

EDITORIAL COMMENTS

THE UNITED STATES SHOULD ACCEPT, BY A NEW DECLARATION, THE GENERAL COMPULSORY JURISDICTION OF THE WORLD COURT

April 7, 1986 marks the end of a notable 40-year experiment in international adjudication. On that date, the United States Declaration of acceptance of the general compulsory jurisdiction of the International Court of Justice terminates, according to the 6-month notice of termination delivered by the Secretary of State to the United Nations on October 7, 1985.

Together with that notice, the State Department issued a press release emphasizing that the United States was not pulling out of the World Court, and that it would continue to participate in the adjudication of treaties containing compromissory clauses and in cases referred by both parties to the Court.¹ Nevertheless, these consensual matters are quite different from compulsory jurisdiction. Domestic law would collapse if defendants could only be sued when they agreed to be sued, and the proper measurement of that collapse would be not just the drastically diminished number of cases but also the necessary restructuring of a vast system of legal transactions and relations predicated on the availability of courts as a last resort. There would be talk of a return to the law of the jungle.

The jungle metaphor has been mooted as a result of the U.S. termination. The United States seems to have relinquished its leadership role in promoting world peace through world law. In 1946, the United States consciously tried to set a good example by joining the Court's compulsory jurisdiction, but according to the State Department's aforementioned press release, "Unfortunately, few other states have followed our example. Fewer than one-third of the world's states have accepted the Court's compulsory jurisdiction. . . ."² Yet the substance of that "example" could well be questioned. Professor Thomas Franck has pointed out that the Connally reservation to the United States Declaration, a self-judging provision regarding jurisdiction, led many would-be joiners of the Court's compulsory jurisdiction to conclude that the example set by the United States was a hollow one and that this country did not take the World Court seriously.³

An even more misleading item in the State Department's press release was the statement, "We have never been able to use our acceptance of compulsory jurisdiction to bring other states before the Court, but have ourselves

¹ Dep't of State daily news briefing, DPC No. 178, Oct. 7, 1985, at 2, *reprinted in part in* 80 AJIL 164, 165 (1986) (issued concurrently with the text of the note of Secretary of State Shultz delivered to the Secretary-General of the United Nations on Oct. 7, 1985).

² *Id.* at 1, 80 AJIL at 164.

³ Franck & Lehrman, *Messianism and Chauvinism in America's Commitment to Peace through Law* (to be published by the Senate Comm. on Foreign Relations).

been sued three times.”⁴ In fact, on several occasions since 1946 the United States considered bringing actions against other states in the World Court but eventually decided not to do so out of fear that those states would invoke the Connally reservation reciprocally. In no sense, however, was the United States disabled from suing.

Three major reasons, among others, argue in favor of reaccepting the general compulsory jurisdiction of the Court. First, in a precarious nuclearized world, not only does adjudication help prevent small disputes from escalating into major ones, but also its very possibility on the basis of compulsory jurisdiction helps modify conduct that otherwise could lead to a dispute. Given the enormity of the stakes and the paucity of international legal institutions, strengthening the World Court could be an extremely valuable investment. Second, the United States stands to benefit in years to come from actively espousing the claims of its nationals against foreign states in the World Court. Many such claims arise in settings ungoverned by treaty or compromissory agreement. The more the United States reaches out to the rest of the world—whether by investments abroad, tourism or the activities of multilateral corporations—the more useful will it be to have a forum where the United States can support private claims of its nationals subjected to unjust treatment abroad. Third, on a purely cost-benefit basis, the United States, as a law-abiding nation under a progressive Constitution, should have little to fear in being brought to account before a world tribunal. And in those few cases where the United States might lose, its willingness to lose gracefully would give it the moral right to expect and demand that other nations comply with adverse judgments against them and maintain their participation in the Court’s compulsory jurisdiction.

Accordingly, I would like to suggest some ideas for a new United States Declaration. However, at the outset I acknowledge the force of an argument contained in a letter to me by Judge Abraham Sofaer, the Legal Adviser to the Department of State.⁵ He refers to the Department’s perception that the Court, in the jurisdiction phase of *Nicaragua v. United States*,⁶ in effect transgressed verbal limitations on its own competence and jurisdiction. “Unfortunately,” he writes, “clever drafting” cannot insure against the risk that the Court might refuse to give jurisdictional reservations their intended effect. In response, although I do not agree with all of the Court’s reasoning in that case, and although I concede that the Court gave its own jurisdiction a liberal interpretation, I see no evidence that the Court ignored the clear meaning of words. But even if there were such a risk in the future, the ambit of risk would be limited by a proposed 6-month termination provision. Finally, with respect to the jurisdictional question of greatest sensitivity—cases involving armed hostilities—I shall suggest a middle ground that may serve

⁴ Dep’t of State, *supra* note 1, at 2, 80 AJIL at 164.

⁵ Letter of Abraham D. Sofaer, Legal Adviser, Department of State, to Professor Anthony D’Amato (Dec. 3, 1985).

⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26).

to reduce the strain otherwise placed on decisive linguistic delimitations of the Court's competence.

SUGGESTED DELETIONS

A new declaration would be materially improved if it omitted both the Connally and the Vandenberg reservations contained in the 1946 Declaration. The Connally reservation⁷ inhibits the United States from bringing actions by giving the defendant almost unlimited power to avoid the suit. Even if the United States refrained from invoking the reservation in unreasonable contexts, as it did in the *Nicaragua* case, there is no assurance that defendant states would be so scrupulous reciprocally, as witness Bulgaria in the *Aerial Incident* case.⁸

The Vandenberg reservation,⁹ requiring that all parties to a multilateral treaty that would be affected by a decision on the treaty be parties to the case, is unnecessary in view of the Court's intervention rules under Article 63 of its Statute, and excessively onerous considering the fact that most cases these days invariably include interpretation of provisions of that huge multilateral convention, the United Nations Charter. The Vandenberg reservation literally mandates that in all such cases where the United States is sued, the plaintiff must implead all the member states of the United Nations.

Whatever the United States might reserve in a new declaration, a bright new dawn for American support of the international rule of law would be signaled if the Connally and Vandenberg reservations were scuttled.

SUGGESTED ADDITIONS

An important addition to the 1946 Declaration would remove the disincentive from accepting the Court's compulsory jurisdiction that it gratuitously confers on other states. Under the old language, a state might reason that if it ever had cause to sue the United States, it could file its acceptance of compulsory jurisdiction a day or two before filing the lawsuit itself. Until then, it could remain immune to suit by the United States simply by withholding any open-ended acceptance of general compulsory jurisdiction. This disincentive could be avoided by adopting a provision, like the United Kingdom reservation,¹⁰ that would allow suits against the United States only if

⁷ Excepted are "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." U.S. Declaration of Aug. 14, 1946, 61 Stat. 1218 (1947), reprinted in MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1982, at 23-24, UN Doc. ST/LEG/SER.E/2 (1983) [hereinafter cited as MULTILATERAL TREATIES].

⁸ Case concerning the *Aerial Incident* of 27 July 1955 (U.S. v. Bulgaria), 1960 ICJ REP. 146 (Order of May 30). See Gross, *Bulgaria Invokes the Connally Amendment*, 56 AJIL 357 (1962).

⁹ Excepted are "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 specially agrees to jurisdiction." MULTILATERAL TREATIES, *supra* note 7, at 24.

¹⁰ Excepted are "disputes in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purposes of the dispute, or where the acceptance of the Court's compulsory jurisdiction on

the plaintiff state had adhered to the Court's compulsory jurisdiction for at least 12 months prior to the commencement of the suit.

Clearly, the most important substantive reservation in any new U.S. declaration would regard ongoing armed hostilities, the question that has so troubled the State Department in the *Nicaragua* case. Having withdrawn from the Court's compulsory jurisdiction as a result of that case, the United States surely would not rejoin on terms that would allow lawsuits similar to *Nicaragua*'s. One may well ask why nations are so concerned about excepting cases regarding armed hostilities from adjudication. Are not such cases ideal occasions for settling conflicts in court instead of on the battlefield? Moreover, when matters have reached the point of military action, how much is there to fear from a court of law? Yet nations sometimes fall prey to a strange psychology, an extreme example of which is the proviso in the United Kingdom Declaration of February 28, 1940, excepting cases originating in events of the Second World War. One wonders, with bombs dropping on London, what made lawyers and government officials in their underground shelters so frightened by the prospect of a ruling on the legality of a war-related case by a court of law sitting at The Hague.

Whatever the motivational basis, the United States clearly has the right to carve out an exception for cases regarding armed hostilities. Yet if that or any other exception were unjustifiable or random, it would have a deleterious effect upon the ideal of international adjudication and thus be at odds with much of the impetus for making a new declaration in the first place. Fortunately, a principled argument can be made for an armed hostilities exception.

Suppose state *X* alleges that state *Y* has illegally commenced military hostilities against *X*, and obtains a judgment in the World Court that, among other things, orders the cessation of hostilities. If *Y* does not comply with the judgment, the Security Council may be faced with making a decision under Article 94(2) of the Charter whether to decide upon measures to be taken to give effect to the judgment. But under Article 39 of the Charter, the Security Council might decide that enforcement measures against state *Y* might endanger international peace and security, as compared to a policy of watchful waiting. The Security Council would thus be caught between enforcing international peace and security—its primary mission under the Charter—and enforcing a judgment of the judicial organ of the United Nations. This dilemma, arising out of the structure of the Charter itself, would normally be resolved politically by the Security Council one way or the other.

The possibility of the dilemma, however, indicates that an exception to the Court's compulsory jurisdiction that avoided the dilemma would be a principled exception. Yet simply excepting all cases of ongoing armed hostilities would be unnecessarily overbroad. The dilemma arises not because

behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court." Declaration of the United Kingdom of Great Britain and Northern Ireland, Jan. 1, 1969, *id.* at 23.

the Court has jurisdiction over the same cases that the Security Council deals with—indeed, the Charter expressly contemplates such overlaps—but because, in the case I have imagined, the Court has issued an enforceable judgment. If the Court simply declared the rights and duties of the parties, and refrained from rendering an enforceable judgment or issuing judicial orders, there would be no clash between the Court and the Security Council.

This reasoning suggests that the Court issue only declaratory judgments in ongoing hostilities cases so that there would be no further need for enforcement. The proviso might read as follows:

Provided further, that with respect to disputes relating to, or pleadings of any contesting Party that allege or refer to, ongoing armed hostilities or the threat or use of military force, the Court may only declare the rights and duties of the Parties under international law, and may not issue any order or enforceable judgment.

Such a proviso, falling between jurisdiction and no jurisdiction, avoids the all-or-nothing consequence of construing an armed hostilities exception, and thus may ease any pressure on the Court to strain the ordinary meaning of words. If a case involves ongoing armed hostilities, the Court will not be disabled from dealing with it, but rather will have the significant role of articulating the applicable rules of international law. Such a proceeding, as well, will give the parties a chance to air their case in the restrained atmosphere of a courtroom and to vindicate, to the extent they are able, their international legal position.

Would such a proviso be compatible with the UN Charter and the Court's Statute? Surely, if a party to the Court's compulsory jurisdiction can refuse to accept that jurisdiction altogether, it should be able to accept any lesser jurisdiction. Article 94(1) of the Charter requires parties to comply with decisions of the Court but does not say that the Court may not render a declaratory judgment that falls short of a "decision" requiring compliance. Under the Statute, Article 36(2) refers to "legal disputes" and 38(1) says that the Court's function is to "decide . . . disputes," but this language does not preclude disputes over rights and duties that could be decided by a judicial declaration on the content of those rights and duties. A similar interpretation can be made regarding Article 59: "The decision of the Court has no binding force except between the parties and in respect of that particular case." If the phrase "binding force" means that a declaratory judgment will be binding with respect to the rules and principles articulated by the Court, then it is compatible with my suggested proviso. Regardless of all these arguments, and out of an abundance of caution, the United States might provide that if the proviso on declaratory judgments is declared invalid by the Court, it is to be automatically amended to exclude cases involving ongoing armed hostilities entirely from the Court's jurisdiction.

Finally, a new declaration should have a 6-month termination clause, which, by confining judicial damage to 6 months, should ensure that Western civilization as we know it will not have enough time to come to an end. An improvement on the 1946 Declaration would provide for a shorter period on the basis of reciprocity and might read as follows:

Provided further, that this declaration may be terminated with effect at the moment of expiration of six months after notice has been given to the Secretary-General of the United Nations, except that in relation to any state with a shorter period between notice and modification or termination, that shorter period shall apply as well to the United States.

ANTHONY D'AMATO

UNNECESSARY UN-BASHING SHOULD STOP

No doubt in part because the United Nations is widely perceived in the United States to have been harassing the U.S., the United States is now being beastly to the United Nations. We are doing so in a manner, and to a degree not previously encountered except during the darkest days of the McCarthy period. This is in the interest neither of the United States nor of the United Nations, and should stop.

First there was the "Kassebaum amendment" which, in pursuit of the impossible dream of forcing weighted voting on fiscal matters based on budgetary contribution, has mandated deep, progressive cuts in the amount the United States is asked to pay the United Nations. This despite the fact that the basis for making the allocation is a capacity-to-pay formula that, while not beyond criticism, was designed primarily at Washington's behest.

Next there was the Gramm-Rudman formula, which also calls for deep, across-the-board, progressively implemented cuts over several years.

Then there is section 151 of the 1986-1987 Foreign Relations Authorization Act, which requires the United States to withhold a portion of its contribution equivalent to the amount of salaries Soviet and other Secretariat personnel are compelled by their governments to "kick back" to those governments. This is an old, deplorable practice and the Secretary-General has been insufficiently strenuous in efforts to put a stop to it. The section 151 approach, however, is a heavy-handed, mean-spirited way to get his attention.

Finally, there was last December's ukase to the UN requiring specific U.S. authorization for travel outside New York by several Communist-country and other nationals who are UN staff members and mandating that their travel arrangements not only be notified to, but booked by, the U.S. Government.¹

Across-the-board unilateral cuts in the U.S. contribution to the United Nations are a violation of Article 17 of the UN Charter and, thus, of a cardinal U.S. treaty commitment. They are not even justified by the "Goldberg corollary," which merely holds that, since the United Nations has not punished the USSR for selectively withholding parts of its contribution in response to Soviet allegations that specific UN peacekeeping ac-

¹ Note verbale from the United States Mission addressed to the Secretary-General, Dec. 13, 1985, UN Doc. ST/IC/85/74, Ann. I (1986). For earlier correspondence on the subject, see Note verbale addressed to the Secretary-General by the Acting Permanent Representative of the United States, Aug. 29, 1985, *reprinted infra* at p. 438; and the Secretary-General's reply of Sept. 9, 1985, *reprinted infra* at p. 440.