36. Some ICJ justices have taken the position that certain reservations conflict with the ICJ statute. See *France v. Norway*, *supra* note 18 (Lauterpacht, J. dissenting).

37. Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985). This author cites the U.S. Supreme Court's issuance of a subpoena against former President Richard Nixon as support for his argument regarding respect for the law. Chayes suggests that a legal system dependent on coercive power for enforcement of its decisions will not survive for very long. *Id.* at 1477. Unfortunately, at present a vast difference exists between the respect given the United States Supreme Court and that enjoyed by the ICJ.

38. Dillard, *Law, Policy, and the World Court—Attacking Some Misconceptions*, 17 WIL-LAMETTE L. REV. 13, 15 (1980) [hereinafter cited as Dillard].

39. Article 94 states that if any party fails to perform under a judgment of the ICJ, the other party has recourse to the U.N. Security Council. The Security Council then has power to make recommendations or decide upon measures to be taken to enforce the judgment. U.N. CHARTER art. 94, para. 2, cited in Dillard, *supra* note 38, at 16.

40. Qadeer, *supra* note 24, at 42-43.

stringent reservations upon the Court's power to adjudicate. Thus, these states can avoid the Court's jurisdiction and can settle disputes through diplomatic, military, and economic persuasion.⁴¹

A combination of factors render the ICJ's decisions potentially ineffectual. Compliance with the ICJ's decisions is largely voluntary, and the UN Security Council has discretion in deciding whether to invoke its enforcement power.⁴² This suggests that the developed states have power over enforcement of the ICJ's decisions both directly and indirectly. The wide use of reservations among states belonging to the UN demonstrates how the majority views the ICJ's jurisdiction.⁴³ Also, the nations belonging to the UN Security Council are unlikely to relinquish the control they now possess over international disputes.⁴⁴ Consequently, the status quo will probably persist.

C. *Distinctions Between Domestic and International Patterns*

An additional explanation for the ICJ's lack of success is the difference between domestic and international rules of behavior. The world consists of many individual states. As such, domestic values are more pervasive as an influence on conduct than any international values.⁴⁵ The international community has rules of conduct and these rules are, for the most part, obeyed.⁴⁶ Nevertheless, when vital domestic concerns conflict with principles of international law, the national demands usually prevail.⁴⁷ States may occasionally overcome domestic instincts in favor of international objectives, but these occasions are few in number.

Patterns of adjudication differ as well. International adjudication rarely involves narrow issues that are capable of strict judicial reasoning. Instead, international disputes often involve a mixture of law and politics.⁴⁸ States object when the Court strays from the legal issues and begins to interpret political issues. When political questions are addressed,

41. *Id.* at 43. Qadeer suggests that the optional jurisdiction clause puts the developed states in an all-win-no-lose situation.

42. Dillard, *supra* note 38, at 17. Justice Dillard (ICJ, 1970-79) suggests that enforcement could become a significant problem if compulsory jurisdiction of the ICJ increases and if the Court begins to decide issues that have more domestic and emotional overtones. *See also* Qadeer, *supra* note 24, at 51.

43. In 1979, only forty-five states were subject to the compulsory jurisdiction of the ICJ by virtue of a declaration of acceptance. This is less than one-third of the United Nations' membership. 1978-1979 I.C.J.Y.B. 56 (1979).

44. Qadeer *supra* note 24, at 43.

45. McGinley, *Ordering a Savage Society: A Study of International Disputes and a Proposal for Achieving Their Peaceful Resolution*, 25 HARV. INT'L L.J. 43, 56 (1984) [hereinafter cited as McGinley].

46. *Id.* at 59.

47. *Id.* at 60.

48. Sathirathai, *An Understanding of the Relationship Between International Legal Discourse and Third World Countries*, 25 HARV. INT'L L.J. 395, 400 (1984) [hereinafter cited as

the charge that judges of the ICJ are allowing their national affiliations to dictate their decisions is more frequently heard.⁴⁹ This can result in an inherent mistrust of the Court.

The ICJ is certainly aware of potential charges about its credibility. The ICJ abstains from deciding political questions as much as possible by ruling on procedural matters and initially avoiding the substantive issues involved in the dispute.⁵⁰ Commentators suggest that it is best for the ICJ to avoid the political arena.⁵¹ However, the dividing line between political and legal questions is not always clear.⁵² Moreover, disputes do not exist in a vacuum and every decision will have political consequences. Additionally, international disputes frequently involve conflicting political philosophies. Thus, to a degree, the ICJ is forced to engage in politics in order to decide the heart of the issue rather than procedurally sidestepping it.⁵³

Lack of faith in international adjudication is due in part to the structure of international bodies. Developing countries view the UN and the ICJ as controlled by the developed countries of the world.⁵⁴ The body of international law that the ICJ uses in deciding disputes is partly a product of colonialism.⁵⁵ Even assuming, *arguendo*, that the ICJ is a neutral tribunal, the body of law on which it bases its decisions may not be. Developing states are reluctant to adjudicate international disputes under such conditions.⁵⁶

Without an international court that is viewed as fair and neutral,

Sathirathai]. The Nuclear Tests cases point out how inseparable law and politics are in dealing with international issues. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Judgment of Dec. 20); Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Judgment of Dec. 20).

49. McGinley, *supra* note 45, at 61.

50. Sathirathai, *supra* note 48, at 400.

51. T. ELIAS, THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS 27 (1983).

The argument that the questions put to the Court may sometimes have a political character is no doubt true, having regard to the circumstances preceding the resolution that prompted a request, but it by no means follows that the Court should decline to answer the specifically legal questions put to it.

The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision. *Id.*

52. Sathirathai, *supra* note 48, at 402.

53. *Id.*

54. Qadeer, *supra* note 24, at 39.

55. *Id.*

56. *Id.* at 45. Qadeer argues that because of the need for economic interdependence among nations as evidenced by the world oil situation, the developed nations no longer enjoy the advantages of power they once did. Thus, developing nations no longer feel compelled to accept a body of law which favors developed nations. The author suggests that if mandatory compulsory jurisdiction for the ICJ were proposed again, a majority of nations would be in favor of its adoption. An impartial international tribunal seems much more favorable in light of the need for cooperation between interdependent nations.

states will protect their domestic interests at the expense of a unified international system of law.⁵⁷ States often have little more than an ethical inducement to comply with international law. This causes the international system of law to appear uncertain and dangerous.⁵⁸ On the other hand, many states actually comply with principles of international law. This compliance is often based on the idea of reciprocity; states frequently have mutual needs, interests, and expectations.⁵⁹ A basic mistrust of international law and of the ICJ limits the role that the ICJ may assume in the peaceful resolution of international disputes.

D. Other Problems

Other problems continue to limit states' acceptance of the ICJ. Many states take the position that the ICJ is unpredictable.⁶⁰ Others suggest that the real reason states are reluctant to submit to the ICJ's jurisdiction is the ICJ's overpredictability: a nation can anticipate losing before the Court when it knows the law is not in its favor.⁶¹ Some of the matters noted here are intertwined with the basic problems previously mentioned. For example, the pretext of unpredictability as a rationale for escaping the ICJ's jurisdiction highlights the problems associated with the ICJ's lack of compulsory jurisdiction.

States often cite an alleged prowestern bias of the ICJ judges as their reason for lacking confidence in the Court.⁶² Again, the real problem lies in the fact that the body of international law the judges apply evolved partly in an era of colonialism and, as such, is reflective of the developed states' interests.⁶³ This viewpoint naturally leads to the developing states' position that the ICJ is controlled by the developed states.⁶⁴

States also employ pragmatic reasons to justify their avoidance of the ICJ. First, tremendous expense and delay are involved once the ICJ gains jurisdiction to a dispute.⁶⁵ Cases are exhaustively briefed, and arguments are frequently lengthy.⁶⁶ Litigation before the Court takes both time and money. Second, states arguing a case before the ICJ face the

57. Qadeer, *supra* note 24, at 62. Unfortunately, law is developed by human beings and cannot be value-neutral. Therefore, the relevant question is not whether values are imposed, but whose values are imposed.

58. *Id.* at 62-63.

59. See text accompanying note 46.

60. Schwebel, *supra* note 1, at 357.

61. *Id.*

62. Qadeer, *supra* note 24, at 45.

63. Schwebel, *supra* note 1, at 357; see *supra* notes 54-55 and accompanying text.

64. Qadeer, *supra* note 24, at 47.

65. Schwebel, *supra* note 1, at 355. One author suggests that the expense factor is an inducement to settle the case before it reaches the ICJ for adjudication. Qadeer, *supra* note 24, at 67.

66. Schwebel, *supra* note 1, at 355. As pointed out by Justice Schwebel, the Court rarely

possibility of unwelcome adverse publicity, especially if a state's conduct is publicly considered deplorable.⁶⁷ After the Iranian takeover of the United States embassy, for example, the states of the world united in condemning Iran for its actions. Such a united world opinion against a state's action may involve long-term effects.⁶⁸ A final reason for lack of ICJ acceptance, often overlooked, is that many states demand the option of choosing when and when not to use the Court. Many states implicitly use this reasoning under the pretext that submitting to the ICJ's compulsory jurisdiction would cause a relinquishment of sovereignty.⁶⁹ The truth is that many states do not wish to put their fate in the ICJ's hands and face the possibility of an adverse decision.⁷⁰ Most states prefer to keep the power of settling international disputes more within their control. This rationale illustrates states' basic mistrust for the ICJ and exemplifies the need for immediate changes.

III. PROPOSALS FOR STRENGTHENING THE ICJ

A. *UN Membership Contingent on Acceptance of ICJ Compulsory Jurisdiction*

In the past several years, commentators have debated various solutions to problems with the ICJ's present status. Many authorities view the lack of true compulsory jurisdiction as the ICJ's most acute problem. One proposal addresses this issue directly. The proposal's goal is to obtain states' acceptance of the ICJ's "unconditioned" compulsory jurisdiction.⁷¹ This could be accomplished if submission to the ICJ's jurisdiction were compulsory upon membership to the United Nations.⁷² However, since many states already are UN members, the proposal would have to be retroactively applied in order to be effective.

An obvious drawback of contingent UN membership is that many states may simply prefer to withdraw from the UN rather than accept the Court's compulsory jurisdiction. Compromises could be worked out to prevent such occurrences. A possible compromise would be for states to accept the ICJ's compulsory jurisdiction while maintaining the right

has many cases pending on its docket, so this factor normally does not cause a delay. However, enormous expense can be involved for legal fees, travel, and living expenses of the parties arguing before the ICJ.

67. Qadeer, *supra* note 24, at 67.

68. Iran was certainly hurt by public sentiment when its actions concerning the U.S. Embassy takeover in Tehran became known to the world. The U.N. Security Council proposed imposing sanctions against Iran, but the measure was vetoed by the Soviet Union. Dillard, *supra* note 38, at 18.

69. Qadeer, *supra* note 24, at 42.

70. McGinley, *supra* note 45, at 70.

71. *Giving Way to the International Court*, 132 NEW L.J. 378 (1982).

72. *Id.*

to limit the extent of the jurisdiction through the reservation process.⁷³ However, this proposal simply returns full circle to the problem of states reserving so extensively that the ICJ is basically without jurisdictional power. If the idea of compulsory jurisdiction is to work, there must be no such loophole to enable states to vitiate the ICJ's authority.

A requirement that UN member states retroactively accept the ICJ's compulsory jurisdiction probably would not cause a mass exodus from the UN. However, upon reflection of the great number of reservations to the ICJ's jurisdiction, and the number of states employing them, it is evident that many states are not ready to accept a fully functional ICJ. If put to a choice between these alternatives, the UN might suffer as a result.

B. United States Rescission of the Connally Amendment

The United States could be instrumental in gaining support for the idea of the ICJ's compulsory jurisdiction by rescinding its expansive reservations.⁷⁴ Advocates of this proposal contend that the United States' alleged support for the Court is meaningless when viewed against its reservations of almost limitless scope. They suggest that the United States' acceptance of the ICJ's jurisdiction is little more than "ill-disguised rejection."⁷⁵ If the United States were to rescind the Connally amendment, other nations might perceive a renewed confidence in the ICJ on the part of the United States. This might lead other states to follow suit, and could create a domino effect.⁷⁶

It is unlikely, however, that the United States unilaterally will take the risk of rescinding its reservations without other states agreeing to do the same. In light of the recent United States position concerning Nicaragua's litigation, it appears clear that the United States has no present intention of acquiescing to expanded ICJ jurisdiction over litigation involving the United States. The Connally amendment is more expansive

73. Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AM. J. INT'L L. 253, 313-14 (1975) [hereinafter cited as Gross].

74. Comment, *Allowing Federal Courts Access*, *supra* note 9, at 765.

75. T. FRANCK, *THE STRUCTURE OF IMPARTIALITY* 98 (1968), cited in Comment, *Allowing Federal Courts Access*, *supra* note 9, at 763 n.122. This so-called "rejection" of the ICJ has become apparent in light of the recent U.S.-Nicaraguan controversy. No one knows for certain what course the U.S. will follow should the ICJ rule against it on the merits of the case. However, at least one commentator has argued that the American people believe in government by law and are basically law-abiding people. Chayes, *supra* note 37, at 1478. This observation leads to speculation that the U.S. government will obey the ICJ's decision on the merits, and this in turn may strengthen somewhat the image of the ICJ as an authoritative international judicial body.

76. Comment, *Allowing Federal Courts Access*, *supra* note 9, at 765. See also Merrills, *supra* note 11, at 116.

than most reservations in that it would allow the United States and not the ICJ to decide whether jurisdiction is appropriate.⁷⁷ The Connally amendment demonstrates the United States lack of regard for the Court's wisdom and impartiality, and it is fairly certain that the United States will not alter its present position.⁷⁸

C. *Alternative Forms of Dispute Resolution*

Recognition that the present system of international adjudication is less than satisfactory has focused attention on alternative methods of settling international disputes.⁷⁹ Most proposals suggesting alternative forms of dispute resolution have concentrated on mediation as a tool that states can use in negotiating peaceful settlements of international disputes.⁸⁰ A potential advantage of mediation is that the parties involved do not risk the loss of a lawsuit.⁸¹

Mediation offers another potential advantage over adjudication when viewed in light of a typical international dispute. International disputes are rarely limited to abstract questions of law.⁸² Rather, international conflicts are composed of foreign policy matters that affect the lives of many people. Emotions are involved and this may be inconsistent with rational assessments.⁸³ The typical international dispute cannot be categorized into a single narrow issue. Mediation is the better method for resolving different and complex issues. Because parties who agree to mediation submit themselves voluntarily, there is also less mistrust when this method of settling conflicts is employed.⁸⁴

77. Gross, *supra* note 73, at 313-14. Despite the presence of this expansive reservation, article 36 of the ICJ statute gives the ICJ the final authority to decide whether ICJ jurisdiction is appropriate in a given situation. See *France v. Norway*, *supra* note 18.

78. Gross, *supra* note 73, at 313-14.

79. Dillard, *supra* note 38, at 24.

80. *Id.*

81. Comment, *Allowing Federal Courts Access*, *supra* note 9, at 758-59. One commentator has espoused the idea that a state which pursues ICJ litigation may ultimately obtain an ICJ dismissal if that state persists with its original jurisdictional arguments in the merits phase of the case. He cites the South West Africa Cases in which the South African government reiterated its jurisdictional basis for seeking dismissal in its brief on the merits of the case. The ICJ, although ignoring these arguments in the jurisdictional phase of the case, dismissed the case on these same jurisdictional issues when the case was considered on the merits. This example supports the commentator's advice that a state should never give up if it believes its position is valid. Hight, *Litigation Implications of the U.S. Withdrawal From the Nicaraguan Case*, 79 AM. J. INT'L L. 992, 998-1000 (1985). This example also illustrates that all avenues of attack are potentially available when a case is argued on the merits before the ICJ, thereby reducing the risk of losing a lawsuit at this phase. However, this example also points to a potential weakness with the ICJ: that if a state argues long and hard enough, the ICJ will eventually accept its position.

82. Comment, *Allowing Federal Courts Access*, *supra* note 9, at 758-59; see *supra* notes 48-53 and accompanying text.

83. McGinley, *supra* note 45, at 67-68.

84. *Id.* at 66.

Despite the arguable advantages of mediation, there are drawbacks. Law is unique in its capacity to establish a sense of order.⁸⁵ Law produces a sense of stability and predictability that alternative dispute methods cannot equal. Alternatives such as mediation may provide ad hoc solutions to an immediate crisis; however, these methods may lack the respectability and effectiveness that law provides in producing long-term solutions.⁸⁶

The presumption is rebuttable that international law as promulgated by the ICJ provides a more lasting solution than other means of dispute settlement. In its present form, the ICJ is ill-equipped to give its opinions the force of law. States rarely permit the ICJ to decide conflicts when important domestic interests are involved.⁸⁷ Consequently the ICJ, in contrast to national tribunals, lacks the wide approval necessary to develop a body of law which will regulate international conduct within specified norms except when important issues are not involved.

Another proposed form of dispute resolution incorporates aspects of both adjudication and mediation. In the proposal referred to as conflict management theory, adjudication is utilized through the ICJ when feasible, and the proposal suggests a form of mediation when that method is more likely to foster a workable solution.⁸⁸

A different proposal for dispute resolution involves the creation of an International Mediation Society. This organization would operate as an arm of the United Nations under the direction of the UN Secretary-General.⁸⁹ A mediator would be selected to intervene in an international dispute, but only when the parties could not continue negotiating on their own. The Society would select a neutral intervenor committed to obtaining a peaceful resolution.⁹⁰

Weighty problems, however, are involved with this proposal. First, the mediator would be required to review all relevant data concerning the dispute. Necessary access to information would include the intervenor's right to see secret files if this sensitive information is pertinent to the conflict.⁹¹ States may conceivably be unwilling to place this type of information into the hands of a third party, especially if the Society could not be trusted as a neutral body. Second, there is the problem of funding

85. Dillard, *supra* note 38, at 24.

86. *Id.*

87. McGinley, *supra* note 45, at 71; see *supra* notes 45-47 and accompanying text.

88. Dillard, *supra* note 38, at 24. Justice Dillard's plan would include the techniques of "old fashioned diplomacy" as well as conference diplomacy, mediation, and conciliation.

89. McGinley, *supra* note 45, at 78. The article stipulates why the Secretary-General should head the International Mediation Society.

90. *Id.* at 74-75. For a discussion of the concerns regarding neutral decision-makers, see *infra* notes 114-16 and accompanying text.

91. *Id.* at 76.

such an organization. Because of possible difficulty in gaining UN approval to finance this type of organization, private funding sources might be needed, at least initially.⁹²

Commentators have proposed alternative forms of dispute resolution because the ICJ has yet to fulfill its projected role as a main arbiter of international disputes. Proposals involving mediation offer a promising step in the right direction. Nevertheless, there are problems which must be resolved. Primarily, any plan for international dispute settlement must have support from the states of the world in order to succeed.

D. Broadening Access to the ICJ

Proposals to remedy defects within the ICJ include suggestions to widen access to the Court. Article 96 of the UN Charter authorizes the ICJ to render advisory opinions on any legal issue when requested to do so by the UN General Assembly, Security Council, or any organ of the UN as authorized by the General Assembly.⁹³ Some critics suggest that article 96 too severely limits access to the ICJ. These critics recommend a referral procedure similar to one formulated by the American Bar Association (ABA) in the United States.⁹⁴ Under the ABA procedure, a domestic court may seek an advisory opinion from the ICJ when difficult questions of international law are involved.⁹⁵ Requests would be filtered through a Special Committee of the General Assembly to prevent the ICJ from being burdened with trivial and politically sensitive issues that states might submit for the ICJ's advice.⁹⁶ If an opinion were ultimately rendered, a domestic court would have the discretion of deciding whether to treat it as binding or advisory.⁹⁷ Also, the domestic court would decide conflict of law questions in the event of conflicts between international and domestic law.⁹⁸

The United States House of Representatives adopted a resolution in support of expanding the ICJ's advisory jurisdiction which was very similar to the ABA's proposal. The stated purpose of the resolution was to

92. *Id.* at 79.

93. U.N. CHARTER art. 96, *cited in* Schwebel, *supra* note 1, at 357-58.

94. *Id.* at 359.

95. Sohn, *Broadening the Advisory Jurisdiction of the International Court of Justice*, 77 AM. J. INT'L L. 124, 126 (1983) [hereinafter cited as Sohn].

96. Szasz, *Enhancing the Advisory Competence of the World Court*, in 2 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 499, 517 (Gross ed. 1976), *cited in* Sohn, *supra* note 95, at 128.

97. Schwebel, *supra* note 1, at 359.

98. The author of this article views the system as an example of "cooperative federalism" whereby resources are used to maximize efficiency. The overall goal is to work together and successfully resolve the problem so that all parties are satisfied with the result. Sohn, *supra* note 95, at 127-28 (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1947)).

encourage greater use of the Court.⁹⁹ Several advantages were cited in support of the proposal. Among these advantages is the additional expertise the ICJ could provide in the resolution of international problems. A domestic court decision would receive greater respect if the ICJ had given advice in support of the decision. Also, early resort to the ICJ could help to resolve disputes expeditiously and prevent them from growing into full-blown conflicts.¹⁰⁰ Another form of referral procedure would involve authorizing the Secretary-General of the UN to seek advisory opinions from the Court. This could be accomplished indirectly through the Security Council, which would avoid its having to amend the UN Charter.¹⁰¹

Referral procedures are designed to increase use of the ICJ and bring about greater uniformity in the application of international law.¹⁰² However, there are potential disadvantages to the proposals under discussion. For example, the procedure of referring potential cases to the UN Secretary-General could prove to be a mistake; critics contend it would encourage the Secretary-General to seek political opinions.¹⁰³ This potential risk is mitigated, perhaps, by an assumption that the Secretary-General is a politically neutral official.¹⁰⁴ There are also potential disadvantages associated with a procedure which authorizes domestic courts to treat an ICJ opinion as either advisory or binding.¹⁰⁵ This may not promote uniformity in the law; it can breed uncertainty and, like the use of reservations, permit states to decide in a self-interested manner when and how to apply international law. Similar problems would arise by giving domestic courts discretion in deciding which issues involve a conflict of laws.¹⁰⁶ Domestic courts would be able to disregard the ICJ's advice under the pretext of conflict of laws. Moreover, domestic courts might decide the same issue differently depending on the domestic interest in the controversy. Thus, referral procedures may not provide uniformity in the application of international law.

Arguably the United States House of Representatives resolution for widening the ICJ's advisory jurisdiction is merely a ploy to de-emphasize the United States' continued refusal to accept the Court's compulsory

99. Goldklang, *House Approves Proposal Permitting ICJ to Advise Domestic Courts*, 77 AM. J. INT'L L. 338, 339 (1983) [hereinafter cited as Goldklang].

100. *Id.*

101. Under article 99 of the U.N. Charter, the Secretary-General is authorized to alert the Security Council of any matter that could threaten international peace and security. Schwebel, *supra* note 1, at 361.

102. Goldklang, *supra* note 99, at 339.

103. Schwebel, *supra* note 1, at 361.

104. McGinley, *supra* note 45, at 78; *but see supra* note 90.

105. Schwebel, *supra* note 1, at 359.

106. Sohn, *supra* note 95, at 127; *see supra* notes 45-47 and accompanying text.

jurisdiction.¹⁰⁷ This focus on widening the ICJ's advisory jurisdiction may be misplaced. The key weakness of the ICJ is still the tribunal's lack of compulsory jurisdiction.¹⁰⁸

Another proposal for widening access to the ICJ is the amendment of article 34 of the UN Charter.¹⁰⁹ Under article 34 only "states" may be parties to adjudication before the Court. International law has grown tremendously in the last century, and to confine adjudication before the ICJ to disputes between states is to ignore reality and the development of international law.¹¹⁰ By this proposal, certain individuals and inter-governmental agencies would be permitted to adjudicate before the ICJ.¹¹¹ The main obstacle to the proposed amendment is obtaining UN approval. Any amendment requires a vote of two-thirds of the General Assembly. Article 108 of the UN Charter further requires ratification of any changes by all permanent members of the Security Council.¹¹² It may be difficult to persuade the Soviet Union, which has traditionally opposed increasing the ICJ's power, to accept such a proposal.¹¹³ The United States may also resist such an amendment, although this is unlikely in view of its proposals for increasing the ICJ's advisory jurisdiction.

E. Other Proposals

Reforming the structure of the ICJ so that the Court appears to be more politically neutral would help to gather support for an increase in its power.¹¹⁴ Suggestions for obtaining a nonpolitical Court include requiring judges of the Court to renounce their citizenship and become world citizens, and having the judges appointed for life terms.¹¹⁵ These reforms may help lessen the impact of judges' nationalities on the decision-making process. In addition, life terms might curb the fear that the judges are biased by a realization that they will return to their native lands once they complete their terms in office.¹¹⁶ These reforms might increase trust in the neutrality of the ICJ. However, judges are humans and biases can still influence decision-making subconsciously. Proponents of such reforms should take this caveat into consideration.

107. Comment, *Allowing Federal Courts Access*, *supra* note 9, at 764-65.

108. *Id.* at 770.

109. Qadeer, *supra* note 24, at 49-50.

110. *Id.* at 49.

111. *Id.* at 50.

112. U.N. CHARTER art. 108.

113. See Qadeer, *supra* note 24, at 51.

114. Comment, *Allowing Federal Courts Access*, *supra* note 9, at 767.

115. *Id.* at 766-67.

116. *Id.*

Another suggested reform involves the creation of a system of regional international courts. Under this proposal, the ICJ would become an appellate court with the power of reviewing selected regional court cases.¹¹⁷ The main disadvantage of a regional court system is that a nonuniform body of international law might develop between the regions.¹¹⁸ There is still no guarantee that states will be willing to accept the ICJ's jurisdiction under such a jurisdictional structure.¹¹⁹

IV. CONCLUSION

In an age where relations between states are increasingly significant to business, politics, and security, it is crucial to have an effective means of administering international disputes.¹²⁰ Though the purpose of the ICJ is to fill this role, it has been far too unsuccessful. This comment describes several reform proposals which share the purpose of improvement. The option of completely abolishing the ICJ is without merit. A system which utilizes both adjudication and mediation in appropriate circumstances may succeed by combining the best attributes of both devices.¹²¹ If the ICJ is ultimately to remain part of the international dispute resolution process, changes must be made to increase its power and prestige. The Court as it exists today is not sufficiently relied upon by states as an effective international arbiter.

A fundamental change in the way states view international relations may be required before any progress is made.¹²² Law is only a beginning point, but it can be employed to demonstrate how international conflicts go beyond domestic concerns. All the people of the world share similar problems.¹²³ Adjudication and mediation can help states to recognize this. International cooperation and mutual understanding are the basis of a successful, peaceful method of conflict resolution.¹²⁴ Many may believe that this viewpoint is idealistic. However, the growth of international trade and increasing interdependence among states exemplify the need for a fair, uniform method for settling international conflicts.

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117. *Id.* at 768.

118. *Id.*

119. Unless alternative dispute resolution systems are developed, increasing acceptance of the ICJ's compulsory jurisdiction is imperative. *Id.* at 769 n.159.

120. Qadeer, *supra* note 24, at 35.

121. See Dillard, *supra* note 38, at 24.

122. Sathirathai, *supra* note 48, at 415-16.

123. *Id.*

124. *Id.* at 416-17.

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