

# RECENT ACTIVITY BEFORE THE INTERNATIONAL COURT OF JUSTICE: TREND OR CYCLE?

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## I. INTRODUCTION

Following the United States refusal to participate in the *Nicaragua* case,<sup>1</sup> and its subsequent withdrawal from the so-called "optional clause,"<sup>2</sup>

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1. Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14 (June 27); *Statement on the United States Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice*, 85 DEP'T ST. BULL. 64 (1985).

2. For the text of the United States August 26, 1946 declaration, see Declaration on the Part of the United States of America, Aug. 26, 1946, 61 Stat. 1218; United States Declaration

a great deal of pessimism surrounded the future of the International Court of Justice.<sup>3</sup> Less than a decade later, and only half way through the *decade of international law*, it would appear, to paraphrase Mark Twain, that reports of the court's demise were greatly exaggerated.<sup>4</sup> Recent literature on the court, and on international law in general, shows a renewed optimism about international adjudication, often bordering on the idealistic. Some authors express a renewed interest in the compulsory jurisdiction of the court and others simply discuss the bright future of the court in a world ruled by international law.<sup>5</sup>

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Recognizing Jurisdiction, 1983-1984 I.C.J.Y.B. 90-91 (1984). For the notice terminating United States declaration see United States: Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, 24 I.L.M. 1742-45 (1985); see also Declarations Recognizing as Compulsory the Jurisdiction of the Court, 1985-1986 I.C.J.Y.B. 60 (1986); U.S. Terminates Acceptance of I.C.J. Compulsory Jurisdiction, 86 DEP'T. ST. BULL. 67 (1986).

3. Anthony Guistini, *Compulsory Adjudication in International Law: The Past, The Present, and Prospects for the Future*, 9 FORDHAM INT'L L.J. 213 (1986). For a discussion of both optimistic and pessimistic views on the United States reacceptance of compulsory jurisdiction of the International Court of Justice, see Jeffrey P. Bialos ET AL., *Should the United States Reconsider Its Acceptance of World Court Jurisdiction?*, 79 AM. SOC'Y INT'L L. PROC. 95 (1985).

4. *Mood swings* by the World Court are not a new phenomenon. More than 20 years ago William D. Coplin and J. Martin Rochester noted, "Both optimism and pessimism about the role of international institutions have been voiced during the past fifty years, with pessimism predominating over the long run." William D. Coplin & J. Martin Rochester, *The Permanent Court of International Justice, the International Court of Justice, the League of Nations, and the United Nations: A Comparative Empirical Survey*, 66 AM. POL. SCI. REV. 529 (1972); see also William D. Coplin, *Current Studies of the Functions of International Law: Assessments and Suggestions*, in 2 POL. SCI. ANN. 149 (1970). Similar sentiments have been expressed more recently by Thomas M. Frank and Jerome M. Lehrman, who characterized the United States commitment toward international adjudication as "the product of an inconclusive struggle between two contradictory national tendencies: the messianic and the chauvinist." Thomas M. Frank & Jerome M. Lehrman, *Messianism and Chauvinism in America's Commitment to Peace Through Law*, in THE INTERNATIONAL COURT OF JUSTICE AT THE CROSSROADS 3, 6 (L. Damrosch ed., 1987).

5. See, e.g., Robert Y. Jennings, *The International Court of Justice after Fifty Years*, 89 AM. J. INT'L L. 493 (1995); Keith Highet, *The Peace Palace Heats Up: The World Court in Business Again?*, 85 AM. J. INT'L L. 646 (1991); Peter H. F. Bekker, *Correspondence*, 87 AM. J. INT'L L. 429 (1993); Martin A. Rogoff, *International Politics and the Rule of Law: The United States and the International Court of Justice*, 7 B.U. INT'L L.J., 267-99 (1989); Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1-45 (1993); Jose Maria Ruda, *Some of the Contributions of the International Court of Justice to the Development of International Law*, 24 N.Y.U. J. INT'L L. & POL. 35-68 (1991); Jonathan Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 AM. J. INT'L L. 227-56 (1994); Edward McWhinney, *Acceptance, Withdrawal or Denial of World Court Jurisdiction: Some Recent Trends as to Jurisdiction*, 20 ISR. L. REV. 148-66 (1985); Anthony D'Amato, *The United States Should Accept, by a New Declaration, the General Compulsory Jurisdiction of the World Court*, 80 AM. J. INT'L L. 331 (1986); Anthony D'Amato, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT'L L. 385

What is the reason for this dramatic turn around in views about the court? Much of the current literature seems generated in response to the sudden flood of cases brought before the court in the past few years.<sup>6</sup> The apparent willingness of states to resort to the International Court of Justice [hereinafter I.C.J.] in recent times has buoyed hope on the part of its proponents and, at least temporarily, given silence to its detractors. This is, perhaps, a natural outcome of the swing from a period of low court business and a high level of defiance against the court, to a period of high business and little or no defiance.

However, lest we be caught up in positing long-term trends from short-term events, we should give some perspective to the current I.C.J. activity. Periods of high activity for the World Court are not new. Both the Permanent Court of International Justice [hereinafter P.C.I.J.] and the I.C.J. demonstrated extremely active periods in their early years. Not unlike the contemporary period, these two periods of high activity on the court also were accompanied by optimistic literature regarding international adjudication.<sup>7</sup> In each instance, though, these periods of high court activity were followed by a decline in the court's business and, in the case of the I.C.J., a period of troublesome defiance by states brought before the court under its optional compulsory jurisdiction clause.<sup>8</sup> In order to assess whether this recent period of high activity indicates a more

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(1985); Louis B. Sohn, *Suggestions for the Limited Acceptance of Compulsory Jurisdiction of the International Court of Justice by the United States*, 18 GA. J. INT'L & COMP. L. 1 (1988); Fred L. Morrison, *Reconsidering United States Acceptance of the Compulsory Jurisdiction of the International Court of Justice*, 148 WORLD AFF. 63 (1985); Richard Gardner, *U.S. Termination of the Compulsory Jurisdiction of the International Court of Justice*, 24 COLUM. J. TRANSNAT'L L. 421 (1986); J. Patrick Kelly, *The International Court of Justice: Crisis and Reformation*, 12 YALE J. INT'L L. 342 (1987); Robert E. Lutz, *The World Court in a Changing World: An Agenda for Expanding the Court's Role from a U.S. Perspective*, 27 STAN. J. INT'L L. 265-343 (1991); Keith Wier, *The International Court of Justice: Is it Time for a Change?*, 8 HOUS. J. INT'L L. 175 (1985); Douglas Ende, *Reaccepting the Compulsory Jurisdiction of the International Court of Justice: A Proposal for a New United States Declaration*, 61 WASH. L. REV. 1145 (1986); Valerie Epps, *Reinstating the United States Acceptance of the Compulsory Jurisdiction of the International Court of Justice*, 34 BOSTON BAR J. 8 (Jan./Feb. 1990).

6. See, e.g., Hight, *supra* note 5.

7. For literature on international jurisdiction, see Manley O. Hudson's annual reports on the work of the court contained in volumes of the American Journal of International Law covering 1923-1959; see, e.g., Manley O. Hudson, *The Eleventh Year of the Permanent Court of International Justice*, 27 AM. J. INT'L L. 11 (1933); Manley O. Hudson, *The Twenty-Second Year of the Permanent Court of International Justice*, 44 AM. J. INT'L L. 1 (1950). See also, e.g., SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE* (1934); SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (1958).

8. Gary L. Scott & Craig L. Carr, *The I.C.J. and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 AM. J. INT'L L. 57 (1987).

long-lasting trend, or just another cycle in the history of the court, we must determine what factors accompanying this recent phase might indicate a more permanent turn by states toward peaceful dispute settlement by adjudication.

The purpose of this article is to analyze the recent court activity in the context of the entire history of the World Court, for the purpose of placing it in broader political perspective. From this vantage point we hope to assess the future prospects for continued reliance on the court by disputant states and also to determine if the current business before the court gives any rise in hope for prospects of greater acceptance of the role of compulsory jurisdiction.

## II. THE ASCENDANCY OF LEGALISM

It has been frequently noted, though not always to great effect, that any legal system must be reflective of the political system which gives it birth. This is true of international law just as it is for domestic law.<sup>9</sup> Because of this, any increased reliance on international law, and by extension, the World Court, must be accompanied by a political atmosphere which allows states to be willing to conceptualize their disputes as legal disputes and to allow third party adjudication of those disputes. Without such an atmosphere, any attempt to impose legal solutions on states without their consent will be doomed to failure. Any attempt to fix the Court or to push it beyond the tolerances of the political system will only create an illusion of lawfulness, surely to be shattered the moment international adjudication runs afoul of the realities of the international political system.

It has been suggested that the normal political atmosphere of the international system is far from conducive to the promotion of international adjudication.<sup>10</sup> Thus, it takes an extra incentive for states to turn to international adjudication, rather than self-reliance, for the settlement of disputes. The aftermath of periods of high international instability, like those created by wars, seem to have provided just such an incentive.

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9. As Martin A. Rogoff has noted, "International law and international institutions, like domestic law and domestic institutions, require political support for their efficacy." Martin A. Rogoff, *International Politics and the Rule of Law: The United States and the International Court of Justice*, 7 B.U. INT'L L.J. 267, 291 (1989). See also Scott & Carr, *supra* note 8; Gary L. Scott & Craig L. Carr, *The International Court of Justice and the Treaty/Custom Dichotomy*, 16 TEX. INT'L L.J. 347, 354-59 (1981).

10. Gary L. Scott & Karen D. Csajko, *Compulsory Jurisdiction and Defiance in the World Court: A Comparison of the P.C.I.J. and the I.C.J.*, 16 DENV. J. INT'L L. & POL'Y 377-87 *passim* (1988).

Unfortunately, in the past these peaks of international legal ascendancy have been all too easily eroded as memories of past conflagrations dim.

The two world wars were each followed by a period of legal idealism that we earlier termed "post-war legal euphoria."<sup>11</sup> It is not surprising that during each of these periods the business of the court was at its peak.<sup>12</sup> In the short time since the end of the Cold War, the I.C.J. has also been beset with an influx of cases which approximates the numbers before the court at the end of each of the two world wars. There seems little doubt that in the period following the end of the Cold War, legal scholars and states alike found renewed interest in international adjudication. This is hardly surprising since the Cold War was probably as disruptive to the functioning of the international system as either of the two previous wars, and its end just as naturally gave rise to hope for the rule of law as did the two preceding *hot* wars.

While recognizing that the end of the Cold War is a significantly different event from the end of the two global conflagrations, there is some reason to think that it has had a similar effect on the thinking of statesmen and scholars alike toward international law. As Anne-Marie Slaughter Burley noted, "The resurgence of rules and procedures in the service of an organized international order is the legacy of all wars, hot or cold."<sup>13</sup>

There are, of course, important differences between the ends of the two world wars and the end of the Cold War. Perhaps the most important distinction, for the purpose of relating it to our analytic framework, is that the ends of the two world wars can be tied to specific dates: November 11, 1918, the signing of the German Armistice ending World War I, and August 15, 1945, the date of the Japanese surrender ending World War II. Fixing a date for the end of the Cold War is somewhat more problematic.

The breakup of the Soviet Union by 1992<sup>14</sup> brought the obvious final chapter of the Cold War's end, but the demise of the Cold War really preceded that by some considerable time. On November 20, 1990, President George Bush announced, "The Cold War is over."<sup>15</sup> The earlier mid-1990 summit between Soviet President Mikhail Gorbachev and

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11. *Id.* at 386.

12. *Id.* at 387.

13. Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 205 (1993).

14. Fred Hiatt, *Minsk is No Moscow, and That's the Point for New Grouping*, WASH. POST, Dec. 9, 1991, at A16.

15. R.W. Apple, Jr., *34 Leaders Adopt Pact Proclaiming a United Europe*, N.Y. TIMES, Nov. 22, 1990, at A1.

President Bush probably provided the impetus for Bush's remark. The crumbling of the Berlin wall, long a symbol of the Cold War, came earlier on November 9, 1989.<sup>16</sup> Even prior to that came the ascendancy of Soviet President Gorbachev "whose 'new thinking' essentially discarded the old rules of the Cold War game."<sup>17</sup> *Perestroika* and *Glasnost*, Gorbachev's new reform programs were formally announced on February 25, 1986,<sup>18</sup> and probably formed the basis for the eventual end of Cold War international politics.

There is yet another important difference that distinguishes legal activity following the ends of the two world wars and the end of the Cold War. We might call that difference *lead-in time*. Prior to the ends of the two world wars, at a time when it was clear that each war was reaching its conclusion and also clear who the victors would be, the victors began planning for the pursuit of peaceful and lawful activities in the post-war period. For example, at the Dumbarton Oaks Conference in October 1944, the United States, Great Britain, China, and the Soviet Union prepared a basic draft of the United Nations Organization<sup>19</sup> based on agreements made earlier at the Moscow and Tehran Conference of 1943.<sup>20</sup> In other words, the post-war effects on the thinking of political and legal practitioners can be seen, at least in the planning stages, prior to the actual end of the war. Such a phenomenon also happened at the end of the Cold War. One can see both scholars' writings and practitioners' plans for the end of the Cold War preceding the actual end of the Cold War, whichever date one prefers to count as its actual end. The Intermediate Nuclear Forces Treaty<sup>21</sup> between the Soviet Union and the United States in December 1987, is but one of these plans. The basic difference is that at the ends of the two world wars states could only plan for the end of the war while actual activity, like the formation of the United Nations or the creation of the Court, had to await the cessation of hostilities.

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16. Ferdinand Protzman, *East Berliners Explore Land Long Forbidden*, N.Y. TIMES, Nov. 10, 1989, at A1.

17. MEL GURTOV, *GLOBAL POLITICS IN THE HUMAN INTEREST* 2, 3 (2d ed. 1991). Gorbachev was appointed General Secretary of the CPSU in March 1985.

18. Mikhail Gorbachev, *The Political Report of the CPSU Central Committee to the 27th Congress of the Communist Party of the Soviet Union*, IZVESTIYA, Feb. 26, 1986, at 2-10 in 38 THE CURRENT DIGEST OF THE SOVIET PRESS No. 8, at 4.

19. GEORG SCHILD, *BRETTON WOODS AND DUMBARTON OAKS* 168-72 (1995).

20. *Id.* at 42-47; 2 LESTER BRUNE, *CHRONOLOGICAL HISTORY OF UNITED STATES FOREIGN RELATIONS* 823 (1985).

21. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of their Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, U.S.-U.S.S.R., DEP'T ST. PUBLICATION 9555 (1987).

However, unlike the ends of the two world wars, the absence of open warfare between the major participants in the Cold War allowed states to begin actions that could proceed apace while the Cold War diminished and eventually ended. Moreover, states could take immediate advantage of the court, even as the Cold War waned, because it was already in place, requiring no start-up time as it had at the ends of the two world wars. Thus, it seems reasonable to argue that increasing confidence in international law and increasing reliance on the I.C.J. as a dispute settlement mechanism may have been sparked by the anticipated, but nonetheless obvious, ending of the Cold War. For purposes of this analysis then, we have chosen 1986 as the beginning of the current phase of I.C.J. activity.

### III. THE P.C.I.J. AND THE I.C.J. IN HISTORICAL PERSPECTIVE

There are distinct similarities in the early years of the P.C.I.J. and the I.C.J. regarding state behavior toward the court. During the period following the two world wars when legal optimism abounded, each court was extremely active. For the P.C.I.J., this period was the busiest of its short existence. For the I.C.J., this period was unsurpassed until the recent spate of litigation before the court.

Each court similarly experienced a decline in activity during its second decade. For both courts, the decline in activity was tied to an increase in international tensions. The decline in activity for the P.C.I.J. seems to be tied to the major international financial crisis begun in 1929, and the rise of National Socialist Germany after 1933.<sup>22</sup> The I.C.J.'s decline in activity seems tied to the intensification of the Cold War and the proliferation of new states following the period of rapid decolonization. The major emphasis on the Cold War probably disinclined states to conceptualize their disputes as legal disputes. The proliferation of new states, mostly former colonies, might also have had a dampening effect on the court's activities, because during this period the court was still dominated by Western state judges before whom the new states may have been reluctant to appear.

Beyond the initial surge of litigation before both courts and its subsequent decline following increased international hostilities, the similarities in the life cycles of the two courts end. Quite simply put, the life of the P.C.I.J., for all practical purposes, lasted only twenty years while the I.C.J. is celebrating its fiftieth anniversary. The activity of the P.C.I.J. was ended by the onset of World War II, while the I.C.J. was

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22. Scott & Csajko, *supra* note 10, at 387.

able to continue into its next phase. Unfortunately for the I.C.J., this next phase proved to be its darkest period thus far. The decade of the 1960's saw very few cases brought before the court, but beginning in the early 1970's and continuing through the mid-1980's there was a period of serious defiance of the court.<sup>23</sup>

#### A. P.C.I.J. I and I.C.J. I.

In roughly equivalent historical periods, one can compare patterns of submissions to the World Court following each of the two world wars. We shall call these periods P.C.I.J. I and I.C.J. I. These time periods represent the busiest periods in the courts' schedules until the contemporary period. During P.C.I.J. I (1923 through 1936) there were twenty-seven contentious cases submitted to the P.C.I.J. There were also twenty-eight cases submitted for advisory opinion. During a similar period in the life of the I.C.J. (I.C.J. I, 1946 through 1962), thirty-one contentious cases were submitted to the court. There were also twelve submissions for advisory opinion during this period.

The patterns of these early submissions to both courts seem largely to reflect a genuine interest in managing conflict through international adjudication. With the exception of several political submissions to the

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23. The following are cases of defiance recorded during the period under consideration: *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24); *Nuclear Tests* (Austl. v. Fr.; N.Z. v. Fr.), 1974 I.C.J. 253, 457 (Dec. 20); *Fisheries Jurisdiction* (U.K. v. Ice.; F.R.G. v. Ice.), 1974 I.C.J. 3, 175 (July 25). Arguably, two other instances of minor defiance occurred during this period. In *Trial of Pakistani Prisoners of War* (Pak. v. India), 1973 I.C.J. 347 (Dec. 15), India refused to appear, though it did communicate with the Court throughout the proceedings until Pakistan decided to have the proceedings discontinued. In *Aegean Sea Continental Shelf* (Greece v. Turk.), 1978 I.C.J. 3 (Dec. 19), Turkey refused to appear in the initial phase of the case, but since the court found in Turkey's favor on the preliminary objections, no further defiance was forthcoming.

As Scott has noted elsewhere, "[t]he instances of defiance of the Court are well documented and have been given a great deal of scholarly attention." See H.W.A. THIRLWAY, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* 3-20 (1985). See also Keith Hight, *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79 AM. J. INT'L L. 992 (1985). There is some disagreement regarding what constitutes defiance and what should be regarded as normal behavior provided for in the statute. THIRLWAY, *supra*, note 23, at 1-20. Rather than debate the merits of the various perspectives, we will classify defiance as any behavior where a state is legally bound to the court's jurisdiction but disregards the orders of the court in a willful manner. Thus, judgments about states' attitudes, as seen in their responses to the court, become an important criterion for our determination. Our definition of defiance includes both non-appearance and non-performance. Albania's non-payment of the damages assessed in the *Corfu Channel* case is an example of the former; France's behavior in the nuclear test cases is an example of the latter, and the United States behavior in the *Nicaragua* case, *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), is an example of both willful non-appearance and non-performance. Scott & Csajko, *supra* note 10, at 377 n.2.



I.C.J. by the United States against the Soviet Union and other Communist states, all submissions seem genuinely for the purpose of reaching a legal settlement.<sup>24</sup> During P.C.I.J. I there were three cases submitted under the optional clause<sup>25</sup> in which there were no preliminary objections by the respondent state<sup>26</sup> and there were ten joint submissions.<sup>27</sup> Each of these types of submissions indicates a willingness on the part of both parties to come to a legal resolution of the problem. There were no instances of defiance of the court in P.C.I.J. I.

The pattern of submissions in I.C.J. I is similar. There were four cases submitted under the optional clause with no preliminary objections<sup>28</sup>

24. For a discussion of various types of submissions, both *political* and *legal*, see Scott & Csajko, *supra* note 10, at 389-91. Scott & Csajko categorize submissions to the court into *legal submissions* and *political submissions*. Legal submissions are divided into *adjudicatory submissions* and *bargaining submissions*, depending on the desired outcome by the parties. Political submissions are further subdivided into *symbolic submissions*, wherein the state tries to enlist the symbolism of the court against another state, and *leverage submissions*, wherein the submitting state tries to enlist the court as an ally against the respondent.

The cases in which the United States used the court for political leverage against the Warsaw Pact states are as follows: *Treatment in Hungary of Aircraft and Crew of U.S.A.* (U.S. v. Hung.; U. S. v. U.S.S.R.), 1954 I.C.J. 99 (July 12); *Aerial Incident of 10 Mar. 1953* (U.S. v. Czech.), 1956 I.C.J. 6 (Mar. 14); *Aerial Incident of 7 Oct. 1952* (U.S. v. U.S.S.R.), 1956 I.C.J. 9 (Mar. 14); *Aerial Incident of 7 Nov. 1954* (U.S. v. U.S.S.R.), 1959 I.C.J. 276 (Oct. 7).

25. The three cases were *Memorial of Denmark, Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. C) No. 62 (Oct. 31, 1931); *Legal Status of the South-Eastern Territory of Greenland* (Nor. v. Den.; Den. v. Nor.), 1932 P.C.I.J. (ser. A/B) No. 48 (Aug. 2); and *Appeal from Czechoslovak-Hungarian Mixed Arbitral Tribunal* (The Royal Hungarian Peter Pazmany University) (Czech. v. Hung.), 1933 P.C.I.J. (ser. A/B) No. 61 (Dec. 15).

26. *Supra* note 25. See our discussion of these types of submissions which we call Category I submissions, *infra* at 9.

27. Interpretation of Article 179, Annex Paragraph 4, of the Treaty of Neuilly (Bulg. & Greece), 1924 P.C.I.J. (ser. A) No. 3 (Sept. 12); *SS Lotus* (Fr. & Turk.), 927 P.C.I.J. (ser. A) No. 10 (Sept. 7); *Payment of Various Serbian Loans Issued in France* (Fr. & the Serb-Croat-Slovene State), 1929 P.C.I.J. (ser. A) Nos. 20/21 (July 12); *Payment in Gold of Brazilian Federal Loans Issued in France* (Braz. & Fr.), 1929 P.C.I.J. (ser. A) Nos. 20/21 (July 12); *Territorial Jurisdiction of the International Commission of the River Oder* (Czech., Den., Fr., Ger., Gr. Brit., Swed., & Pol.), 1929 P.C.I.J. (ser. A) No. 23 (Sept. 10); *The Free Zones of Upper Savoy and the District of Gex* (Fr. & Switz.), 1929 P.C.I.J. (ser. A) No. 22 (Aug. 19); *Delimitation of the Territorial Waters between Castellorizo and Anatolia* (Italy & Turk.), 1933 P.C.I.J. (ser. A/B) No. 51 (Jan. 26); *Lighthouse Case between France and Greece* (Fr. & Greece), 1934 P.C.I.J. (ser. A/B) No. 62 (Mar. 17); *Oscar Chinn* (Belg. & Gr. Brit.), 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12); *Lighthouse in Crete & Samos* (Fr. & Greece), 1936 P.C.I.J. (ser. A/B) No. 71 (Oct. 8).

28. See *Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18); *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27); *Application of the Convention of 1902 Governing the Guardianship of Infants* (Swed. v. Neth.), 1958 I.C.J. 55 (Nov. 28); *Arbitral Award Made by the King of Spain on 23 Dec. 1906* (Hond. v. Nicar.), 1960 I.C.J. 192 (Nov. 18).

and six joint submissions.<sup>29</sup> With the arguable exception of Albania's refusal to pay damages in the *Corfu Channel* case,<sup>30</sup> there were no instances of defiance during I.C.J. I, thus matching the record of compliance of P.C.I.J. I.

Both P.C.I.J. I and I.C.J. I reflect the willingness of states in the post-war periods to have their conflicts settled by third party adjudication. As will be shown in the discussion below of I.C.J. III, there are many similarities in both the types of submissions and the lack of defiance of the court exhibited during the contemporary post-cold war period.

### B. P.C.I.J. II and I.C.J. II

In the periods immediately following these rather busy times, both the P.C.I.J. and the I.C.J. experienced a rather dramatic decline in the number of cases submitted. We shall refer to these two periods as P.C.I.J. II and I.C.J. II. From 1937 until the P.C.I.J.'s demise at the creation of the I.C.J.,<sup>31</sup> only seven contentious cases and no advisory requests were submitted to the court. This was, quite obviously, because of the outbreak of World War II. Interestingly, however, during I.C.J. II there was a similar decline in the number of submissions, probably explained by the intensification of cold war hostilities. In many ways the decline during I.C.J. II was even more dramatic than during P.C.I.J. II. During the period from 1963 through 1985, there were only twelve submissions of contentious cases to the I.C.J. and six submissions for advisory opinion. Moreover, several of these cases resulted in outright defiance of the court's compulsory jurisdiction.<sup>32</sup>

Though there are similarities in the second phases of both Courts, perhaps the differences in these periods are more important. The P.C.I.J. was obviously unable to operate during the open hostilities of World War

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29. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9); *Asylum* (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20); *Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum* (Colom. v. Peru), 1950 I.C.J. 395 (Nov. 27); *Haya De La Torre* (Colom. v. Peru), 1951 I.C.J. 71 (June 13); *Minquiers and Ecrehos* (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17); *Sovereignty Over Certain Frontier Lands* (Belg. v. Neth.), 1959 I.C.J. 209 (June 20). Note that the number of joint submissions is somewhat misleading because three of the cases involve essentially the same incident between Columbia and Peru.

30. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 244 (Dec. 15). For discussion indicating that this might not accurately be described as defiance of the court see, e.g., THIRLWAY, *see* fn 23, at 6-7; GENEVIEVE GUYOMAR, *LE DÉFAUT DES PARTIES À UN DIFFÉREND DEVANT JURISDICTIONS INTERNATIONALES* 30, 201-3 (1960), *cited in* Hight, *supra* note 23, at 994.

31. *Declaration Recognizing as Compulsory Jurisdiction of the International Court of Justice under art. 36, para. 2 of the Statute of the Court*, U.N. Doc. ST/LEG/SER.E/8, U.N. Sales No. E.90.V.6. (1990).

32. Scott & Csajko, *supra* note 10, at 377 n.2.

II and the decline in the court's business foreshadowed, only shortly, the outbreak of fighting in Europe. In fact, it is rather amazing that in 1937 and 1938 there were actually two cases submitted to the court each year<sup>33</sup> despite the fact that Germany had invaded and annexed Austria by March 1938.<sup>34</sup> Moreover, in spite of troubling times on the European continent, there were no instances of defiance of the court during P.C.I.J. II.<sup>35</sup>

During I.C.J. II, a significantly longer period than P.C.I.J. II, the court averaged only one case for every two years. The period from 1963 through 1970 saw the most startling decline in the court's business. Only one case was submitted, that in 1967, following a four-year hiatus in submissions and preceding another three-year period of no submissions. This period marked the nadir of World Court activity in peacetime. Because this period of inactivity came during the most intense period of Cold War hostilities, following the October 1962 Cuban Missile Crisis, it seems reasonable to argue that the Cold War had as significant an impact on the court as did the open hostilities of World War II.

During the remainder of I.C.J. II, the court experienced somewhat more frequent submissions (a total of eleven - an average of still less than one per year), but there were also four instances of outright defiance of the court's compulsory jurisdiction during this time.<sup>36</sup> There is no equivalent period of defiance during the history of the P.C.I.J.<sup>37</sup> By the time I.C.J. II ended in 1985 and following the United States defiance of the court in the *Nicaragua* case,<sup>38</sup> the outlook for the future of international adjudication looked quite bleak. There was little to portend the upsurge in the court's business that emerged in the following period, 1986 to the present.

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33. Interestingly, Belgium was involved in three of the four cases as the applicant state. *See* Borchgrave (Belg. v. Spain), 1937 P.C.I.J. (ser. C) No. 83 (May 13); Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.), 1939 P.C.I.J. (ser. C) No. 88 (Mo. Day); Société Commerciale de Belgique (Belg. v. Greece), 1938 P.C.I.J. (ser. C) No. 87 (May 4). The other submission was by Estonia, Panevezys-Saldutiskis Railway (Est. v. Lith.), 1937 P.C.I.J. (ser. C) No. 86 (Oct. 25).

34. BRUNE, *supra* note 20, at 738.

35. The representative of Bulgaria failed to appear in the Electricity Co. of Sofia and Bulgaria case, but he was unable to attend due to the outbreak of the war. Electricity Co. of Sofia and Bulgaria (Belg. v. Bulg.), 1939 P.C.I.J. (ser. A/B) No. 77 (Apr. 4).

36. *See* Scott & Csajko, *supra* note 10, at 377 n.2.

37. For a full discussion of comparisons of defiance of compulsory jurisdiction on the P.C.I.J. and I.C.J., see Scott & Csajko, *supra* note 10.

38. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

## IV. THE CONTEMPORARY COURT - I.C.J. III

A. *Compulsory Jurisdiction - The Optional Clause.*

Several things stand out about the court's activity in the period from 1986 to the present. The first and most prominent differentiation from the preceding period is the lack of defiance by states in cases brought unilaterally under the court's compulsory jurisdiction as conferred by article 36 (2) of the I.C.J. Statute.<sup>39</sup> So far, during this most recent period of court activity, seven cases have been brought under the optional clause.<sup>40</sup> As yet, none of these cases has resulted in any defiance of the court's jurisdiction.<sup>41</sup> While this might seem to be encouraging for the institution of compulsory jurisdiction under the optional clause, a closer look at the cases reveals that we should be cautious about inferring too much about the power of compulsory jurisdiction based on these cases.

In order to determine the importance of compulsory jurisdiction in bringing certain states before the court, we will rely on an earlier analysis of compulsory jurisdiction cases.<sup>42</sup> To analyze the effect of compulsory jurisdiction on the outcome of I.C.J. cases, the universe of optional clause cases can be divided into four categories: Category I consists of cases wherein the respondent state made no preliminary objections; Category II consists of cases wherein there were preliminary objections that were upheld by the court; Category III is made up of cases in which the preliminary objections were overruled by the court, but where the decision on the merits supported the respondent state's submissions; and finally,

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39. *Declaration Recognizing as Compulsory Jurisdiction of the International Court of Justice under art. 36, para. 2 of the Statute of the Court, supra* note 31.

40. The seven cases brought under article 36(2) of the Statute of the I.C.J. are as follows: *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Den. v. Nor.), 1993 I.C.J. 38 (June 12); *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), 1992 I.C.J. 240 (June 26); *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Sen.), 1991 I.C.J. 53 (Nov. 12); *East Timor* (Port. v. Austl.), 1993 I.C.J. 32 (May 19); *East Timor* (Port. v. Austl.), 1995, I.C.J. Communiqué No. 95/19bis (June 30); *Passage Through the Great Belt* (Fin. v. Den.), 1992 I.C.J. 348 (Sept. 10); *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nig.), 1994 I.C.J. 105 (June 16); *Fisheries Jurisdiction* (Spain v. Can.), 1995 I.C.J. 87 (May 2).

Although article 36(2) was used as a basis for the court's jurisdiction in Nicaragua's submission against Honduras, the court found its jurisdiction in article XXXI of the Pact of Bogota. *Border and Transborder Armed Actions* (Nicar. v. Hond.), 1988 I.C.J. 69 (Dec. 20). We have therefore not counted this case as an optional clause case. *Declaration Recognizing as Compulsory Jurisdiction of the International Court of Justice under art. 36, para. 2 of the Statute of the Court, supra* note 31.

41. There are still two cases pending, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nig.), 1994 I.C.J. 105 (June 16), and *Fisheries Jurisdiction* (Spain v. Can.), 1995 I.C.J. 87 (May 2).

42. Scott & Carr, *supra* note 8, at 60; Scott & Csajko, *supra* note 10, at 378.

Category IV includes cases wherein the court upheld the applicant state's case on both objections and merits.<sup>43</sup>

From this categorization of compulsory jurisdiction cases under article 36(2), it should be evident that compulsory jurisdiction does little to enhance the court's role in Category I cases, which probably would have been submitted to the court eventually even without compulsory jurisdiction.<sup>44</sup> In other words, there seems to be a willingness on the part of the respondent states to participate in these cases which is implied by the lack of preliminary objections. Category I cases are hard to distinguish from joint submissions in terms of the disputant states' willingness to conceptualize their dispute in legal terms.<sup>45</sup>

Category II cases also do not reveal much about a state's willingness to be bound by the court's decision because in these cases the court simply finds it lacks jurisdiction.<sup>46</sup> The respondent state, then, is never really forced to make what might be a difficult choice between short-term self-interest and the longer term interest of being seen as a law-abiding state. Thus, only Category III and IV cases provide a test of states' willingness to abide by the court's compulsory jurisdiction.<sup>47</sup> Although our earlier analysis was of completed cases, and although two of the cases in the present period are still pending, we nonetheless think this categorization helpful in providing some perspective on this issue.

Of the seven cases brought under the optional clause during this latest period, three had no preliminary objections and thus fall under Category I.<sup>48</sup> In the *Maritime Delimitation* case<sup>49</sup> between Denmark and Norway, the court decided in favor of the respondent, Norway. Despite negotiations since 1980, Denmark contended it had not been possible to find a solution to a dispute concerning delimitation off Denmark and Norway's fishing zones and continental shelf areas in the waters between the East Coast of Greenland and the Norwegian Island of Jan Mayen. Denmark initiated proceedings against Norway, asking the court to

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43. Scott & Csajko, *supra* note 10, at 378.

44. *Id.*

45. *Id.* at 379-81.

46. *Id.* at 378.

47. *Id.*

48. Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991 I.C.J. 53 (Nov. 12); Passage Through the Great Belt (Fin. v. Den.), 1992 I.C.J. 348 (Sept. 10); Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38 (June 14).

49. Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38 (June 14).

adjudge and declare the parties' fishing zones and continental shelf areas. Norway lodged no preliminary objections to the court's jurisdiction. The court delivered a judgment which draws a delimitation line that divides the continental shelf and fishery zones of the Kingdom of Denmark and the Kingdom of Norway.<sup>50</sup>

Similarly, without preliminary objections, the *Arbitral Award* case<sup>51</sup> was submitted to the court by Guinea-Bissau against Senegal on the basis of Article 36(2) of the Statute of the court.<sup>52</sup> This dispute arose over the delimitation of maritime boundaries which had been fixed in 1960 by an agreement between Portugal and France<sup>53</sup> and reaffirmed by an arbitration tribunal in 1989.<sup>54</sup> Before the I.C.J., Guinea-Bissau claimed that the arbitral award of July 31, 1989, should be declared inexistent. Guinea-Bissau also claimed that Senegal was not justified in seeking application of the *null and void award*.<sup>55</sup> The court unanimously rejected Guinea-Bissau's submission and found the award valid and binding. The parties are thus bound by the earlier arbitration decision.<sup>56</sup>

In each of the cases above, the states involved seemed to be willing to conceptualize their dispute in legal terms. Moreover, since the cases were decided in favor of the respondents, there is little test of whether this willingness to pursue legal remedies initially would have continued in the face of a negative court decision. There is no reason to suppose it would not. Past Category I cases have not resulted in defiance of the court's decisions.<sup>57</sup>

The third case in which there were no preliminary objections to the court's jurisdiction under article 36(2)<sup>58</sup> is the case between Finland and Denmark, *Passage through the Great Belt*.<sup>59</sup> As a result of an agreement reached between the two parties, the case was discontinued at the request of Finland.<sup>60</sup> Once again, it seems that the parties were originally willing

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50. *Id.* at 46-47, paras. 91-92.

51. Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991 I.C.J. 53 (Nov. 12).

52. *Id.* at 55.

53. *Id.* at 57.

54. *Id.* at 59-61.

55. *Id.* at 56.

56. *Id.* at 75-76.

57. Scott & Carr, *supra* note 8, at 61-62; Scott & Csajko, *supra* note 10, at 379-81.

58. *Supra* note 31.

59. *Passage Through the Great Belt* (Fin. v. Den.), 1991 I.C.J. 12 (July 29).

60. *Passage Through the Great Belt* (Fin. v. Den.), 1992 I.C.J. 348 (Sept. 10).

to conceptualize their dispute in legal terms. In this instance, however, the lure of a political settlement apparently won out over a judicial remedy.<sup>61</sup>

In the first optional clause case in which there were preliminary objections, the court rejected those objections that were based upon jurisdictional grounds. In *Certain Phosphate Lands in Nauru*,<sup>62</sup> Australia lodged six preliminary objections to the court's jurisdiction, only the first of which applied directly to article 36(2).<sup>63</sup> Australia also lodged a seventh objection that pertained more to the scope of the subject matter within the case.<sup>64</sup> While the court rejected the objections based upon jurisdiction, it upheld Australia's objection which excluded the overseas assets of the British Phosphate Commissioners from consideration in the instant case.<sup>65</sup> While the court found that it had jurisdiction based upon the two parties' acceptance of the optional clause, it excluded the part of Nauru's claim that seemingly provided the *raison d'etre* for its case.<sup>66</sup> Perhaps as a result of that exclusion, during the following year the parties entered into negotiations that resulted in an agreement between them,<sup>67</sup> and Nauru requested a discontinuance of the case.<sup>68</sup> With such a result, it is difficult to conclude much about the role played by compulsory jurisdiction in this case.

The second case in which there were preliminary objections to the court's jurisdiction was the *East Timor* case<sup>69</sup> between Portugal and Australia, wherein, "Portugal referred, in its application, to the

61. The settlement of the dispute was no doubt aided by Denmark's willingness to pay to Finland the sum of 90 million Danish kroner. *Passage Through the Great Belt* (Fin. v. Den.), 1992 I.C.J. 348 (Sept. 10); International Court of Justice: Order Discontinuing the Proceedings in Case Concerning Passage Through the Great Belt (Fin. v. Den.), 32 I.L.M. 101, 103 (1993). This resulted in Finland's agreement to withdraw the case.

62. *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), 1992 I.C.J. 240 (June 26).

63. Australia's preliminary objection was based upon its reservation to its acceptance of the optional clause deposited with the Secretary-General of the United Nations on March 17, 1975. *Id.* The court, by a vote of nine votes to four, found that it had jurisdiction on the basis of article 36(2). *Id.* at 269. The Australian reservation reads, "The Government of Australia further declares that this declaration does not apply to any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement." Austr., 1990-1991 I.C.J.Y.B. 69 (Mar. 13, 1975).

64. Australia's seventh objection stated, *inter alia*, "that Nauru's claim concerning the overseas assets of the British Phosphate Commissioners is inadmissible and that the Court has no jurisdiction in relation to that claim, on the grounds that: the claim is a new one . . . ." *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), 1992 I.C.J. 240, 264 (June 26).

65. *Id.* at 268.

66. *Id.* at 268-69.

67. *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), 1993 I.C.J. 322 (Sept. 13).

68. *Id.*

69. *East Timor* (Port. v. Austl.), 1991-1992 I.C.J.Y.B. 179 (May 3, 1991).

Declarations made by the two States under Article 36, paragraph 2, of the Statute of the Court.”<sup>70</sup> In this case, Portugal claimed that Australia’s 1989 agreement with Indonesia, “relating to the exploration and exploitation of the continental shelf in the area of the ‘Timor Gap,’ . . . had caused particularly serious legal and moral damage to the people of East Timor and to Portugal. . . .”<sup>71</sup> Further, Portugal claimed material damage if the exploitation of hydrocarbon resources should begin.<sup>72</sup>

Australia’s principal objection in this case was that the court could not adjudicate any dispute over the treaty in question without first determining the lawfulness of Indonesia’s entry into and continued presence in East Timor. Moreover, the court could not do so without the consent of Indonesia since Indonesia is not a party to the optional clause. The court, by a vote of ten to five, upheld Australia’s principal objection.<sup>73</sup> This case then falls under Category II and offers little on the impact of compulsory jurisdiction.

In the *Land and Maritime Boundary case between Cameroon and Nigeria*,<sup>74</sup> preliminary objections concerning the jurisdiction of the court and the admissibility of the claims by Cameroon were filed by Nigeria on December 13, 1995.<sup>75</sup> The respondent, however, had appointed an ad hoc judge to the court, apparently indicating its willingness to participate in the case. This is another serious case involving open hostilities over land and maritime delimitation, but one in which the parties seem willing to seek a judicial settlement. On March 15, 1996, at the request of Cameroon and following hearings on the matter, the court issued an order on provisional measures designed to stop the most recent outbreak of fighting in this dispute.<sup>76</sup>

On March 28, 1995, Spain instituted proceedings against Canada<sup>77</sup> using their mutual acceptances of the optional clause as the basis for the

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70. *Id.*

71. *Id.*

72. *Id.*

73. East Timor (Port. v. Austl.), I.C.J. Communiqué No. 95/19bis, June 30, 1995.

74. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.), 1994 I.C.J. 105 (June 16).

75. *Id.*; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.), I.C.J. Communiqué No. 96/1, Jan. 11, 1996.

76. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.), I.C.J. Communiqué No. 96/13, Mar. 15, 1996.

77. Fisheries Jurisdiction (Spain v. Can.), 1995 I.C.J. 87 (May 2).



court's jurisdiction.<sup>78</sup> This dispute arose generally over provisions of the Canadian Coastal Fisheries Protection Act as amended on May 12, 1994,<sup>79</sup> and specifically over the boarding on the high seas of a fishing boat flying the Spanish flag.<sup>80</sup> Canada believes that the court does not have jurisdiction over this matter because of the reservation to their acceptance of the optional clause which excludes "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the [North Atlantic Fisheries Organization] Regulatory Area . . . and the enforcement of such measures."<sup>81</sup> As of this writing the parties have not yet submitted their written arguments addressing the court's jurisdiction. It is thus too early to make any judgment on the impact of this case on the institution of compulsory jurisdiction.

Review of optional clause cases suggests that there is little reason to be either optimistic or pessimistic about the success of the court's compulsory jurisdiction based on the optional clause. It would seem that there is no reason to differ with our earlier analyses of the P.C.I.J. and I.C.J. experiences under the optional clause.<sup>82</sup> That is, when states are willing to conceptualize their disputes in legal terms, they will do so, and they will follow through with adherence to the decisions of the court. This seems true with or without compulsory jurisdiction under article 36(2).<sup>83</sup> There is nothing in the present record to suggest, however, that if a state found it in its own best interest to defy compulsory jurisdiction that it would not. Moreover, the record of state defiance in I.C.J. II dramatically supports this conclusion. On the whole then, for the present period, the evidence about compulsory jurisdiction under the optional clause is inconclusive. We should, however, add one qualifier to this.

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78. Peter H.F. Bekker, *Recent Developments in the World Court*, AM. SOC. INT'L L. NEWSL., June-Aug. 1995, at 4; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), I.C.J. Communiqué No. 95/11, Mar. 29, 1995; Fisheries Jurisdiction (Spain v. Can.), I.C.J. Communiqué No. 95/12, May 2, 1995.

79. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), I.C.J. Communiqué No. 95/11, Mar. 29, 1995; see also Bekker, *supra* note 78, at 4.

80. *Id.*

81. Bekker, *supra* note 78, at 4.

82. Scott & Carr, *supra* note 8, at 74-76; Scott & Csajko, *supra* note 10, at 391-92. But see RENATA SZAFARZ, *THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE* (1993).

83. *Declaration Recognizing as Compulsory Jurisdiction of the International Court of Justice under art. 36, para. 2 of the Statute of the Court*, *supra* note 31.

One of the most recent cases brought under the optional clause, *Cameroon v. Nigeria*,<sup>84</sup> has the potential to provide some evidence in support of the effectiveness of the court's compulsory jurisdiction. There are several elements about this case that have been associated in the past with instances of defiance. There have been open hostilities in this particular dispute (a security issue), there is a serious economic matter at stake, it is a dispute about border and maritime delimitations,<sup>85</sup> and the power differential between the two states is large.<sup>86</sup> In light of these factors, this dispute, should it be resolved against the respondent, Nigeria, would be a serious test of a commitment to lawfulness in the post-Cold War period. The preliminary signs are hopeful. Nigeria recognized the compulsory jurisdiction of the court under article 36(2) in 1965 with no reservations.<sup>87</sup> There was a Nigerian judge on the court continuously from 1967 until 1994,<sup>88</sup> thus establishing Nigerian participation in the international legal process soon after its independence.<sup>89</sup> Furthermore, Nigeria has thus far indicated a willingness to participate in this case by the appointment of an ad hoc judge.<sup>90</sup> It has also indicated its willingness to abide by the court's order of provisional measures issued on March 15, 1996.<sup>91</sup>

### B. *Compromissory Clauses*

We now turn to compulsory jurisdiction granted to the court under compromissory clauses.<sup>92</sup> During this period of I.C.J. activity there have been several cases submitted to the court on the basis of compromissory clauses in treaties. Our analysis of these cases, however, will necessarily

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84. Cameroon brings a case against Nigeria, I.C.J. Communiqué 94/12, Mar. 30, 1994.

85. "In the Application Cameroon refers to 'an aggression by the Federal Republic of Nigeria, whose troops are occupying several Cameroonian localities on the Bakassi peninsula,' resulting 'in great prejudice to the Republic of Cameroon.'" *Id.*

86. Scott & Csajko found that, "the best indicator of likely defiance seems to be 'power differential' since most of the recent instances of defiance have occurred between states of great power disparity." Scott & Csajko, *supra* note 10, at 392.

87. Nigeria, 1990-1991 I.C.J.Y.B. 93-94 (Aug. 14, 1965).

88. The Nigerian Judges were C.D. Onyeama, 1967-1976, and T.O. Elias, 1976-1994.

89. Nigeria achieved independence within the Commonwealth on October 1, 1960.

90. "The Federal Republic of Nigeria notified the Court of its intention to choose Mr. Bola Ajibola to sit as judge *ad hoc* in the case." Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v. Nig.*), 1994 I.C.J. 106 (June 16).

91. *BBC Summary of World Broadcasts* (broadcast Mar. 18, 1996).

92. For an excellent discussion of Compromissory Clauses and I.C.J. jurisdiction see Jonathan I. Charney, *Compromissory Clauses and The Jurisdiction of the International Court of Justice*, 81 AM. J. INT'L L. 855 (1987).

be limited since at the time of this writing only one of these cases had come to judgment.<sup>93</sup> Two cases were discontinued at the parties' request,<sup>94</sup> and the remaining cases were still pending.

The first of the compromissory clause cases was between Nicaragua and Honduras.<sup>95</sup> Though Nicaragua presented two bases for the court's jurisdiction, including Article 36(2) of the Statute, the court found its jurisdiction in article XXXI of the Pact of Bogota.<sup>96</sup> Beyond a judgment on the preliminary objections, however, this case never came to judgment on its merits. Though the judgment on the preliminary objections was given on December 20, 1988,<sup>97</sup> the case continued for the next three and one half years because of extensions requested by the parties.<sup>98</sup> These extensions were brought about because the parties were, "in the context of arrangements aimed at achieving an extra-judicial settlement of the dispute . . . ."<sup>99</sup> As a result of these negotiations, Nicaragua requested on May 11, 1992, that the court discontinue the proceedings.<sup>100</sup>

The effect of the court's compulsory jurisdiction in this case may have been to cause the parties to seek a settlement they otherwise might not have sought. That is, once faced with the prospect of going to court, Honduras may have been more willing to settle the dispute in a process over which it had some control (negotiation) rather than risk a judicial settlement over which it had no control. Once the court ruled against the Honduran preliminary objections and found it had jurisdiction, the only other alternatives to negotiation for Honduras were to proceed with the unwanted litigation or to defy the court. The latter does not seem to be a prospect that most states undertake lightly, especially when jurisdiction is based upon a compromissory clause.<sup>101</sup>

The second case submitted to the court on the basis of a compromissory clause was *Electronica Sicula S. p. A. (ELSI)*,<sup>102</sup> between

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93. *Electronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15 (July 20).

94. *Border and Transborder Armed Actions* (Nicar. v. Hond.), 1988 I.C.J. 69 (Dec. 20).

95. *Id.*

96. *Id.* at 107.

97. *Border and Transborder Armed Actions* (Nicar. v. Hond.), 1988 I.C.J. 69 (Dec. 20).

98. *Border and Transborder Armed Actions* (Nicar. v. Hond.), 1992 I.C.J. 222, 223 (May 27).

99. *Border and Transborder Armed Actions* (Nicar. v. Hond.), 1989 I.C.J. 174, 175 (Dec. 14).

100. *Border and Transborder Armed Actions* (Nicar. v. Hond.), 1992 I.C.J. 222, 223 (May 27).

101. Scott & Carr, *supra* note 8, at 67.

102. *Electronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15 (July 20).

the United States and Italy. The court's jurisdiction was based on the dispute settlement clause in the Treaty of Friendship and Commerce and Navigation between the United States and Italy.<sup>103</sup> Though this was a unilateral application by the United States, there was no objection to the court's jurisdiction by the respondent state.<sup>104</sup> In fact, the response of Italy in accepting the United States proposal was so quick that the case has the look of a joint submission.<sup>105</sup> A particularly interesting feature of this case is that it was the first (and so far the only) case heard in chambers which was submitted unilaterally on the basis of a compromissory clause.<sup>106</sup>

The third case submitted to the court based upon its jurisdiction conferred by treaty is the *Aerial Incident* case<sup>107</sup> between Iran and the United States. This case is a quintessential example of protracted adjudication that has ended in a negotiated settlement. It arose from the destruction of an Iranian aircraft and the killing of its 290 passengers and crew on July 3, 1988, and over the interpretation and applicability of the 1944 Convention on International Civil Aviation<sup>108</sup> and the 1971 Convention and Suppression of Unlawful Acts Against the Safety of Civil Aviation.<sup>109</sup> Not only did the United States request extended time limits for filing its Memorial prior to lodging preliminary objections, but it also petitioned the court for more time to prepare its objections. At the time of this writing, the case, having been extended several times, has been discontinued at the request of the parties who have negotiated "an agreement in full and final settlement of all disputes, differences, claims, counterclaims and matters directly or indirectly raised by or capable of

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103. Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, arts. 16, 63 Stat. 2255 (entered into force July 26, 1949).

104. It is common ground between the Parties that the court has jurisdiction in the present case, under Article 36, paragraph 1 of its Statute, and Article XXVI of the Treaty of Friendship, Commerce of its Statute, and Article XXVI of the Treaty of Friendship, Commerce and Navigation, of 2 June 1948 ('the FCN Treaty'), between Italy and the United States . . . .

*Elettronica Sicula S.P.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15, 41 (July 20).

105. The United States submitted its application and request that the case be heard in chambers to the court on February 6, 1987, and the Italian response accepting the United States proposal was submitted to the court by telegram on February 13, 1987. *Id.* at 17-18.

106. Hight, *supra* note 5, at 647 n.11.

107. *Aerial Incident of 3 July 1988* (Iran v. U.S.), 1989 I.C.J. 132 (Dec. 13).

108. Convention On International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 215.

109. Suppression Of Unlawful Acts Against The Safety Of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 178.

arising out of, or directly or indirectly related to or connected with, this case."<sup>110</sup>

There have been two cases submitted to the court by unilateral application based upon earlier agreements to submit the dispute to the court failing a resolution by other means.<sup>111</sup>

In the *Territorial Dispute* between Libya and Chad,<sup>112</sup> the court took its jurisdiction from a special agreement between the two parties<sup>113</sup> that conferred jurisdiction on the court with respect to the settlement of the territorial dispute between them. Article 1 of the agreement stated, "The two parties undertake to settle their territorial dispute first by all political means, including conciliation, within one year, unless the Chiefs of State decide upon another time period."<sup>114</sup> Article 2 goes on to state, *inter alia* "[i]n the absence of a political settlement of their territorial dispute, the two parties undertake: A) to submit the dispute for judgment by the International court of Justice."<sup>115</sup> This was a case of high salience since it involved a territorial dispute and there had been armed hostilities over the area in question. Throughout the proceedings both parties seemed willing to abide by the court's judgment and, following the court's judgment, negotiated an agreement on the implementation of the judgment.<sup>116</sup> Though there is some chance that this case might have ended in defiance of the court's judgment, this probability was lessened considerably by the court's decision in favor of the respondent.

In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*,<sup>117</sup> Qatar brought a unilateral application to the court based upon earlier agreements between the two parties. Bahrain objected to the court's jurisdiction, but the court in its decision dated February 15, 1995,

110. Aerial Incident of 3 July (Iran v. U.S.), I.C.J. Communiqué No. 96/6, Feb. 23, 1996.

111. The two cases are: *Territorial Dispute* (Libya v. Chad), 1994 I.C.J. 4 (Feb. 3); and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, 1994 I.C.J. 112 (July 1).

112. *Territorial Dispute* (Libya v. Chad), 1994 I.C.J. 4 (Feb. 3).

113. *Id.*

114. Agreement On The Peaceful Settlement Of The Territorial Dispute Between The Republic Of Chad and Libya, Aug. 31, 1989, Chad-Libya, 29 I.L.M. 15, 16 (1990).

115. *Id.* at 16.

116. Agreement Between The Great Socialist People's Libyan Arab Jamahiriya and The Republic Of Chad Concerning The Practical Modalities For The Implementation Of The Judgement Delivered By The International Court Of Justice On Feb. 3, 1994, Apr. 4, 1994, Chad-Libyan Ardo Jarrahiriya, U.N. Doc. S/1994/402 (1994).

117. *Maritime Delimitations and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), I.C.J. Communiqué No. 95/11, May 1, 1995.

held that it had jurisdiction over the dispute.<sup>118</sup> It also found the application of Qatar admissible and that it was seized of the whole dispute.<sup>119</sup> At the time of this writing the court had extended the timelimit for the filing of memorials on the merits of the case to September 30, 1996.<sup>120</sup>

During I.C.J. III then, the court has had a good record on compulsory jurisdiction cases brought under compromissory clauses. This is not unexpected. As we have noted above, states seem more compelled to carry through with cases brought under compromissory clauses than under the optional clause. This is probably because the treaty relationship is held to be more important to them than the optional clause. In other words, the treaty creates a social relationship between the parties, based on their mutual self-interest, that engenders cooperative behavior in dispute settlement procedures. This relationship is either lacking or much weaker among parties to the optional clause.

### C. Chambers

I.C.J. III has seen three cases decided in chambers.<sup>121</sup> This increased reliance upon chambers following the 1984 case, *Gulf of Maine*,<sup>122</sup> was the cause of some concern among international law scholars and practitioners.<sup>123</sup> While there may be some genuine issues to be raised about over-reliance upon the institution of chambers,<sup>124</sup> it may also increase states' willingness to submit disputes to the court. This was, after all, the main reason behind the change in the 1978 edition of the *Rules of the*

118. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), 1994 I.C.J. 112 (July 1).

119. *Id.*

120. *Maritime Delimitations and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), I.C.J. Communiqué No. 96/2, Feb. 5, 1996.

121. *Frontier Dispute* (Burk. Faso v. Mali), 1986 I.C.J. 554 (Dec. 22); *Elettronica Siclva S.p.A. (ELSI)* (U.S. v. Italy), 89 I.C.J. 15 (July 20); *Land, Island And Maritime Frontier Dispute* (El Sal./Hond.: Nicar. intervening), 1992 I.C.J. 351 (Sept. 11).

122. *Delimitation Of The Maritime Boundary In The Gulf Of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12).

123. See Hight, *supra* note 5, at 649. *Land, Island and Maritime Frontier Dispute* (El Sal. v. Hond.), 1990 I.C.J. 3, 18 (Feb. 28) (dissenting opinion of Judge Shahabuddeen). *But see* Jennings, *supra* note 5, at 496-97.

124. Jennings raises a concern over the work load that chambers places on the Court. The members of a chamber inevitably remain also members of the full court. If, therefore, a chamber of the Court is faced with a very considerable task - as the Chambers were in the *Gulf of Maine* case, and particularly in the *Land, Island and Maritime Frontier* case - it is practically unavoidable that the full Court should mark time in order to permit the members of the Chamber to perform their task.

Jennings, *supra* note 5, at 496.

Court designed to make the institution of chambers more accessible to disputants.<sup>125</sup> Moreover, if we view the purpose of the court as being the settlement of legal disputes, then successful methods of dispute resolution, including chambers, should be encouraged. During a period of extreme under-use of the court, facilitating chambers seemed a good idea. In a period of peak court activity it may seem less so. Nonetheless, chambers has proven successful in resolving some serious disputes. As Judge Jennings points out, "Clearly it is not the lesser disputes where parties have preferred a chamber."<sup>126</sup>

Two very serious cases involving territorial disputes were settled in chambers. The first was the *Frontier Dispute* case<sup>127</sup> between Burkina Faso and Mali, submitted to the court by special agreement between the two parties. This case, referred to as a "dangerous dispute" by Judge Jennings,<sup>128</sup> involved armed hostilities in the border region between the two states.<sup>129</sup> From indicated provisional measures through final judgment the court played a very successful role in the resolution of this dispute. By the time of the judgment both sides had agreed to withdraw their troops from the disputed area and to return to their respective territories.<sup>130</sup>

The second territorial dispute settled in Chambers during I.C.J. III was *Land, Island and Maritime Frontier Dispute* (El Salvador/ Honduras: Nicaragua intervening).<sup>131</sup> This very complicated case consumed two straight months of hearings and was "the longest single case since the ill-fated 'merits' phase of the South West Africa cases in 1965."<sup>132</sup> Moreover, this case, according to Hight, was "really four, if not five, cases of normal size and shape rolled into one . . ."<sup>133</sup> Judge Jose Sette-Camara, presiding judge of the chamber, called the case the most complicated in the history of the court.<sup>134</sup> Indeed, the issues were complex and involved open

125. *Id.*

126. *Id.*

127. *Frontier Dispute* (Burk. Faso v. Mali), 1986 I.C.J. 554 (Dec. 22).

128. *Id.*

129. Jennings, *supra* note 5, at 496.

130. *Frontier Dispute* (Burk. Faso v. Mali), 1986 I.C.J. 554 (Dec. 22).

131. *Land, Island and Maritime Frontier Dispute* (El Sal./Hond.: Nicar. intervening), 1992 I.C.J. 351 (Sept. 11).

132. Hight, *supra* note 5, at 648. *South West Africa* (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, 1966 I.C.J. 6 (July 18), cited in Hight, *supra* note 5.

133. Hight, *supra* note 5, at 648.

134. *World Court Settles a Latin Border Dispute*, N.Y. TIMES, Sept. 13, 1992, at A10.

conflict between the parties prior to the litigation.<sup>135</sup> Nonetheless, the court was able to resolve this highly explosive territorial dispute in a chamber of five judges.<sup>136</sup> The decision, which favored Honduras, was difficult for El Salvador for several reasons, but they apparently will abide by the terms of the court's judgment.<sup>137</sup>

The third case brought before chambers involved economic issues. In the 1987 *ELSI* Case,<sup>138</sup> the United States claimed that Italy had violated their bilateral 1948 Treaty of Friendship, Commerce, and Navigation,<sup>139</sup> and the Supplementary Agreement<sup>140</sup> by executing an unjustified involuntary bankruptcy of an Italian company.<sup>141</sup> The court found for the respondent and held that the Government of Italy was not responsible to pay compensation to the United States.<sup>142</sup>

#### D. Discontinued Cases

One interesting development during I.C.J. III is the number of cases which have been discontinued as a result of states deciding to settle their disputes prior to a judgment by the court. This current upswing is reminiscent of earlier terminations by parties under the auspices of the Permanent Court of International Justice.<sup>143</sup> During the summer of 1992, Denmark and Finland negotiated a settlement of their 1991 dispute *Concerning Passage through the Great Belt*.<sup>144</sup> Both sides felt that their bilateral relations had suffered as a result of the conflict, and on September 3, 1992, Denmark agreed to pay ninety million Danish kroner if Finland would agree to withdraw its application.<sup>145</sup>

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135. The dispute over the territory in question was more than two centuries old and the violence erupted in the so-called soccer war in 1969. Shirley Christian, *In Land Lost To Honduras, Hearts Are Holdouts*, N.Y. TIMES, Oct. 1, 1992, at A4.

136. The judges in the chamber were: Sir Robert Jennings (Pres. of the court), Sigeru Oda (Vice Pres. of the court), Jose Sette-Camara (Presiding over the chamber), Santiago Torres Bernárdez (Judge ad hoc for Hond.), and Nicolás Valticos (Judge ad hoc for El Sal.). *Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening)*, 1992 I.C.J. 351 (Sept. 11).

137. *Id.* See also Christian, *supra* note 135, at 4.

138. *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 41 (July 20).

139. Treaty of Friendship, Commerce and Navigation, *supra* note 103.

140. Agreement Supplementing the Treaty of Friendship, Commerce and Navigation, Protocol, Feb. 2, 1948, U.S.-Italy, 12 U.S.T. 131.

141. *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (July 20).

142. *Id.* at 70.

143. Scott & Csajko, *supra* note 10, at 385-86.

144. *Passage Through the Great Belt (Fin. v. Den.)*, 1992 I.C.J. 348 (Sept. 10).

145. *Passage Through the Great Belt (Fin. v. Den.)*, 32 I.L.M. 101, 103 (1993).



In the *Nicaragua* case,<sup>146</sup> despite the fact that on June 27, 1986, the court delivered a judgment against the United States, as of September 7, 1987, no agreement had been reached between the parties as to the form and amount of the adjudged reparations. In view of this lack of progress, Nicaragua requested that the I.C.J. make the necessary orders for further review of the case. However, by September 1991 Nicaragua informed the court that they did not wish to continue with the proceedings and renounced all further rights in the case. Consequently, the court delivered an Order of Discontinuance, removing the dispute from its docket, on September 26, 1991.<sup>147</sup>

Nicaragua also requested discontinuance of its claim against the Government of Honduras in the 1986 *Border and Transborder Armed Actions*.<sup>148</sup> Nicaragua further announced "that the Parties had reached an out-of-court agreement aimed at enhancing their good neighborly relations.

..."<sup>149</sup>

Similarly, in *Certain Phosphate Lands in Nauru* between Nauru and Australia,<sup>150</sup> regarding the legal entitlement to the Australian allocation of overseas assets of the British Phosphate Commissioners, the parties reached an agreement outside the court and agreed to terminate their case. This came after the court's judgment on Australia's preliminary objections, but prior to a judgment on merits.<sup>151</sup>

The most recent case to be discontinued as a result of an amicable settlement between the parties is the *Aerial Incident* case<sup>152</sup> between Iran and the United States.<sup>153</sup> After several extensions of time limits granted by the court, the parties reached a final settlement. The length of time allowed by the court at the request of the parties no doubt aided the ability of the parties to reach a negotiated settlement.

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146. *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

147. *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1991 I.C.J. 47, 48 (Sept. 26).

148. *Border and Transborder Armed Actions* (Nicar. v. Hond.), 1992 I.C.J. 222 (May 27).

149. *Id.*

150. *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), 1993 I.C.J. 322 (Sept. 13).

151. *Id.* at 323.

152. *Aerial Incident of 3 July 1988* (Iran v. U.S.), I.C.J. Communiqué No. 96/6, Feb. 23, 1996.

153. *Id.*

These cases support the contention that states will consider the court as one of several alternatives for dispute settlement.<sup>154</sup> Although discontinuances represent a solution absent adjudication, in these cases the court seems to have acted as a catalyst for a negotiated settlement. As indicated, terminated cases represent a sincere "desire for dispute settlement rather than a specifically judicial resolution."<sup>155</sup>

### E. Other Cases

There are several other cases not discussed above which are still pending. Although they cannot be included in our analysis, they deserve mention because of the importance of their subject matter. In *Oil Platforms*,<sup>156</sup> Iran and the United States requested an extension of time limits prior to the filing of preliminary objections by the respondent.<sup>157</sup> This case was brought by Iran against the United States over the destruction of oil platforms allegedly caused by United States troops during the Iran-Iraq War in 1987 and 1988.<sup>158</sup> Hearings on the preliminary objections are set to open on September 16, 1996.<sup>159</sup>

Another lengthy proceeding involves *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*.<sup>160</sup> This case arose over incidents which followed the destruction of Pan Am Flight 103 over Lockerbie, Scotland on December 21, 1988. The United States and the United Kingdom subsequently indicted two Libyan nationals for bombing the aircraft, and the U.N. Security Council demanded their extradition from Libya. The United States and the United Kingdom also instituted economic boycotts against Libya. Libya claimed that both states violated international law by their actions which were contrary to the provisions of the Montreal Convention<sup>161</sup> which governs aviation matters among the parties. Libya

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154. For a discussion of the role of the court as a *bargaining agent* see William Coplin, *The World Court in the International Bargaining Process*, in *THE UNITED NATIONS SYSTEM AND ITS FUNCTIONS* 317 (R. Gregg & M. Barkun eds., 1968).

155. Scott & Csajko, *supra* note 10, at 385.

156. *Oil Platforms (Iran v. U. S.)*, 1994 I.C.J. 3 (Jan. 18).

157. *Id.*

158. *See Iran Sues U.S. Over Gulf Attacks*, N.Y. TIMES, Nov. 7, 1992, at A6.

159. *Oil Platforms (Iran v. U.S.)*, I.C.J. Communiqué No. 96/4, Feb. 6, 1996.

160. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.)*, 1992 I.C.J. 114 (Apr. 14); *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.)*, 1992 I.C.J. 3 (Apr. 14).

161. *Montreal Convention for the Suspension of Unlawful Acts Against the Safety of Civil Aviation*, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178.

initially asked the court to grant them interim measures of protection from the actions of the United States and the United Kingdom, but these measures were denied by the court.<sup>162</sup> At the time of this writing, the case was proceeding on its merits phase.

In addition to cases jointly submitted by the parties to chambers, there has been only one other joint submission during I.C.J. III. In *Gabikovo-Nagymaros Project*,<sup>163</sup> Hungary and Slovakia jointly brought to court a dispute over the implementation and the termination by Hungary of the Treaty on the Construction and Operation of the Gabikovo-Nagymaros Barrage System, signed in Budapest on September 16, 1977.<sup>164</sup> This case, which arose over the building of a dam on the Danube, is of particular interest involving both treaty law questions, and international environmental law questions.<sup>165</sup> At the time of this writing, the case was in the stage of written pleadings.

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>166</sup> there were two applications for provisional measures made by Bosnia and Herzegovina against Yugoslavia. The court ordered provisional measures in the first application but found itself unable to order further provisional measures in the second because of jurisdictional questions.<sup>167</sup> At the time of this writing Yugoslavia has filed preliminary objections in this case, and the court has fixed November 14, 1995, for the filing of a written statement by Bosnia

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162. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), 1992 I.C.J. 114 (Apr. 14).

163. *Gabikovo -Nagymaros Project* (Hung./Slovk.), 1993 I.C.J. 319 (July 14).

164. *Id.*

165. *See Dispute Over Danube Dam Threatens Hungarian Wetlands*, N.Y. TIMES, July 11, 1993, at A10.

166. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Yugo.; Serbia & Montenegro), 1993 I.C.J. 325 (Sept. 13).

167. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Yugo.; Serbia & Montenegro), 1993 I.C.J. 3 (Apr. 8); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Yugo.; Serbia & Montenegro), 1993 I.C.J. 325 (Sept. 13). *See also* Jennings, *supra* note 5, at 502.

and Herzegovina concerning these preliminary objections.<sup>168</sup> Hearings on the preliminary objections opened on April 29, 1996.<sup>169</sup>

## V. CONCLUSION

The results of cases submitted during the current period of the I.C.J. is encouraging for international adjudication. Nonetheless, viewing the current period as a trend in the lawful settlement of international disputes should be approached with cautious optimism; there is some probability that it might merely be another cycle of increased court activity. Our comparisons of the immediate post-Cold War court (I.C.J. III), with the court in the immediate post-World War periods (P.C.I.J. I and I.C.J. I), indicate a similar willingness of states to rely on international adjudication to resolve their disputes in periods following serious international disruptions.

The I.C.J. in the current period has been used by states in a variety of ways to resolve their disputes. The states have used it to gain judicial settlement, and they have used it as an element in the international bargaining process. This is evidenced by the number of cases which were terminated because of solutions reached prior to judgment. This augers well for international lawfulness and for the court. It is not necessary that a dispute have a judicial resolution, only that it be settled. If the court can play a role as a *bargaining agent* in the dispute settlement process, then it has served a useful function.

A further encouraging sign is that states have not used the court during I.C.J. III as a means merely for gaining political leverage against each other, which happened often during I.C.J. I, and particularly in the cases of defiance during I.C.J. II.<sup>170</sup> Probably because of this, there have been no instances in the current period of state defiance of the court's authority. However, this deserves a cautionary note as well. In many of the cases exhibiting elements which were present in earlier instances of defiance, the cases were resolved in favor of the respondent state; thus effectively removing any reason for the respondent state to defy the court.

Similarly, the court's compulsory jurisdiction has not been put to any severe test. It has served in both optional clause jurisdiction and in

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168. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.; Serbia & Montenegro), I.C.J. Communiqué No. 95/21, July 19, 1995.

169. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.; Serbia & Montenegro), I.C.J. Communiqué No. 96/3, Feb. 6, 1996.

170. See generally *supra* note 23.

compromissory clause jurisdiction, when states seem predisposed toward dispute settlement, and when the desired settlement is a legal one. While there is no particular reason for pessimism over the compulsory jurisdiction of the court, as there was during I.C.J. II, there is no particular reason for extreme optimism either. The court has simply not seen cases where one state is attempting to *force* another into litigation through the use of the court's optional compulsory jurisdiction. Recent cases certainly give no reason to try to increase the court's power of compulsory jurisdiction. Compulsory jurisdiction works well enough in its present optional form and would probably not work if attempts were made to institute mandatory compulsory jurisdiction.

For reasons that may have to do with the end of the Cold War and an accompanying sense of legal idealism, the current period of the I.C.J. has been one wherein states have exhibited a concern for the lawful settlement of disputes. Moreover, the disputes have been of high salience, involving as they have, matters that have often been the subject of open hostilities. In the matters presented before it, both in chambers and in the full court, the court has been quite successful in performing its role of dispute settlement. At this juncture there is no way of knowing whether the current sense of lawfulness among states will outlive the post Cold War period of legal idealism, or whether it will come to an end like those periods of legalism which followed the two world wars. We can only be hopeful that we are witnessing a trend toward international lawfulness and not merely witnessing another cycle in the history of the World Court.