AMERICAN BAR ASSOCIATION
SECTION OF
INTERNATIONAL LAW AND PRACTICE
AND
THE STANDING COMMITTEE ON WORLD ORDER UNDER LAW

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association recommends that the United States Government present a declaration recognizing as compulsory the jurisdiction of the International Court of Justice that should read as follows:

> I, _____, President of the United States of America, declare on behalf of the United States of America, under Article 36, paragraph 2, of the Statute of the International Court of Justice, and in accordance with the Resolution of _____ of the Senate of the United States of America (two-thirds of the senators present concurring therein), that the United States of America recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is to say on the condition of reciprocity, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning
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> (a) the interpretation of a treaty;
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> (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 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; or where the acceptance of the Court's compulsory jurisdiction on 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; or

(c) disputes relating to action taken pursuant to decisions of the Security Council of the United Nations or of a regional arrangement or agency fulfilling the requirements of Article 52 of the Charter of the United Nations.

Provided further, that this Declaration may be modified or terminated with effect as from 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 of notification of modification or termination, the notification by the United States of America shall take effect at the end of such shorter period, and in relation to any State which may modify or terminate its declaration as from the moment of notification, the notification by the United States of America shall take effect as from the moment of notification.

REPORT

This recommendation is the first in a series of five recommendations which deal with important issues of international law that are crucial to the maintenance of international peace and security and justice. They have been developed by the Section of International Law and Practice, through its Working Group on Improving the Effectiveness of the United Nations, as a contribution of the American Bar Association to the 50th Anniversary of the United Nations, in fulfillment of the American Bar Association's Goal 8 -- to advance the rule of law in the world. This recommendation addresses the issue of the settlement of international disputes, with emphasis on the preparation by the United States of a draft declaration accepting the jurisdiction of the International Court of Justice.

The United States is a party to the Statute of the International Court of Justice ("World Court" or I.C.J.).[1] In this capacity the United States may sue and be sued in that Court, but only where consent to suit is founded on mutual agreement[2] or on acceptance of the Court's compulsory jurisdiction by declarations filed pursuant to Article 36(2) of the Statute of the Court. The United States filed such a declaration in 1946, but withdrew it in 1986 owing to the Court's willingness to accept jurisdiction of Nicaragua's complaint that the United States had violated international law through its actions in support of the *Contras* in Nicaragua. The Working Group examined the question whether the United States should restore its acceptance of the Court's compulsory jurisdiction.

In reaching its decision to recommend that the United States file a new declaration accepting the Court's compulsory jurisdiction pursuant to Article 36(2), the Working Group considered four major issues:

1. Whether acceptance of the Court's compulsory jurisdiction is in the national interest;

2. Whether a new United States declaration should include the "Connally reservation," that is, whether to include a reservation that excludes from the Court's jurisdiction matters that are "essentially within [U.S.] domestic jurisdiction...as determined by the United States;"

3. Whether the declaration should exclude issues of national security from the

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[1] All Members of the United Nations are parties to the Statute of the Court, U.N. Charter, Article 93(1).

[2] I.C.J. Statue, Article 36(1).

Court's jurisdiction, that is, whether the declaration should extend to uses of force, actions in self-defense, or matters connected with ongoing armed conflicts; and

4. What other conditions or reservations should be attached to the new U.S. declaration.

Apart from the proviso that introduces reciprocity into the termination clause, the Working Group's draft Declaration contains only three reservations: proviso (a) concerning alternative methods of dispute resolution; proviso (b) concerning declarations made in relation to particular disputes; and proviso (c) concerning collective measures. The Working Group agreed that there should be no domestic jurisdiction reservation and that there should be no national security, use of force, or self-defense reservation.

The Working Group's support for renewing U.S. acceptance of the Court's compulsory jurisdiction is rooted in support for the rule of law. As it is within nations, adjudication is a necessary feature of the rule of law among nations. Although no nation can be certain of winning every International Court case in which it is a party, dispute settlement by law and not by force is in the long-range interest of all. Moreover, as a world leader having many and varied interests throughout the world, dispute settlement by law is most especially in the interest of the United States. Acceptance of the Court's compulsory jurisdiction serves that interest.

The domestic jurisdiction reservation contained in proviso (b) of the U.S. 1946 Declaration[3] was both unnecessary and destroyed the effectiveness of that declaration. The proviso was not needed because under the U.N. Charter the Court has no authority to "intervene in matters which are essentially within the domestic jurisdiction of any State."[4] The proviso rendered the U.S. declaration ineffective because, owing to the Court's requirement of reciprocity in the acceptance of compulsory jurisdiction, any state that the United States might seek to bring before the Court could avoid the Court's jurisdiction by invoking the U.S. domestic jurisdiction reservation.[5] What is more, the self-judging feature of the U.S. domestic jurisdiction reservation ("as determined by the United States") conflicts with Article 36(6) of the I.C.J. Statute. Under that provision, the Court has jurisdiction to determine its own jurisdiction: When there is a dispute as to whether the Court has jurisdiction, as is the case when a party claims that a matter

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[3] Proviso (b) excluded from the Court's compulsory 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."

[4] U.N. Charter, Article 2(7).

[5] In 1957 the United States was unable to sue Bulgaria on a claim of wrongful attack against an airliner which was flying over Bulgaria because of a navigational error, because Bulgaria was able to rely on the U.S. domestic jurisdiction reservation. Aerial Incident of 27 July 1955 (United States v. Bulgaria) (1959).

falls within its domestic jurisdiction, the dispute is to be settled by the decision of the Court, not by the self-determination of one of the parties. For all these reasons, the Working Group considered it inappropriate to include a domestic jurisdiction reservation in the new declaration.

A national security, use of force, or self-defense reservation presents two major issues. First, there is the question of principle. Should matters relating to national security be excluded from the Court's compulsory jurisdiction? Second, there is a technical or practical problem in conducting litigation subject to such a proviso. Is it technically feasible to achieve the presumed objective of the proviso's proponents -- that is, to preclude judicial scrutiny of the merits of sensitive issues -- without engaging in prolonged litigation over related issues at the jurisdictional phase?

With regard to the issue of principle, the reasons that led the Working Group to support renewal of U.S. acceptance of the Court's compulsory jurisdiction cut against the exclusion of national security, self-defense, and use of force issues. Extraterritorial action taken in the name of national security or self-defense is governed by international law; such action does not fall within national discretion or domestic jurisdiction. The United States would be ill-served by an international law system that did not seek to subject the use of force to the discipline of law. Here, as elsewhere, effectiveness in the rule of law requires access to adjudication. In the long-run the interests of all states are furthered by bringing the use of force within the domain of law.

As to practical problems of litigation, the objective of a national security, use of force, or self-defense reservation would be to secure the dismissal of the case at the outset, that is, at a preliminary hearing on jurisdiction. In many cases this would not be possible, because the Court would have to examine certain merit issues at the jurisdictional phase in order to satisfy itself that the conditions for invoking the reservation were met. For example, a reservation that excludes Court review of acts of self-defense would require a showing that the challenged act was indeed an act of self-defense. This would require both a presentation of the facts and legal argument to show that the action is properly characterized as self-defense. Unless the reservation is self-judging ("self-defense as determined by the United States"), the Court would need to hear the merits of the claim and would dismiss the case only if it concluded that the U.S. action was indeed justified as an act of self-defense. A "national security" reservation could probably not satisfy its own proponents unless the determination concerning U.S. security interests were made self-judging; but for the reasons discussed above concerning the Connally Amendment, the Working Group concluded that self-judging reservations of any kind should be avoided. While some other proposals might avoid the self-judging problem -- for example, by leaving it to the Court to determine from the pleadings or from ascertainable facts whether the dispute concerned "force" or "hostilities" -- we concluded that the effort to formulate an "objective" test that could be readily applied at the threshold of the case was elusive. More importantly, such an exercise seemed unwarranted in view of our unanimous agreement that, because of the reciprocal character of reservations, it is in the interest of the United States to draw all reservations to the Court's jurisdiction as narrowly as possible.

With regard to other possible reservations, the Working Group decided to recommend three reservations.

First, in proviso (a) the Working Group decided to retain the 1946 Declaration's alternative dispute settlement proviso. Under this proviso the Declaration does not apply to "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."

Second, in proviso (b) the Working Group decided to exclude disputes that are brought to the Court pursuant to a declaration that was made only for the purpose of bringing the dispute to the Court. Such an exclusion in effect requires other states to accept the Court's compulsory jurisdiction on a broader basis before they may utilize the U.S. Declaration to bring the United States before the Court.

Third, in proviso (c) the Working Group decided to exclude disputes relating to collective action. In the judgment of the Working Group, legal challenges to collective actions should require a broader jurisdictional basis than the acceptance by the United States of the compulsory jurisdiction of the Court. Judicial review of collective actions would advance the rule of law, but the Court's review would be effective only if both the responsible institution and all affected states participate in the process. Such a process would require both rethinking of the basis for collective action and amendment of the Statute of the Court.[6]

Finally, the Working Group decided to retain the six months notice provision of the 1946 Declaration, but to insert into that provision a requirement of reciprocity.

Respectfully submitted,

James H. Carter
Chairman

August 1994

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[6]Article (34)1 of the Statute of the Court provides: "Only states may be parties in cases before the Court."