

MODIFYING U.S. ACCEPTANCE OF THE COMPULSORY JURISDICTION OF THE WORLD COURT, by Anthony D'Amato [FN1], 79 American Journal of International Law 385 (1985) (Code A85b)

There is little doubt, in the wake of the decision of the International Court of Justice on jurisdiction in *Nicaragua v. United States*, [FN1] that the U.S. Government will modify its 1946 Declaration accepting the compulsory jurisdiction of the Court under the "optional clause." [FN2] There will probably be rash calls for the United States to withdraw completely from the optional clause. This paper proposes, first, several modifications of the U.S. Declaration that arguably serve the national as well as the international interest. Second, several other proposals for change are examined and found arguably to be contrary to the national interest. Finally, two broader questions are briefly considered that are necessarily implicated by the issue of modifying the U.S. Declaration: whether the rules of international law as a whole are in the national interest, and whether the existence of the World Court as a forum for discerning and applying those rules is consonant with the U.S. national interest over the long run. Naturally, there is no expectation that the brief treatment here of these latter questions can do anything more than begin to suggest possible contours of inquiry.

***386 I. DESIRABLE MODIFICATIONS OF THE U.S. DECLARATION**

It is misleading to think of compulsory jurisdiction primarily in terms of defending against possible lawsuits. A declaration accepting the World Court's compulsory jurisdiction is as much an offensive weapon against the international legal delicts of other states as it is a defensive weapon; it is a sword as well as a shield. *Nicaragua v. United States* should not loom so large in current thinking as to downplay the offensive potential of the Court's jurisdiction for the United States. Because of the principle of reciprocity, any substantive exception from compulsory jurisdiction will reduce opportunities to use the Court offensively against other states; hence, in theory, the defensive benefit of any exception is counterbalanced by an equivalent offensive cost.

In fact, for two reasons the costs may exceed the benefits. First, in accordance with the evolution of its jurisprudence, the Court will construe a substantive exception from compulsory jurisdiction more broadly against its proponent when its proponent acts offensively than when it is part of its proponent's defense to a lawsuit. Any substantive exception will inherently buy its proponent less protection under its terms than will be provided, through reciprocity, to its opponent. How and why this happens with regard to specific provisions will be indicated below as we examine possible substantive exceptions to compulsory jurisdiction; here it is important to note simply that the phenomenon occurs.

Second, in the years ahead, the number of instances in which the United States will want to use the compulsory jurisdiction of the World Court offensively will probably exceed potential defensive uses. We may expect that other nations will violate international law more often, to the detriment of U.S. interests, than the United States will allegedly violate that law. To be sure, on a subjective level, every state can say the same; every state professes to act legally on the international plane, and every state believes it is the victim of the illegal acts of some of the other states. To the extent that any state truly believes this, that state should join the compulsory jurisdiction of the World Court. (The steadfast

refusal of the Soviet Union to accept the compulsory jurisdiction of the Court is an ever present reminder that the USSR accepts the likelihood that it will more frequently be considered guilty of transgressions of international law than its opponents.) But even on an objective level, the fact that the U.S. Constitution is broadly coincident with evolving standards of rights under international law will mean that in years to come, U.S. citizens and corporations will probably receive treatment in other countries that violates international legal standards much more often than foreign citizens and corporations will allege having received substandard international treatment in the United States. In a world where nuclear weaponry has made the use of transboundary coercive force dangerous and exceptional, the United States may thus increasingly find itself resorting to the World Court, as it successfully did in the Iranian Hostages case, [FN3] to protect the *387 legitimate interests of its citizens and corporations abroad. For all the preceding reasons, any exception to the compulsory jurisdiction of the Court should at least be scrutinized carefully, and the burden of justification should be upon the proponent of such an exception.

The Sitting Duck Problem

One remediable problem with the U.S. Declaration at present is that it encourages other nations that might want to sue the United States not to make similar declarations accepting compulsory jurisdiction. For example, suppose state A, which has not accepted the World Court's compulsory jurisdiction, contemplates bringing suit against the United States in the Court. There is no need for state A to have accepted the optional clause because A can file its declaration under the optional clause a day or two before instituting its suit. [FN4] Thus, as long as A has not accepted the Court's compulsory jurisdiction, it cannot be sued by the United States, but if it wants to sue the United States, it simply files its acceptance just before filing the suit. Consequently, the United States is a "sitting duck" for the offensive actions of other states but--as to those states that do not have standing acceptances of compulsory jurisdiction--has no offensive capability of its own.

The problem can be remedied by adding a proviso to the U.S. Declaration similar to the British exception, [FN5] which excludes from jurisdiction those states that have deposited or ratified their acceptance of the Court's compulsory jurisdiction less than 12 months prior to filing their lawsuit. [FN6] Not only will this protect the United States, but it will also serve the *388 international interest in gaining general acceptance of the Court's compulsory jurisdiction by encouraging states such as state A to file their declarations well in advance of a given dispute.

The Single-Shot Problem

The sitting duck problem raises a related issue: that of limiting acceptance of compulsory jurisdiction, albeit 12 months in advance of a dispute, to a subject on which offensive litigation is contemplated. For example, suppose state B, anticipating that it may want to sue the United States with regard to mineral claims in Antarctica, files an acceptance of the Court's compulsory jurisdiction limited to "disputes involving or regarding Antarctica." [FN7] Twelve months later, state B sues the United States without ever having exposed itself to general litigation by the United States or other states. The British Declaration seems to address such a problem by excepting "disputes in respect of which any other Party

to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute." [FN8] But this language, or even appropriately modified language, probably will not suffice to achieve its purpose. For example, would it exclude the Antarctica hypothetical? Twelve months after the fact, the United States might have a hard time proving that state B had accepted jurisdiction for questions relating to Antarctica to enable it to file that particular suit later. If nothing else, *Nicaragua v. United States* is a warning that vague language in declarations of acceptance of jurisdiction may meet with unsympathetic interpretation by the Court.

Additionally, subject-matter limitations to declarations of acceptance of jurisdiction should be welcomed as at least partial steps along the road to general acceptance. An Antarctica-question limitation, for instance, is not per se objectionable. Thus, it would probably be unwise to attempt to defeat all such subject-matter limitations in advance by such vague formulas as that of the British exception, "in relation to or for the purpose of the dispute."

Instead, the remedy for the United States in such a case is not an additional exception to its Declaration, but rather an alertness on the part of the Government to react within 6 months to limited acceptances of compulsory jurisdiction. Thus, if state B, 12 months before filing suit against the United States accepts the compulsory jurisdiction of the World Court only for questions regarding Antarctica, the United States could modify its own Declaration within the next 6 months to take state B's possible tactics into account. (Under its present Declaration, the United States can terminate the Declaration by giving 6 months' notice.) For example, the United States could amend its Declaration to exclude disputes on questions relating to Antarctica if the other party to the dispute has limited its acceptance of jurisdiction to such questions. Perhaps the United *389 States might decide, in the actual instance, not to do this; perhaps it might conclude that a case limited to Antarctica brought by state B would be welcome as a way to resolve legal questions vis-a-vis state B. Such an option would be retained by the strategy here indicated.

The Hit-and-Run Problem

Suppose state C sues the United States in the World Court, and then a day or two after filing suit, withdraws its acceptance of compulsory jurisdiction. This hit-and-run tactic is objectionable from the U.S. standpoint, although it is perhaps not a serious problem in any event. For one thing, any counterclaim the United States may want to make against state C arising out of the litigation instituted by C is permissible even after C has withdrawn its acceptance of jurisdiction. [FN9] However, C's withdrawal may well serve to insulate it from related claims of other states. For example, when state C sues the United States, its legal theory in the litigation may suggest a similar claim that could be asserted against C. State C's withdrawal would bar the lawsuit by D, perhaps to the tactical disadvantage of the United States in its litigation strategy.

At this point, one may wonder whether the present 6-month notice provision in the U.S. Declaration will automatically serve as a matter of reciprocity to require that C must not terminate its own declaration in less than 6 months. In *Nicaragua v. United States*, the Court answered in the negative, holding that the "notion of reciprocity is concerned with the scope and substance of the commitments

entered into, including reservations, and not with the formal conditions of their creation, duration or extinction." [FN10]

A possible way around this problem is suggested by analogy to the "sitting duck" problem previously discussed. There a condition precedent *390 (of a 12-month acceptance of jurisdiction by the other party) was expressly included as part of the proposed declaration of acceptance. Here a condition subsequent could be included, providing for the defeat of jurisdiction if the plaintiff state withdraws (or modifies) its declaration within 6 months after filing its suit. Yet it is quite possible that the Court would refuse to give effect to such a condition subsequent, on the ground that the Court, once seised of a case, cannot have its jurisdiction vitiated by a subsequent event. [FN11]

To avoid that adverse possibility, the United States might consider conditioning its acceptance of compulsory jurisdiction on the presence of at least a 6-month notice-of-withdrawal provision in the declaration of the plaintiff state. Yet such a condition could turn out to be draconian in its effect. Since at least 11 states currently accept compulsory jurisdiction with no provision as to termination, [FN12] and at least 25 other states currently accept compulsory jurisdiction with undefined duration but with the right to terminate upon notice, [FN13] the effect of such a modification would be to remove all of these states from the possibility of being sued by (or suing) the United States. [FN14] Since states are notoriously slow to modify their World Court declarations, the negative impact of these disabilities upon the Court's jurisdiction might be long-lasting.

It appears, therefore, that every solution to the hit-and-run problem is a cure that is worse than the disease. Perhaps the problem is not significant enough to warrant any tampering with the U.S. Declaration. Yet there does seem to be an undesirable imbalance between the 11 states including the United States that have accepted at least a 6-month notice for termination, and the 36 other states that have accepted the compulsory jurisdiction of the Court without explicitly limiting themselves as to modification or termination of their declarations. This imbalance has real "bite" not with respect to the hit-and-run problem, however, but with respect to the problem of running away from compulsory jurisdiction when faced with a threatened lawsuit. Let us therefore postpone the question of remedy until this latter problem is presented in the next subsection.

The Last-Minute Withdrawal Problem

The Senate Committee on Foreign Relations, reporting favorably on the U.S. Declaration of 1946 accepting the compulsory jurisdiction of the World Court, noted that the 6-month period of notice before termination *391 of that acceptance "has the effect of a renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding." [FN15] Thus the United States cannot withdraw its acceptance of compulsory jurisdiction within 6 months before a threatened lawsuit against it is filed, as indeed the Court confirmed in *Nicaragua v. United States* by 13 to 3. [FN16] But if the United States wants to sue any of the 36 states that do not have a 6-month or longer notice provision in their acceptance of compulsory jurisdiction, are those states not free to withdraw at the last minute from the threatened legal proceeding?

The Court will infer some reasonable period of time from those declarations which do not specify a notice period for withdrawals. In *Nicaragua v. United States*, the Court held that a 3-day period would not amount to a reasonable time, drawing upon an analogy to the law of treaties, which requires a reasonable time for withdrawal from treaties that contain no provision regarding the duration of their validity. [FN17] But exactly what would constitute a reasonable time is problematic.

One approach to the specification of a reasonable time may be to disallow states from withdrawing because they have learned of an impending lawsuit against them. However, the evidentiary problems posed by such a standard are obvious, irrespective of its merits. A second possibility, more objective than the first, is to specify that no notice of withdrawal will be effective if given sooner than 6 months after the occurrence of the events *392 that gave rise to the cause of action; notice of withdrawal would thus be analogous to a short statute of limitations.

Such a rule would be preferable, from a defensive point of view, to the present U.S. 6-month notice period. For example, under the present provision, if the United States gives notice of termination 5 months after the occurrence of facts giving rise to a claim against it, it has to wait an additional 6 months, for a total of 11 months, until it escapes from compulsory jurisdiction; in contrast, under the statute-of-limitations type of rule, the total escape time would be only 6 months. On the other hand, the 6-month notice provision can serve as a maximum cut-off point in the event of a continuing cause of action, whereas the statute-of-limitations type of rule would be indefinitely extended if the cause of action were ongoing.

No one can predict how the Court will resolve these questions of attempted last-minute escape from compulsory jurisdiction. But the Court's decisional processes may be aided by any declaration that spells out a reasonable rule. At the very least, the Court's attention will be drawn to such a declared rule; at best, the Court may be guided by a desire to make such a rule consistent across the board.

For these reasons, the United States might well consider modifying the termination provision of its Declaration. First, the United States might add that the provision apply to modification of its Declaration as well as to termination. Second, the United States might retain the 6-month notice provision as a final "in any event" clause. Third, the United States might provide that it may modify its Declaration, without previous notice and to take effect immediately, to exclude any dispute as to which the underlying facts occurred more than 6 months previously. [FN18]

The Connally Trap

The Connally reservation to the U.S. Declaration of acceptance of the compulsory jurisdiction of the World Court excepts from that jurisdiction "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." The reservation has been the subject of voluminous scholarly commentary, mostly hostile, [FN19] and President Eisenhower urged the repeal of "our present self-judging reservation" in his State of the *393 Union message in 1960. [FN20] The incompatibility of that reservation with the ideal of the rule of law in international relations has been frequently asserted, [FN21] and this is not the place to

repeat those vague generalizations. Rather, the position is taken here that the Connally reservation ought to be omitted from a revised U.S. Declaration on the ground that its costs exceed its benefits, that it is a defense that backfires.

The principle of reciprocity assures that any state sued by the United States in the World Court may invoke the Connally reservation in its own defense. Yet that invocation will most likely be more effective offensively than if the United States invoked the reservation defensively. When the United States is plaintiff and the defendant state invokes the U.S. reservation, its validity, as the Court held in the Norwegian Loans case, [FN22] is not in issue. Thus, a defendant state will have an easy ride on a plaintiff state's self-judging reservation, as Norway did in the Loans case. But when a state invokes its own reservation as defendant, the plaintiff can make several good arguments against it. First, the plaintiff can argue that because international law does extend to the dispute in question and hence it could not in good faith be viewed as a matter of domestic jurisdiction, the defendant's invocation of the reservation should be rejected by the Court. (Such an argument might have worked in Norwegian Loans if the position of the parties had been reversed.) Second, the plaintiff may argue that the self-judging reservation is incompatible with Article 36, paragraph 6 of the Statute of the Court, which provides that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by a decision of the Court." The plaintiff will probably not argue, with Judge Lauterpacht, that the presence of the self-judging reservation vitiates the entire declaration of acceptance of compulsory jurisdiction, [FN23] but rather that it simply deletes the reservation, while leaving all the other provisions of the declaration intact. Third, the plaintiff state may argue that invocation of the Connally reservation by the United States as defendant should be subject to a standard of reasonableness in order to preserve the Court's ultimate power under Article 36 to determine questions of its own jurisdiction. While a reasonableness standard would apply to both offensive and defensive uses of the Connally reservation, the ambit of reasonableness is likely to be larger in a defensive use because there it is applied against *394 the party that initiated and formulated the reservation. Thus, whichever of these three arguments or combination of them is used, there is a substantial probability that the United States will see its Connally reservation blunted or destroyed when used defensively in the way it was meant to be used, yet invoked successfully by a defendant state when the United States is plaintiff.

There is no substantive need for the Connally reservation. Since the World Court can only deal with questions of international law, anything that is a matter of domestic jurisdiction is ipso facto not a matter of international law. [FN24] Clearly, the Connally reservation ought to be dropped.

The Vandenberg Complication

The Vandenberg reservation to the U.S. Declaration of 1946 withholds from the Court's compulsory jurisdiction disputes arising under a multilateral treaty unless "all parties to the treaty affected by the decision are also parties to the case before the Court." The reservation was added in 1946 partly out of a sense of excess caution by a nation not familiar with the jurisprudence of the World Court (the United States had not joined the predecessor Permanent Court of International Justice), and partly perhaps to ensure that the United States not be the only one of several parties to a multilateral dispute bound by a decision of the Court. The wording of the reservation leaves much to be desired; as the Court pointed

out in *Nicaragua v. United States*, is it the "parties" or the "treaty" that is "affected by the decision," and how can the Court determine who is "affected" until the final decision in the case is reached? [FN25] If the answer to the latter question is, all parties to the treaty are legally affected, then under the broad multilateral treaties prevalent today, far too many states would have to be party to every case. Indeed, in the *Nicaragua* case, since the UN Charter was broadly implicated, nearly every state in the world would have had to be a party under this literal interpretation of the Vandenberg reservation.

Under the Court's own rules regarding intervention and indispensable party practice, and under Article 63 of its Statute allowing the interpretation of any party to a treaty in question, it is clear that Senator Vandenberg's concerns are amply met by the Court's procedures. Despite a valiant attempt by the U.S. litigators to flesh out and insist upon the validity of the Vandenberg reservation, the Court dispatched it rather handily. In the future, that reservation will only serve to slow down and complicate jurisdictional questions, and--like the Connally reservation--it may hurt the United States more when invoked against this country than when used defensively. Thus, the Vandenberg reservation, together with the Connally reservation, ought to be deleted from the U.S. Declaration.

***395 II. UNDESIRABLE MODIFICATION OF THE U.S. DECLARATION**

There are numerous possible modification of the U.S. Declaration of acceptance of the World Court's compulsory jurisdiction, limited only by the ingenuity of the drafter. Let us consider four types that may have current interest; each will be argued to be undesirable for various reasons.

The All-or-None Approach

A nation might condition its acceptance of the Court's compulsory jurisdiction upon the similar acceptance of all other nations. Although such a universalist sentiment is commendable, it is unrealistic, except as a rather transparent "cover" for a decision to pull out altogether. A more practical- sounding approach would be to condition acceptance upon similar action by all the members of a group, or of a region. For example, the United States might condition its acceptance upon similar acceptances by the other permanent members of the Security Council of the United Nations. Here again, the goal is a commendable one, but the method should be rejected for two decisive reasons.

First, at present, only the United States and the United Kingdom accept the compulsory jurisdiction of the Court; France, the Soviet Union and China, the other three permanent members of the Security Council, do not. France formerly adhered to the optional clause, but terminated its acceptance in 1974. For the United States now to condition its acceptance upon that of France, the Soviet Union and China would amount to a U.S. termination since there is no present prospect of acceptance by these other nations. Of course, if the United States wishes to withdraw anyway, putting its withdrawal in terms of the conditional acceptance of the other powers tends to save face and shift the guilt. Yet the action would probably be perceived as allowing U.S. policy to be determined by the lowest common denominator. World public opinion may simply interpret such an action by the United States as tantamount to saying, "If it's not good enough for the Soviet Union, it's not good enough for us." Apart from public opinion, the underlying burden of such a condition would be that acceptance of compulsory

jurisdiction is a net liability and will only be shared if other major powers accept the same net liability.

Second, this latter policy assessment is incorrect. For a law-abiding nation, joining in the World Court's compulsory jurisdiction is a net asset, not a net liability. The U.S. Declaration assures the nation of an advantage vis-a-vis all other nations (at present, 46 others) that accept the Court's compulsory jurisdiction. In years to come, the United States is less likely to violate international law than those other nations, and hence is more likely to be well served by the existence of reciprocal compulsory jurisdiction. To be sure, since 1946, with few exceptions (most notably in the Iranian Hostages situation), the United States has not resorted to the Court as plaintiff. Yet on several occasions when it might have done so, it may have been restrained by the estimation that the Connally reservation ***396** would be invoked against it to defeat jurisdiction. [FN26] If the United States revokes the Connally reservation, it may decide in the near future to be far more aggressive in utilizing the Court's compulsory jurisdiction.

Ironically, the permanent members of the Security Council constitute the single group of nations least likely to be hurt by adverse decisions of the World Court. They possess a veto against the only mechanism the Court has to enforce its judgments, namely, enforcement action by the Security Council. Great Britain and the United States, the only permanent members of the Security Council currently accepting the Court's compulsory jurisdiction, thus have a preferred position against all the other states accepting that jurisdiction, and have the least reason to be apprehensive about its scope and impact. Indeed, perhaps they should not be overly concerned about bringing France, Russia and China into the compulsory jurisdiction fold, since these nations also possess a veto over enforcement measures.

The Swiss Cheese Fallacy

Another possible modification of the U.S. Declaration would be to reserve certain specified subjects as being outside the ambit of compulsory jurisdiction. By thus creating "holes" in the area of substantive jurisdiction, a nation may feel protected against legal incursions into sensitive matters of national security or high national interest.

The approach, however, is fallacious, and the goals illusory. To illustrate, let us consider two examples.

First, the Canadian Declaration (several other countries, such as the Philippines and New Zealand, have made similar reservations) omits from compulsory jurisdiction

disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada. [FN27]

However, in the vague area thus described, as well as in any other subject-matter area, customary international law nevertheless plays a decisive role. First of all, it regulates those aspects (e.g., living resources of the sea) that come under its rules. Second, it delimits those areas that come under the ***397** littoral state's domestic jurisdiction (e.g., the marine area within Canada's territorial sea). And

finally, it draws the line between general custom and special custom (the latter being subject to Canada's consent), as the World Court did in the North Sea Continental Shelf Cases. [FN28] The development of customary international law will proceed irrespective of this Canadian reservation. Thus, the Court, in a case involving the marine environment of Europe, Asia or Africa, could define customary law in a way that would have a great impact upon Ottawa's claims to the marine area around Canada. The net effect of the reservation might therefore be to disable Canada itself from participating in a case that could determine the content of customary law. Strategically, this makes little sense for a country with expert attorneys in international legal advocacy. Perhaps a recognition of this fact led Australia in 1975 to withdraw its Declaration of 1954, which had contained an exclusion in respect to Australia's continental shelf, and to accept the Court's compulsory jurisdiction without any subject-matter reservation.

As a second example, let us consider a possible U.S. reservation excluding disputes involving armed hostilities. In *Nicaragua v. United States*, such a reservation was argued by the United States to be implied as a limitation upon the judicial process. The Court, however, found by a vote of 16 to 0 that the ongoing armed conflict in Nicaragua was no barrier to judicial resolution of the legal aspect of that conflict. Faced with this decisive rejection of its strenuously argued position, the United States might very well contemplate adding an explicit exclusion for disputes involving armed hostilities to its declaration on compulsory jurisdiction.

Such a reservation, however, would disable the United States from resorting to the Court in many cases that may arise in the future. For example, if American diplomats are taken hostage, as occurred in Tehran in 1979, the involvement of armed hostilities (the Iranian "students" at that time stormed the American Embassy and took prisoners by force of arms) would exclude such a dispute from the jurisdiction of the Court. The same exclusion would apply if American citizens were involved in a terrorist attack abroad, especially one with the apparent complicity of the local government. But more significantly, other disputes that have begun peacefully may be escalated into armed hostilities solely to avoid the Court's jurisdiction. A dispute over fishing rights in a self-proclaimed "exclusive economic zone" might encourage a foreign country to send military vessels to the scene, and perhaps to fire warning shots at the American fishing vessel, so as to bring the dispute under the U.S. exclusion for cases involving armed hostilities. Or a military action that has ceased, and thus becomes subject to a lawsuit for damages, might be revived by intermittent military actions. It would be most ironic if a U.S. reservation regarding armed hostilities would itself lead to an escalation of armed hostilities in the world.

***398** Any attempt to cut a "hole" in the jurisdiction of the Court by a subject-matter exclusion may thus give rise to either or both of the negative effects discussed in the two preceding examples. In any event, it would evoke the image of a nation afraid to trust the Court on certain subjects, an image hardly conducive to the goal of encouraging all nations to settle their disputes in court rather than by resorting to military power.

Dealing from a Limited Deck

Instead of excluding certain matters from the ambit of compulsory jurisdiction, a nation might want to

specify certain subjects, and those alone, to be included within the Court's jurisdiction. Thus, a nation that has not accepted compulsory jurisdiction at all might begin by accepting it solely with respect to questions involving outer space and Antarctica. Later, encouraged by the Court's jurisprudence in dealing with these subjects, that nation might add another card or two to the jurisdictional deck--for example, questions involving the law of the sea or the rights and duties of ambassadors. Gradually over time (centuries?), enough states would add enough subjects to give the Court almost universal jurisdictional competence.

There is little that is undesirable about such a procedure, and indeed it may be a feasible way of introducing reluctant states to the idea of having their disputes settled by the Court. The idea itself is time-honored, dating back to proposals for international arbitration at the end of the 19th century. But what would be a step forward for states that have not subscribed to the optional clause would just as clearly be a step backward for states that currently accept compulsory jurisdiction. For the United States to adopt a limited-deck procedure now would certainly be perceived as a retreat from the principle of compulsory jurisdiction.

That perception, however, is not a compelling reason against U.S. adoption of the procedure. What is compelling is the difficulty of specifying the subjects that are to be included and the near impossibility of defining them once they are specified. For example, suppose that the United States modifies its acceptance of the Court's compulsory jurisdiction so that the only areas included are the law of the sea and human rights. Would such a declaration have shielded the United States from the recent lawsuit by Nicaragua? By slightly changing its allegations, Nicaragua could have brought exactly the same case against the United States. It could have alleged that the U.S. mining of its harbors violated the law of the sea. It could have added that "law of the sea" jurisdiction was also implicated by the U.S. use of the high seas to ship arms to insurgent groups in Nicaragua. Finally, to bring the case within the "human rights" area, Nicaragua could have alleged that U.S. military and economic support for the insurgents in Nicaragua results directly in violations of the human rights of Nicaraguan citizens committed by the insurgents. Not only would the limitation to the law of the sea and human rights therefore not block the Nicaraguan lawsuit against the United States, but, to make matters worse, those limitations might at least arguably block a U.S. defense/counterclaim in ***399** the same case that U.S. military and paramilitary activity in the region is designed to contain Nicaraguan aggression against its neighbors. Attorneys for Nicaragua would certainly argue that external aggression does not come within the U.S. subject-matter limitations of law of the sea and human rights.

These pitfalls of dealing from a limited deck suggest that there are serious problems in confining acceptance of compulsory jurisdiction to specified subjects.

Passing the Buck

A fourth possible reservation to the U.S. Declaration would be to consider excluding those matters which are under consideration by the political organs of the United Nations--the Security Council or the General Assembly. This possibility grows out of the "political question" approach taken by the United States in *Nicaragua v. United States*, where it was argued that the Nicaraguan claim was inadmissible

because Nicaragua had also asked the Security Council for a condemnation of U.S. military and paramilitary activities in and against Nicaragua. The Court held against the United States on this point, again by a vote of 16 to 0. It pointed out that although the Security Council is given "primary responsibility for the maintenance of international peace and security" under Article 24 of the UN Charter, "primary" does not mean "exclusive." Undoubtedly, the United States will want to consider making a "political question" exception an explicit part of its acceptance of compulsory jurisdiction.

One model for such a reservation is the Declaration of the United Kingdom and other Commonwealth countries under Article 36, paragraph 2 of the Statute of the Permanent Court of International Justice. The British reservation allowed the British Government to suspend judicial proceedings in respect of any dispute "which has been submitted to and is under consideration by the Council of the League of Nations." [FN29] What would a similar reservation entail, substituting "Security Council" for the Council of the League?

In the first place, under the principle of reciprocity, such a reservation would allow either the plaintiff or the defendant state to suspend judicial proceedings. Second, since under Article 35 of the UN Charter, any member state may bring a dispute to the attention of the Security Council, the judicial proceedings would be subject to suspension not only by the action of either party to the dispute but also by the action of any other state. With so many current member states in the United Nations, there will surely be one state that will have an interest, even if only a perverse one, in bringing a litigated case before the Security Council so as to suspend the litigation. Third, however, under the model we are looking at, suspension of the litigation would only occur if the Security Council ***400** decided as a matter of its own procedure to consider the dispute. Since procedural questions are not subject to veto, but require only an affirmative vote of 9 out of the 15 members of the Security Council under Article 27 of the Charter, litigation may very well be suspended for reasons that have nothing to do with the nature of the litigation or its merits, but purely for political reasons known to the 9 affirmatively voting members of the Council.

The disruptive effects upon the Court's judicial processes, possibly random and nonsensical, make this passing-the-buck type of reservation undesirable. We know too much now about the political nature of voting in the United Nations to be as complacent about giving those political organs preemptive jurisdictional powers as were the old members of the League of Nations. For the United States in particular, contemplation of greater offensive use of the World Court to secure the rule of law would be undercut by any provision that allows any nine members of the Security Council to thwart litigation before the Court.

We might briefly contemplate an interesting variation on the above theme: dis-seising the Court of litigation only if the Security Council, including the five permanent members, agrees to consider the dispute. Under such a stipulation, the United States would ensure the necessity of its own consent, as a permanent member of the Council, before any suspension of litigation could take place. However, the Court would probably see through such an attempt as a disguised self-serving reservation. Analogously to arguments that can be made about the Connally reservation, the Court may rule that passing the buck to oneself strips the Court of its statutory right to determine questions of its jurisdiction and is hence invalid. A second argument for its invalidity would be the inherent lack of reciprocity in the arrangement:

the other party to the dispute with the United States would not have a similar power in the Security Council unless it happened to be one of the other four permanent members. Third, under the principle that voting rules specified in the Charter cannot be modified by specific treaties, the Court is likely to strike down such an attempt to condition jurisdiction on a particular majority vote in the Security Council.

Finally, any attempt to attach to a passing-the-buck type of reservation the provision that it applies only to disputes that endanger international peace and security will not suffice to cure the problems previously mentioned. The World Court will undoubtedly itself decide whether the dispute is likely to endanger peace and security, under its statutory power to determine questions regarding its own jurisdiction. We should then not be too surprised if the Court held that the dispute cannot endanger peace and security so long as it is subject to the Court's own jurisdiction and resolvable by the application of accepted principles of customary international law.

III. IS COMPULSORY JURISDICTION ITSELF DESIRABLE?

At this point, an American policymaker might concede that certain desirable modifications can be made to the U.S. Declaration accepting the ***401** World Court's compulsory jurisdiction, and that other possible modifications either will not work or might backfire, but he or she may feel that the entire enterprise is still not in the national interest. Let us assume that such a policymaker neither denies the importance of the rule of law in international affairs nor contests the desirability of having disputes resolved judicially rather than militarily. Rather, our policymaker is not persuaded either that the present rules of customary international law are in the U.S. interest or that the World Court, as currently constituted, can be expected to define and apply international law in a manner consonant with U.S. interests. Such a policymaker may conclude--as apparently his or her counterparts in France, China and the Soviet Union have so far concluded-- that it is not in the national interest to submit to the compulsory jurisdiction of the Court with or without reservations.

The policymaker's concerns are real and must be addressed. They cannot be fully answered here. But the contours of the problems can be suggested, and relevant lines of inquiry can be offered in outline form.

International Law and the National Interest

Denigrating the importance of international law is a common phenomenon among journalists and commentators when they are attempting to be ultrarealistic. Yet it may be useful, even if boring, to consider the numerous, vast subjects regulated by international law (and usually regulated so well that they remain utterly unnewsworthy): boundaries of nations on land or at sea, international servitudes, succession of states and governments, ports and inland waters, international rivers and lakes, territorial waters, contiguous zones, continental shelf, exclusive economic zones, international canals and straits, rights and duties of states on the high seas, fisheries, whaling and sealing, air navigation, polar regions, outer space, nationality and status of ships, piracy, slavery, international traffic in women and children and in narcotic drugs, nationality and statelessness, rights of aliens, asylum, extradition, international

communications, protection of minorities, human rights, governmental and state immunities, diplomatic and consular privileges and immunities, status and immunities of international organizations and their personnel, status of armed forces on foreign territory limits of criminal jurisdiction, limits of antitrust jurisdiction, enforcement of foreign judgments and commercial arbitral awards, validity of international treaties and agreements, interpretation and application and termination of treaties and agreements, validity and interpretation of international arbitral awards, pacific blockade, reprisals, indirect aggression and subversion, rights of neutrals, relations between belligerents and neutrals, violations of the laws of war, terrorism and hijacking, and overlying all of these, the limits of countermeasures and retaliatory measures designed to protect existing primary rules of international law. [FN30]

***402** The rules of international law covering these subjects were not imposed on states from on high, but rather grew out of their interactions over centuries of practice and became established as customary international law. [FN31] Thus the rules, almost by definition, are the most efficient possible rules for avoiding international friction and for accommodating the collective self-interest of all states.

Clearly, the vast bulk of the rules of international law serve the peaceful interests of the United States. But in a world that has changed significantly from that envisioned by the framers of the United Nations and the International Court of Justice in 1945, at least two major rules now clash that were thought in 1945 to fit well together and even reinforce each other. The clash of these two general rules poses a problem for the United States that cannot be glossed over by a general commitment to international law.

The first of these rules is the prohibition of transboundary military force against the territorial integrity or political independence of another state. The second is the cluster of human rights that are increasingly articulated in treaties and passing into customary international law, such as the interdictions against genocide, torture, slavery and the denial of basic human liberties. However, human rights are often denied within the borders of a state either by, or with the complicity of, the government or the military. It follows that one way to prevent such transgressions of human rights is the application of transboundary force against the delinquent government; yet to do so would apparently violate the first rule. [FN32] Although the framers of the United Nations did not see, or dimly saw, this possible clash of rules, they did in fact provide a mechanism for an international police power. But that mechanism, the Security Council's chapter VII powers, was stillborn; the veto prevented, and continues to prevent, its utilization. Absent this international mechanism, each state must decide for itself how to resolve the clash between the two rules.

There are signs that the United States is moving in the direction of enforcing the second rule at the expense of the first. The use of military and paramilitary force by the United States in other countries to preserve basic human rights is becoming increasingly apparent. The intervention in Grenada prevented a dictatorial group that had just assassinated the leaders of the democratic government from taking over the country by force. The present military and paramilitary intervention in and against Nicaragua, the subject of *Nicaragua v. United States*, seeks its justification in the attempt to ensure that the people of Nicaragua are not brutalized by an undemocratic government that will deny them their basic human freedoms.

Of course, conventional commentary will say that the United States has simply tried to ensure that a government friendly to itself will prevail in *403 these countries, and that its military actions abroad are therefore no different from those of the Soviet Union vis-a-vis Afghanistan or the Eastern bloc nations. But this simplistic equation ignores the fundamental point that the United States, by committing itself to governments abroad that reflect the genuine wishes of their peoples, is just as committed to accepting unfriendly governments if democratically elected. In sharp contrast, the Soviet Union is interested solely in friendly or "puppet" regimes. Unlike the United States, the Soviet Union is not interested in securing the freedom of choice, irrespective of outcome, of the citizens of the countries in question.

The United States can expect to find itself increasingly charged with violations of the rule against the transboundary use of military force as it acts abroad to secure basic human rights of foreign persons against their own governments. Does this mean that international law, as currently constituted, is a barrier to these U.S. aspirations?

Some publicists will certainly denounce transboundary military force as illegal, but that may only indicate that they have not thought through the human rights question. For example, would any nation or publicist outside of South Africa say that Article 2(4) was an absolute barrier to military force against the South African Government if that Government (improbably) set up Nazi-type death camps against its black population? Clearly, the rule against transboundary military force would give way when confronted with a genocidal denial of human rights. The principle carries through to less extreme cases. Ultimately, what claim does a state have to the sanctity of its borders against foreign military force if it uses its sovereign isolation to subjugate its own powerless citizens?

In sum, even if most of the rules of international law suggested by the categories given at the outset of this subsection are in the interest of the United States, it must be conceded that at least one major rule--transboundary military force--may not be. But that rule is itself undergoing revaluation against the powerful claims of human rights in international law. It may only be a temporary impediment to U.S. practice. Indeed, because customary law results from practice, a sophisticated study of the rule against transboundary military force may even at present show that that rule is eclipsed by human rights considerations (as in the many examples of so-called humanitarian intervention). Thus, time is clearly on the side of the United States in this regard. [FN33]

The World Court and the National Interest [FN34]

The judges on the World Court may possibly be unpersuaded by the foregoing argument that the rise of human rights law has eclipsed the rule against transboundary military force. Further, they may decide in *404 favor of the plaintiff on the merits in *Nicaragua v. United States*. Does it follow that the United States should seriously consider renouncing the compulsory jurisdiction of that Court?

In the first place, one should not lose sight of the fact that in a recent case all of the judges of the World Court, with the sole exception of the Soviet judge, found that a use of transboundary military force by the United States for a human rights purpose was completely legal under international law. The use of force was President Carter's aborted rescue mission of April 24-25, 1980, against Iranian

airspace and territory. By awarding reparations to the United States against Iran for the diplomatic hostages held by Iran without deducting any amount (even a nominal one) to compensate Iran for the incursion against its territory, the World Court showed that it could take a sophisticated view of international law in favor of a superpower against a Third World nation. [FN35]

Nevertheless, it may be too much to expect the Court to extend its view in that aspect of the Hostages case to the more continuous and sustained use of force for a possibly less clear objective in *Nicaragua v. United States*. If so, it may be explained largely by drawbacks in the way judges are retained and compensated for their services on the Court. The present tenure is for 9 years, and the salary level is modest. As a result, the judges remain very much committed to their home nations. Moreover, their families and extended families have their roots at home; hence, they may be unprepared to assert judicial independence from their home governments. If, however, the term of office were increased to lifetime tenure, and the salary were substantially raised to assure independence for the judge and his family, greater impartiality would probably obtain.

Judicial impartiality is especially needed when the legal question involves a confrontation of the two rules discussed in the preceding subsection. For the rule against the transboundary use of force is one that many governments hold dear; it defends their sovereign prerogatives at home and shields them from external accountability. Even if, or especially if, a government is actively involved in transgressing the human rights of its own citizens, it will piously assert its claim to sovereignty and the fundamentality of Article 2(4) of the Charter. Correspondingly, any judge it sends to the World Court under present circumstances will feel a strong pressure to support that basic outlook irrespective of the judge's own qualms about the human rights violations.

Yet, apart from tenure and salary, the method of selecting judges for the Court is commendable. It has yielded sophisticated jurists of international ***405** law. The opinions of the Court in general compare favorably in clarity, logic and scholarly depth with recent opinions of the U.S. Supreme Court. The World Court's opinions are the more remarkable because of the vastly different legal systems represented by the judges. [FN36]

On balance, it would be more in the interest of the United States to improve the World Court than to abandon it. The way to deal with a possible loss in a given case is to initiate many cases; the public hardly notices when the U.S. Government loses a case in the Supreme Court.

Senator Moynihan summed it up well when he advocated respecting the World Court's procedures at the time *Nicaragua* filed its suit against the United States: "We are--when we have our wits about us--a law-abiding nation. It is in our interest that others should be. If, for example, the Soviets are not, then that is their problem. If, because the Soviets are not, we cease to be, then that is their victory." [FN37]

[FN1]. Portions of this paper are based on an address given by the author to the John Bassett Moore Society of International Law at the University of Virginia School of Law, Nov. 16, 1984. The author would like to thank Professor Louis B. Sohn, Professor Edward Gordon and Dr. Paul C. Szasz for their helpful comments.

[FN1]. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26) [hereinafter cited as *Nicaragua*].

[FN2]. The optional clause is contained in Article 36(2) of the Court's Statute. The U.S. Declaration of Aug. 14, 1946 provides in pertinent part that the United States

recognizes as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising 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;

Provided, that this declaration shall not apply to

- (a) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

- (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or

- (c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction; and

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.

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*].

[FN3]. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ REP. 3 (Judgment of May 24). In his closing statement to the Court in support of the U.S. Application for Provisional Measures, Roberts B. Owen, the State Department's Legal Adviser, said: "We believe that this case presents the Court with the most dramatic opportunity it has ever had to affirm the rule of law among nations and thus fulfill the world community's expectation that the Court will act vigorously in the interest of international law and international peace." ICJ Public Sitting, Dec. 10, 1979, Verbatim Record (uncorrected) 44 (Doc. CR 79/1, 1979), cited in Gross, *The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures*, 74 AJIL 395, 397 (1980). Clearly an important function of the World Court is to provide a forum where a nation may state its complete legal position. In the Iranian Hostages case, "mobilizing the world community by means of the one agency of the world community most likely to speak for it in an unambiguous and authoritative way was one of the Government's objectives." Gordon & Youngblood, *The Role of the International Court in the Hostages Crisis--A Rejoinder*, 13 CONN.L. REV. 429, 435 (1981).

[FN4]. Portugal filed its Declaration accepting the Court's compulsory jurisdiction on Dec. 19, 1955,

MULTILATERAL TREATIES, *supra* note 2, at 21, and 3 days later (before India was even notified of it) sued India. Case concerning Right of Passage over Indian Territory (Port. v. India) (Preliminary Objections), 1957 ICJ REP. 125, 132 (Judgment of Nov. 26).

[FN5]. The Declaration of the United Kingdom of Great Britain and Northern Ireland, of Jan. 1, 1969, MULTILATERAL TREATIES, *supra* note 2, at 23, excludes disputes where the other party's deposit or ratification of acceptance of compulsory jurisdiction occurred "less than twelve months prior to the filing of the application bringing the dispute before the Court."

[FN6]. For a good early discussion, see Bleicher, ICJ Jurisdiction: Some New Considerations and a Proposed American Declaration, 6 COLUM. J. TRANSNAT'L L. 61, 74-75, 79-85 (1967).

[FN7]. The present Egyptian Declaration is limited to legal disputes involving the Suez Canal.

[FN8]. Declaration of the United Kingdom of Great Britain and Northern Ireland, *supra* note 5.

[FN9]. Nottebohm case (Liechtenstein v. Guat.) (Preliminary Objection), 1953 ICJ REP. 111, 123 (Judgment of Nov. 18).

[FN10]. Nicaragua, para. 62. To be sure, this holding is somewhat complicated by the fact that the United States in that case claimed that Nicaragua's Declaration, which did not specify its duration, was capable of immediate termination without notice, and hence, that, reciprocally, the U.S. 6-month notice provision should not apply against Nicaragua; rather, on the principle of reciprocity, the United States arguably should be able to terminate its own Declaration vis-a-vis Nicaragua immediately and without notice. Part of the trouble with this argument was the fact that the Nicaraguan Declaration contained no language that the United States could use and cite; immediate terminability was not something that Nicaragua had expressly included in its own Declaration. But this would be a slender distinction for the United States to count on in the future against a nation, like Canada, that provides for immediate termination upon notice to the United Nations. (The Declaration of Canada of Apr. 7, 1970, MULTILATERAL TREATIES, *supra* note 2, at 13, provides that the Canadian Government "reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added.") In that case, the Court is more likely to elevate the sentence just quoted in the text into an unshakable rule, excluding from the operation of reciprocity matters relating to the formal conditions of the duration or modification of declarations of acceptance of jurisdiction.

[FN11]. See note 9 *supra*.

[FN12]. Colombia, the Dominican Republic, Egypt, Gambia, Haiti, Honduras, Nicaragua, Nigeria, Panama, Uganda and Uruguay.

[FN13]. Australia, Austria, Barbados, Belgium, Botswana, Canada, Costa Rica, Kampuchea, El

Salvador, India, Israel, Japan, Kenya, Liberia, Malawi, Malta, Mauritius, Pakistan, the Philippines, Portugal, Somalia, Sudan, Swaziland, Togo and the United Kingdom.

[FN14]. Only ten states would be left, those which, like the United States, have a notice-of-withdrawal provision of 6 months or longer. They are Denmark, Finland, Liechtenstein, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Sweden and Switzerland.

[FN15]. S. REP. NO. 1835, 79th Cong., 2d Sess. 1, 5 (1946). Unfortunately, withdrawal in the face of a threatened lawsuit seems to be precisely what the U.S. Government attempted to do on Apr. 6, 1984, when the Secretary of State notified the Secretary-General of the United Nations that the U.S. Declaration "shall not apply to disputes with any Central American state" for a period of 2 years. Three days later, Nicaragua filed its Application in the World Court against the United States. In its Judgement on jurisdiction, the Court held that the United States could not abrogate the 6-months notice provision of its 1946 Declaration. By participating in the case and by arguing vigorously, the United States went a long way toward countering the unfavorable legal image evoked by the attempted withdrawal of April 6.

[FN16]. Nicaragua, para. 113. In addition to Judge Schwebel's dissenting vote, Judges Oda and Jennings, concurring, would have upheld the validity of the withdrawal on Apr. 6, 1984 on the ground that Nicaragua's Declaration was theoretically terminable with no notice and hence temporal reciprocity should be applied in favor of the United States. *Id.*, ICJ REP. at 510-13, 546-50 (Oda, J., and Jennings, J., concurring, respectively). Judge Schwebel, it should be added, acknowledged strong reasons against the validity of the April 6 withdrawal. See *id.* at 617-18 (Schwebel, J., dissenting).

[FN17]. The Court's interpretation of a 3-day period as not constituting a reasonable period of time was undoubtedly made easier by the fact that the Nicaraguan Declaration says nothing about withdrawal or termination; hence, by "operation of law" it can be said that a reasonable time should be read into it. The situation would be made more difficult for the Court if it had to construe one of the several declarations that provide expressly for withdrawal to take place from the moment of notification. However, having once determined that 3 days is not a reasonable time, the Court may find it possible, when later confronted with a declaration providing for withdrawal from the "moment" of notification, to say that although withdrawal takes effect as of the moment of notification, the notification process itself must consume a reasonable period of time after preliminary notice is given to other states that the notification process has begun.

[FN18]. Further, to attempt to lock in reciprocity, the United States might want to specify that it may only be sued by states whose declarations provide for a 6-month notice of modification or termination, and if the language of the declarations is not clear on this point, then the Court itself must, as a preliminary matter, determine the amount of time to be inferred from those declarations. If the Court fails to determine the meaning, or if the Court does so but determines the meaning as allowing for less than 6 months' notice, then the United States does not consent to being sued by those states. Nevertheless, for the reasons given in the text, this approach, too, may turn out to be too draconian.

[FN19]. See the references cited in Crawford, *The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court*, 50 BRIT. Y.B. INT'L L. 63, 63 n. 3 (1979).

[FN20]. 42 DEP'T ST. BULL. 111, 118 (1960).

[FN21]. See Statement by Secretary Herter, *id.* at 227.

[FN22]. *Case of Certain Norwegian Loans (Fr. v. Nor.)*, 1957 ICJ REP. 9, 27 (Judgment of July 6).

[FN23]. Dissenting in the *Interhandel Case (Switz. v. U.S.)*, 1959 ICJ REP. 6, 95, 101-02 (Judgment of Mar. 21), Judge Lauterpacht stated that the Connally reservation,

being an essential part of the [U.S.] Declaration of Acceptance, cannot be separated from it so as to remove from the Declaration the vitiating element of inconsistency with the [ICJ] Statute and of the absence of a legal obligation. The Government of the United States, not having in law become a party, through the purported Declaration of Acceptance, to the system of the Optional Clause of Article 36(2) of the Statute, cannot invoke it as an applicant; neither can it be cited before the Court as defendant by reference to its Declaration of Acceptance.

[FN24]. See D'Amato, *Domestic Jurisdiction*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (Instalment 10).

[FN25]. *Nicaragua*, paras. 72, 75. The Court cogently posited the hypothetical that "if the Court were to decide to reject the Application of Nicaragua on the facts, there would be no third State's claim to be affected." *Id.*, para. 75.

[FN26]. Undoubtedly, the U.S. Government has considered going to the World Court with respect to numerous foreign policy incidents over the years, but of course it is hard to know how close these possibilities came to fruition, and for what reasons. One situation that did surface, however, occurred in 1955 when the United States sued Bulgaria. Case concerning the Aerial Incident of 27 July 1955 (*U.S. v. Bulgaria*), 1960 ICJ REP. 146 (Order of May 30), in which the United States discontinued proceedings in the case when it became evident that Bulgaria proposed to exercise its right to invoke the Connally reservation on a reciprocal basis. Another example that ended at the diplomatic level occurred in the 1960s when the United States threatened Canada with referring various maritime disputes to the World Court. Canada replied that in that event it would invoke the Connally Amendment.

[FN27]. Declaration of Canada, Apr. 7, 1970, *supra* note 10.

[FN28]. (*FRG v. Den.*; *FRG v. Neth.*), 1969 ICJ REP. 3 (Judgment of Feb. 20). For an analysis of this case regarding the line between general and special custom, see D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1140-44 (1982).

[FN29]. Declaration of the United Kingdom of Great Britain and Northern Ireland, Feb. 28, 1940,

LEAGUE OF NATIONS O.J. Spec. Supp. 193, at 39 (1944).

[FN30]. The list is taken largely from the Draft General Treaty on the Peaceful Settlement of International Disputes, Art. 29, prepared for the American Bar Association by Professor Louis B. Sohn, July 1983.

[FN31]. See D'Amato, Is International Law Really "Law"?, 80 NW. L. REV. (1985).

[FN32]. Nevertheless, the transboundary force rule may be permeable. For an argument that Article 2(4) was not violated by Israel's use of transboundary military force against a nuclear reactor in the territory of Iraq, see D'Amato, Israel's Air Strike upon the Iraqi Nuclear Reactor, 77 AJIL 584 (1983). See also *infra* note 35.

[FN33]. The customary practice underlying Article 2(4) of the UN Charter already has shifted and changed the meaning of its terms, transforming the treaty rule into a rule of customary law that more accurately reflects the competing needs of states. See, e.g., Franck, Who Killed Article 2(4)?, 64 AJIL 809 (1970).

[FN34]. See Rovine, The National Interest and the World Court, in 1 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 313 (L. Gross ed. 1976).

[FN35]. Many readers will probably dispute the argument made here. They will point to statements by the Court in its opinion that the U.S. military incursion was not an issue before the Court or that it amounted at worst to a disrespect for the Court's adjudicatory procedures in an ongoing case. But what the Court did is more important than what it said. It adjudicated all the legal issues in the case, concluded that Iran owed reparations to the United States, and despite Judge Morozov's pointed reference to the matter in dissent, provided no offset in any amount for the damage or even nominal insult to Iran's territory occasioned by the American incursion. For a full statement of this argument, see D'Amato, *supra* note 28, at 1152-54.

[FN36]. See generally L. Gross (ed.), *supra* note 34.

[FN37]. Moynihan, International Law and International Order, 11 SYRACUSE J. INT'L L. & COM. 1, 8 (1984).