The Changing Process of International Law and the Role of the World Court

J. Patrick Kelly
Widener University School of Law
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INTRODUCTION

Over the last several months, both the United States and a new player on the international legal stage, the Soviet Union, have made announcements about submitting disputes to the World Court. Both countries have indicated an interest in doing so when the meaning of certain multilateral treaties that contain provisions referring disputes to the World Court is involved. Neither country is suggesting that it would accept the compulsory jurisdiction of the Court. A declaration accepting compulsory jurisdiction would expose each nation to broad categories of disputes involving uncertain and contested principles of customary international law.

This hopeful but modest step must be contrasted with the recent U.S. withdrawal of its declaration accepting the compulsory jurisdiction of the World Court and its withdrawal from the proceedings in

* Associate Professor, Widener University School of Law; Director, Nairobi International Law Institute; J.D. Harvard Law School, 1972.

3. States accept the compulsory jurisdiction of the International Court of Justice by filing a declaration recognizing, in advance, the Court's jurisdiction for matters included within the declaration and not specifically reserved. Statute of the International Court of Justice art. 36(2). It provides:

   The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
   (a) the interpretation of a treaty;
   (b) any question of international law;
   (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
   (d) the nature or extent of the reparation to be made for the breach of an international obligation.

Jurisdiction may be conferred on the Court in three ways: by compulsory jurisdiction, by a special agreement between the parties, or by a provision within a treaty referring disputes concerning the treaty to the Court. Id. art. 36; see also 1984-85 I.C.J.Y.B. 54-57 (1985) (explaining bases of Court's jurisdiction).


These actions have precipitated a crisis of confidence in the Court and stimulated a small cottage industry of books and law review articles addressing the question whether the United States should, in some measure, re-accept the compulsory jurisdiction of the Court.

The underlying premise of the vast majority of these writers is that increased participation in the World Court will help resolve many types of disputes and thereby promote respect for the Court and international law. A new declaration by the United States, however, would be a triumph of form over substance. The United States has never effectively accepted the compulsory jurisdiction of the Court and many proposals to re-accept it are similarly illusory.

More importantly, the compulsory jurisdiction system assumes a level of agreement on both the substantive content of customary international law and on the process of norm creation that does not exist in the modern world. A shared perspective on the content and process of international law, if it ever existed, has evaporated in the twentieth century. The new nations of the Third World, representing the majority of the world's people, have posed two fundamental challenges to the structure of international law. First, they argue that they are not bound by customary norms to which they have never consented and have specifically opposed, and second, they argue that U.N. resolutions are a new source for creating international legal norms. In such a maelstrom, it is not simply that the application of international law is difficult to predict — the substantive norm to be

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7. See, e.g., T. Franck, Judging the World Court (1986); The United States and the Compulsory Jurisdiction of the International Court of Justice (A. Arend ed. 1986) [hereinafter Compulsory Jurisdiction]; The International Court of Justice at a Crossroads (L. Damrosch ed. 1987) [hereinafter Crossroads]. In a related book Richard Falk more directly addresses the role of the Court in international law and the reasons for its disuse. R. Falk, Reviving the World Court (1986).


9. See infra text accompanying notes 67-77.

10. See infra text accompanying notes 78-79.

11. See infra Part III.

12. See infra Part IV.
applied is itself indeterminate.\textsuperscript{13}

The opinion by the majority of the World Court in the \textit{Nicaragua} case has exposed the underlying disagreements among nations about how international law is formed. There, the Court adopted the position, long advocated by Third World nations, that General Assembly resolutions may create norms of international law and that consent to such resolutions may be understood as acceptance of the stated norms' validity.\textsuperscript{14} While generally unnoticed in the furor over the Court's interpretation of the law of force, its process innovation may be, in the long run, more important and controversial.

The \textit{Nicaragua} case demonstrates that conclusions in international law about the content of norms depend upon the decisionmaker's perspective about customary international law and upon the theory of norm creation applied by the decisionmaker. Forcing the Court to articulate legal principles when there is no consensus, but, indeed persistent acrimony over the content and process of many areas of international law, misjudges the appropriate role of the International Court of Justice in the development of international law and would undermine rather than promote the goals of the various authors.

Two approaches have emerged in recent American literature as to the appropriate United States attitude toward the World Court: (1) the re-acceptance of compulsory jurisdiction with various reservations to preserve vital American interests; and (2) the preservation of the status quo premised on a perception that the World Court is biased or misguided, while promoting the United States government's perspective on international law.

This article argues that neither approach comes to terms with the wide disagreements about content and process in the international community. Both fail to promote the goals of an enhanced World Court or a better international legal order. The Court's compulsory jurisdiction cannot be saved by clever draftsmanship. Well-designed reservations offer hope for today's problem, but the Court's process innovation and fundamental disagreements about the content of many norms promise further cracks in a legal order facing a crisis of legitimacy.

\textsuperscript{13} This is not an indeterminacy inherent in legal reasoning or theory because legal rules are malleable, a point of view held by many critical legal studies adherents. See, e.g., Singer, \textit{The Player and the Cards: Nihilism and Legal Theory}, 94 \textit{Yale L.J.} 1 (1984); but see Stick, \textit{Can Nihilism Be Pragmatic?}, 100 \textit{Harv. L. Rev.} 332 (1986). Rather, the concern is that the rules themselves cannot be determined in many areas of international law because nations disagree about the content of the rules and the process of rule formation.

\textsuperscript{14} Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 99-100 (Merits: June 27).
A viable World Court and a more legitimate international legal order can only be accomplished by sovereign nations undertaking the difficult and painful task of redefining customary international legal principles through multilateral treaty negotiations. These goals cannot be accomplished by the World Court, nor will they be accomplished by the predominance of the perspective of any one nation or group of nations.

Part I introduces the proposals and perspectives regarding compulsory jurisdiction championed by American international law scholars and practitioners in several recent books and articles. Part II demonstrates that the United States has never effectively accepted the compulsory jurisdiction of the Court and argues that a number of the proposals for re-acceptance are similarly illusory. Part III addresses the numerous disagreements about the content of the norms of international law and the Court's limited capacity and authority to resolve these disagreements. Part IV discusses the fundamental disagreements about the legitimate processes of international law formation and the Court's process innovation in the Nicaragua case. Part V discusses the need for a universal jurisprudence in a world divided by the provincial perspectives of nations that manipulate principles for short-term ends. Finally, in Part VI, an evolution towards a more legitimate process of norm creation is suggested.

I. PROPOSALS AND PERSPECTIVES ON THE RE-ACCEPTANCE OF COMPULSORY JURISDICTION

In a series of recent books and articles, American international law scholars have discussed the merits of United States participation in the compulsory jurisdiction of the World Court. The explicit analysis includes various perspectives on the bias or objectivity of the Court, the degree to which certain subject matter is reserved for, or is more appropriately considered by, the Security Council than by the World Court, and the effectiveness of various techniques, such as reservations or special chambers procedures, in limiting the United States' exposure to an acceptable degree. Implicit in these suggestions, however, are assumptions about the content of international law and the accepted processes for its formation that are under challenge by the majority of nations of the world.

15. The formation of ad hoc chambers or panels of judges to decide specific disputes is authorized by article 26 of the Court's statute. The number of judges on the chamber is to be determined by the Court with the approval of the parties. Statute of the International Court of Justice art. 26. See Schwebel, Ad Hoc Chambers of the International Court of Justice, 81 Am. J. Int'l L. 831 (1987).
Thomas M. Franck, one of the most prolific and original thinkers about international law today, has written a useful and timely book, *Judging the World Court*. His volume surveys the history of the United States' participation in the compulsory jurisdiction system, delineates the advantages and disadvantages of international adjudication, and recommends a limited commitment to compulsory jurisdiction. Building a case for increased utilization of the Court, Franck points out that the United States remains subject to the Court's authority under more than 60 multilateral treaties that specifically refer disputes arising under them to the International Court of Justice. He argues that law and the legal process are conservative institutions that promote the United States' interest in the development of principled, consistent, normative behavior in areas such as the suppression of terrorism, freedom of the seas, and protection of foreign investments. He therefore recommends that the United States should re-accept the Court's compulsory jurisdiction subject to several important qualifications.

Noting that the United States is unwilling to relinquish control over its essential national interests, Franck would reserve from the Court's jurisdiction disputes involving hostilities, armed conflict, and individual and collective self-defense. Such a reservation would remove the Nicaragua situation, the invasion of Grenada, and other use of force incidents from the Court's compulsory jurisdiction. Franck would further qualify the declaration by permitting the United States, along with the other states party to a dispute, to choose the panel of judges through the special chambers procedure successfully used in the *Gulf of Maine case*, and to request the Court to render a decision limited to a declaration of applicable legal principles rather than to decide the dispute. He would, as would most of the authors in these collections, eliminate the self-judging Connally reservation that excludes matters of domestic jurisdiction "as determined by the United States."

16. T. FRANCK, supra note 7.
17. Id. at 28.
18. Id. at 65. While I agree that judicial settlement is in the United States' interest, Parts III and IV demonstrate that the conditions for consistent principled development of customary international norms are not yet present.
19. His proposal for a new declaration is found in Appendix B. Id. at 111-12.
The United States and the Compulsory Jurisdiction of the International Court of Justice\textsuperscript{22} and The International Court of Justice at a Crossroads\textsuperscript{23} are collections of specially commissioned papers by outstanding international legal scholars addressing the merits of the United States' participation in the compulsory jurisdiction system. Professor Sohn, understanding that the United States may not wish to limit its military options, would exclude disputes affecting the national security or those involving a state party to a collective security arrangement with the United States from compulsory jurisdiction.\textsuperscript{24} He counsels against the United States terminating its acceptance of jurisdiction as a relinquishment of leadership toward a better world. Sohn argues against any self-judging reservation because it could be used reciprocally by other nations to prevent jurisdiction in any litigation brought by the United States.

Professor Morrison, one of the counsel for the United States in Nicaragua v. United States, would exclude cases of armed hostilities and "matters which are properly exclusively within the jurisdiction of the Security Council."\textsuperscript{25} He finds that proposals to limit acceptance of jurisdiction to special chambers chosen by the parties are inconsistent with a general declaration accepting jurisdiction.\textsuperscript{26} The special chambers procedure could be utilized more effectively by an \textit{ad hoc} special agreement without compulsory jurisdiction. Such a procedure, he points out, is presently available to all nations, and would permit the parties to stipulate the exact question for decision.

Alone\textsuperscript{27} among the authors of these volumes, Professor Reisman would remove the United States from the compulsory jurisdiction of the Court.\textsuperscript{28} He argues that changes in both the Court's composition (more judges from Asia and Africa) and in the substantive law that reflect notions of distributive justice rather than effective power have

\textsuperscript{22} Compulsory Jurisdiction, supra note 7.
\textsuperscript{23} Crossroads, supra note 7.
\textsuperscript{24} Sohn, Compulsory Jurisdiction of the World Court and the United States Position: The Need to Improve the United States Declaration, in Compulsory Jurisdiction, supra note 7, at 15-16.
\textsuperscript{25} Morrison, Potential Revisions to the Acceptance of Compulsory Jurisdiction of the International Court of Justice by the United States of America, in Compulsory Jurisdiction, supra note 7, at 61.
\textsuperscript{26} Id. at 59-60.
\textsuperscript{27} Rostow in his article is unclear on this point. See Rostow, Disputes Involving the Inherent Right of Self-Defense, in Crossroads, supra note 7, at 264. A few other American international legal scholars have similar concerns, but would protect United States interests through reservations or the use of special chambers procedures. See Leigh and Ramsey, Confidence in the Court: It Need Not Be a Hollow Chamber, in Crossroads, supra note 7, at 106.
\textsuperscript{28} Reisman, Termination of the United States Declaration Under Article 36(2) of the Statute of the International Court, in Compulsory Jurisdiction, supra note 7, at 73.
led to a decline in United States influence at the Court. The only practical option, he asserts, in these circumstances, is withdrawal from the Court's compulsory jurisdiction. The United States government arrived at a similar conclusion in its statement explaining the U.S. withdrawal from the *Nicaragua* case, but in less temperate tones. The statement accused the Court of "misreading and distortion of the evidence and precedent."

In a recent article criticizing the *Nicaragua* decision, Reisman has gone so far as to question the desirability of the United States' continued participation in treaty regimes that refer disputes arising under the treaty to the Court. He is concerned that the Court's interpretation of its jurisdiction in the *Nicaragua* case may portend an expansive interpretation of the subject matter of such treaties that has heretofore limited the jurisdiction of the Court.

In *Messianism and Chauvinism in America's Commitment to Peace through Law*, Thomas Franck and Jerome Lehrman argue that there have been two conflicting traditions of American attitudes toward international adjudication, each of which found expression in the U.S. Declaration. The messianic vision, which states that disputes should be settled by law rather than war, appeared to triumph with the passage of the Declaration. Yet, the chauvinistic tradition of untrammeled sovereignty found expression in the Connally Reservation undermining the commitment of the United States to compulsory jurisdiction. The authors argue that, to achieve the messianic goals, its proponents must find appropriate substantive areas for international adjudication and must design tribunals whose judges will give fair consideration to American interests.

Professor Leo Gross analyzes the frequent use of reservations by

29. *Id.* at 86-94.


33. *Statute of the International Court of Justice* art. 36, para. 1.


37. *Id.* at 18.
states and finds the Court’s treatment of them thorough and objective.\textsuperscript{38} He observes that the United States could have avoided the \textit{Nicaragua} adjudication by the thoughtful use of reservations without abandoning its traditional role in promoting peace through law. Monroe Leigh and Stephen D. Ramsey in their paper, \textit{Confidence in the Court: It Need Not Be a Hollow Chamber},\textsuperscript{39} argue that the changing composition of the Court to achieve geographic diversity has led to a perception that the Court is a political, rather than a judicial, body that acts contrary to U.S. interests. In order to remedy this perceived partisan character, they propose a U.S. declaration accepting jurisdiction only with regard to disputes submitted to \textit{ad hoc} special chambers composed of members acceptable to the parties.\textsuperscript{40}

In light of the arguments by Michael Reisman, Leigh and Ramsey, and the Administration,\textsuperscript{41} that U.S. interests are not being reviewed objectively by the Court, Edith Brown Weiss’ empirical analysis of the voting records of judges is instructive.\textsuperscript{42} After reviewing earlier studies on the voting patterns of judges, Weiss then analyzed the votes of all final decisions in contentious cases. She concludes that the record does not indicate that the Court is biased against the United States or that it is unduly politicized or factionalized into blocs.\textsuperscript{43} The data reveals a high degree of consensus among the judges. If the \textit{Nicaragua} case is excluded, the average correlation of votes by national judges with votes by the United States judges from 1966 to 1986 is 79\%.\textsuperscript{44} Weiss states that the \textit{Nicaragua} decision may represent a relatively unusual disagreement between the judges and the views of the United States government. Comparing statistical studies of both the U.S. Supreme Court and the U.N. General Assembly that demonstrate a persistent alignment of voting behavior, she finds that the voting record of the International Court of Justice does not indicate that the judges vote in any predetermined way.\textsuperscript{45}

Richard Bilder analyzes the advantages (dispositive, impartial, principled, authoritative, depoliticizing, precedential, and system rein-

\textsuperscript{39} Leigh and Ramsey, \textit{supra} note 27, at 108.
\textsuperscript{40} \textit{Id.} at 117-22.
\textsuperscript{41} \textit{U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice}, \textit{supra} note 5.
\textsuperscript{42} Weiss, \textit{Judicial Independence and Impartiality: A Preliminary Inquiry}, in \textit{CROSSROADS}, \textit{supra} note 7, at 123.
\textsuperscript{43} \textit{Id.} at 134.
\textsuperscript{44} \textit{Id.} at 129.
\textsuperscript{45} \textit{Id.} at 132-33.
forcing) and the disadvantages (chance of losing, unpredictable, arguably insufficiently impartial, imposed, adversarial; and often ineffective) of international adjudication.\textsuperscript{46} He does not believe that the decision in the \textit{Nicaragua} case or in any other case has been the result of bias for or against a particular party.\textsuperscript{47} He concludes that the benefits to the U.S. national interest of accepting compulsory jurisdiction far outweigh the risks and that appropriate reservations can be drawn to protect it from particular risks which are deemed unacceptable.\textsuperscript{48}

The \textit{Crossroads} volume also addresses whether certain kinds of disputes (political or armed conflict) are inappropriate for judicial resolution by the Court and whether certain disputes are more properly within the primary responsibility of the U.N. Security Council as asserted by the United States in the \textit{Nicaraguan} case. Professor Gordon finds that Article 36(2) of the Court’s statute granting jurisdiction in “all legal disputes”\textsuperscript{49} is descriptive of the categories of disputes, including any question of international law, rather than a limitation on the type of international law questions that the Court may hear.\textsuperscript{50} Thus, he concludes that the Court’s statute does not distinguish between acceptable legal disputes and those that are beyond its institutional capacity.\textsuperscript{51}

Oscar Schachter reviews the thirteen cases involving the use of armed force brought before the Court, including eight brought by the United States against unwilling respondents.\textsuperscript{52} He concludes that cases involving the use of force have proven suitable for adjudication and questions of national security should not be considered non-justiciable if they also present legal questions.\textsuperscript{53} He notes, for example, that the Court in the \textit{Tehran Hostages Case}\textsuperscript{54} rejected Iran’s political dispute defense to the advantage of the United States.

Domingo Acevedo, the Principal Legal Advisor with the Secretariat for Legal Affairs of the Organization of American States, analyzes disputes before the Security Council and regional organizations such

\textsuperscript{46} Bilder, International Dispute Settlement and the Role of International Adjudication, in \textit{Crossroads}, supra note 7, at 155.
\textsuperscript{47} Id. at 168 n.40.
\textsuperscript{48} Id. at 178-79.
\textsuperscript{49} Gordon, Legal Disputes Under Article 36(2) of the Statute, in \textit{Crossroads}, supra note 7, at 222.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Schachter, Disputes Involving the Use of Force, in \textit{Crossroads}, supra note 7, at 223.
\textsuperscript{53} Id. at 241.
\textsuperscript{54} Id. at 226.
as the Organization of American States. He concludes that consideration by such a political body does not make the dispute per se non-justiciable. The Court has taken a broad view of what constitutes a justiciable dispute, he reasons, and, therefore, a country that wishes to prevent adjudication of armed conflict should reserve such subject matter as have other countries.

Contrary to the positions of Gordon, Schachter, and Acevedo, Professor Eugene Rostow views the Court's decision to take jurisdiction in the Nicaragua case as an attack on the primary responsibility of the Security Council for the maintenance of international peace. He asserts that the Court does not have the authority to pass on the legality of the use of force since this judgment is left by the Charter to the Security Council. Rostow views this diminution of the veto rights of the permanent members of the Security Council as a usurpation of power by the Court. He concludes that this justifies the termination of compulsory jurisdiction by the United States.

In their paper, United States Experience at The International Court of Justice, Anthony D'Amato and Mary Ellen O'Connell examine the history of United States' participation before the Court in thirteen contentious cases and fourteen advisory opinions. Their study demonstrates that the U.S. position has prevailed in the vast majority of cases before the Court. Furthermore, the United States has successfully used the Court to galvanize world opinion to the U.S. viewpoint in a number of cases, most particularly in the Tehran Hostages case and the Advisory Opinion on Admission of a State to the United Nations, much like Nicaragua used the Court in the Nicaragua case. D'Amato and O'Connell argue that the Nicaragua case should be put in the

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55. Acevedo, Disputes Under Consideration by the U.N. Security Council or Regional Bodies, in CROSSROADS, supra note 7, at 242.
56. Id. at 262.
57. Id. at 263.
58. Rostow, supra note 26, at 277.
59. Id. at 277; but see Schachter, supra note 52, at 234-35 (quoting Judge Schwebel's opinion in Tehran Hostages and the Statement of the Legal Advisor of the Department of State to the effect that action by the Security Council does not exclude action by the Court); see also Chayes, Nicaragua, The United States, and the World Court, 85 COLUM. L. REV. 1445 (1985) (argues that Nicaragua's claims should not be barred as a political question either under an article III constitutional analysis or from the perspective of the World Court).
60. D'Amato & O'Connell, United States Experience at the International Court of Justice, in CROSSROADS, supra note 7, at 403.
broader and positive perspective of the previous 40 years.\textsuperscript{63}

In recent articles, Professor D'Amato has clearly expressed his view that the U.S. should re-accept, by a new declaration, the compulsory jurisdiction of the Court, albeit limited by reservations to protect American interests.\textsuperscript{64} Nevertheless, D'Amato is particularly troubled by the Court's use of United Nations resolutions which he views as exhibiting a misunderstanding of the nature of customary law.\textsuperscript{65} He argues that customary law arises out of state practice, not from political documents such as U.N. resolutions,\textsuperscript{66} and that there is state practice to support a number of categories of intervention.\textsuperscript{67} Here is the beginning of a recognition that there may be a greater problem in the international legal order than a temporary concern about the bias of a particular Court panel or the inappropriate exercise of jurisdiction by the Court.

II. THE VIABILITY OF COMPULSORY JURISDICTION

All of the international legal scholars mentioned above, with the exception of Michael Reisman and perhaps Eugene Rostow, favor the United States' re-acceptance of the Court's compulsory jurisdiction, qualified by various reservations to protect vital American interests. This appears to be the overwhelming sentiment of our nation's most distinguished international law scholars.\textsuperscript{68} The inchoate hope is that greater participation in the compulsory jurisdiction system will increase utilization of the Court and thereby expand international legal doctrine and respect for international law. History belies such a prospect.

Despite appearances to the contrary, the United States has never effectively accepted the Court's compulsory jurisdiction, and arguably, neither has any other major country. The Connally Reservation, which excludes domestic jurisdiction matters from the Court's jurisdiction, permits the United States to determine for itself whether the dispute is a domestic one. This reservation is well known and de-

\textsuperscript{63} D'Amato & O'Connell, supra note 60, at 421-22.
\textsuperscript{64} See D'Amato, supra note 8.
\textsuperscript{66} \textit{Id.} at 102.
\textsuperscript{67} \textit{Id.} at 103.
\textsuperscript{68} See Letter from Anthony D'Amato and Keith Highet in N.Y. Times, Feb. 1, 1986, at 26, col. 4 (on behalf of over 40 of the most distinguished American scholars and experts on international law expressing the view that "... the U.S. should re-establish its long standing commitment to international law and the peaceful settlement of international disputes by carefully considering the adoption of a new or amended instrument of adherence to the World Court's compulsory jurisdiction").
nounced by Franck, Sohn, D'Amato, and others. It is less well known that the United States has, on two occasions, used this reservation arbitrarily to oust the Court from jurisdiction in international matters, not domestic ones.

In the *Interhandel* case, the government of Switzerland argued on behalf of a Swiss corporation that the release of the corporation's assets in the United States was required by a multilateral agreement. The United States invoked the Connally Reservation and argued, "this determination . . . is not subject to review or approval by any tribunal. It [the exercise of the reservation] operates to remove definitively from the jurisdiction of the Court the matter it determines. After the United States of America has made such a determination . . . the subject-matter of the determination is not justiciable."

In the *Aerial Incident* case, the United States sued Bulgaria for violations of international law in the downing of an Israeli aircraft with U.S. citizens on board. Bulgaria raised the Connally Reservation reciprocally as a defense to prevent the Court's jurisdiction. Thereupon, the Legal Advisor to the State Department, on behalf of the United States, asked the Court to dismiss the proceeding rather than have the Court place a good faith limitation on the reservation. The Legal Advisor's letter to the Court made it clear that the United States' position is that it is an escape hatch from the Court's jurisdiction. The letter stated "[A] determination under [the Connally] reservation . . . that a matter is essentially domestic constitutes an absolute ban to jurisdiction irrespective of the propriety or arbitrariness of the determination."

D'Amato, as have others in the past, argues that the Court could exercise its powers to limit the reservation to a reasonable invocation. However, the legislative history of the reservation suggests that no such good faith limitation was intended. The Senate Foreign Relations Committee in opposing such a reservation warned that this limitation was illusory. As indicated above, the United States gov-

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72. 1960 I.C.J. Pleadings 677 (letter of May 12, 1960 from Legal Advisor to Department of State to Registrar of Court).
73. *CROSSROADS*, supra note 7, at 413.
75. See Kelly, supra note 8, at 356.
ernment has argued before the Court its view that the reservation may be invoked arbitrarily and its determination is not justiciable.

The World Court, unlike a domestic court, acquires jurisdiction only to the extent a sovereign state has consented to jurisdiction in its declaration. The inescapable conclusion both from the legislative history and the history of the reservation's use is that the United States never granted the Court the jurisdiction to decide the meaning of the term “domestic jurisdiction.” Judge Lauterpacht had it right thirty years ago in his separate opinion in the Interhandel case when he wrote, “it is impossible for the Court to apply the reservation [Connally] in question . . . [because], in consequence thereof, the instrument [U.S. Declaration] in which it is contained is not an instrument conferring legal rights and creating legal obligations.”

A declaration without such a self-judging reservation would, of course, remove the impediment to validity found in the now withdrawn declaration. However, it is unlikely that a government which has never fully accepted compulsory jurisdiction in the first place would eliminate such an escape hatch under an administration that perceives the Court to be biased against it and fundamentally wrong in its interpretation of international law.

The scholars who propose a new declaration qualified by the special chambers procedure must perceive that an effective declaration will not be forthcoming. The proposals by Thomas Franck, Monroe Leigh, and others, to permit the United States to choose the panel of Judges would resurrect the Connally Reservation in a new guise. A reservation requiring the special chambers procedure would permit the United States or, reciprocally, the other party-litigant, to escape compulsory jurisdiction by rejecting the panel. If the co-litigant is a nation with a different perspective on the content and process of international law, agreement on a panel is unlikely. If the co-litigants have similar perspectives, then, as Professor Morrison suggests, jurisdiction is essentially voluntary and could have been obtained under the special agreement procedures of article 36(1) without the pretense of compulsory jurisdiction.

Moreover, an examination of the practice of other nations reveals

78. Interhandel (Switz. v. U.S.) 1959 I.C.J. 6106 (Mar. 21) (dissenting opinion of H. Lauterpacht) (Court dismissed the complaint for failure to exhaust local remedies without reaching this issue).
79. See supra note 30.
80. COMPULSORY JURISDICTION, supra note 7, at 59-60.
the historical decline of compulsory jurisdiction. Nearly all existing declarations filed with the Court are so hampered by reservations and conditions that only a handful of nations could be held to compulsory jurisdiction. Twenty-one of the forty-six declarations are terminable upon notice. The United Kingdom, the only permanent member of the U.N. Security Council still accepting compulsory jurisdiction, has twice terminated its declaration to substitute a more restrictive one in order to avoid potential adjudication. Many of the other declarations contain reservations severely restricting either the subject matter or the time period of disputes subject to adjudication. The major economic and military powers, including France, the Soviet Union, Japan, China, and West Germany, are not members of the compulsory jurisdiction system.

One further dose of realism is in order. Respondents in the last eight contentious cases, not based on a voluntary special agreement, have chosen either not to appear at some stage of the proceedings or not to comply. This is not to say that international adjudication is not a valuable dispute resolution technique. It has frequently been successful on an ad hoc voluntary basis under article 36(1) of the Court’s statute. The United States government has referred several such disputes to the Court in recent years. Rather, compulsory jurisdiction has not worked in practice; indeed it has never been tried.

III. THE LACK OF AGREEMENT ON SUBSTANTIVE NORMS AND THE ROLE OF THE COURT

One could be unpersuaded by this “Emperor Has No Clothes” form of argument if there were a reasonable prospect of the Court deciding disputes, elucidating international legal doctrine, and thereby enhancing respect for itself and international law. Contrary to the as-

82. See generally Kelly, supra note 8, at 351-61.
83. Id. at 352-54.
84. See Waldock, supra note 81, at 268; Merrills, supra note 81, at 94.
sumption of many of these authors, there are fundamental disagreements among nations about the substantive norms of customary international law and how such norms are made. These disagreements call into question the very legitimacy of the international legal order itself. It is both inappropriate and destructive to burden a powerless court with fundamental problems of law content and formation that are in the exclusive domain of sovereign states.

American and other domestic lawyers tend to view the World Court and, indeed, international law, through the prism of the United States Supreme Court and a domestic legal system with a written constitution and a history of shared values. These analogies are inapposite.

International law is created by the general consent of sovereign states as expressed in customary rules of international law and in treaties specifying legal obligations between the parties. Lacking a central authority, legislature, or Supreme Court to articulate legal norms, international legal norms are created by the interactions of equal sovereign states. Customary law is created through consistent state practice accepted as law. While there is no generally accepted definition of customary law, it contains at least two crucial elements: (1) the quantitative element of state actions indicating that the asserted norm is the practice of states; and (2) a psychological element, the *opinio juris* requirement, by which states recognize that the norm is obligatory.

Since international law is the positive creation of sovereign states in order to limit their behavior in their perceived mutual self-interests, the role of the World Court, or any court, in developing international law is severely constrained. There is no institution with the authority to definitively articulate binding norms of international law. The articulation of new norms or the expansion of existing norms by a Court violates the consensual foundations of international law.

The existential conundrum of the international legal order is how it is possible to know the content of customary international law in a decentralized system without an authoritative institution to articulate norms. What weight should be given to the World Court’s conclusion

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87. See Statute of the International Court of Justice, art. 38, para. 1; see also 1 Oppenheim's International Law 25 (H. Lauterpacht ed. 1955).

88. See, e.g., A. D’Amato, The Concept of Custom in International Law, chs. 3-4 (1971).

89. The common consent of states, not the actual consent of each state, is thought sufficient. See I. Brownlie, Principles of Public International Law 6-7 (3d ed. 1979); Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law, 30 Brit. Y.B. Int’l L. 1, 68 (1953). But see G. Tunkin, Theory of International Law 211-16 (1974) (Soviet scholar and diplomat argues that a concordance of wills of states is required to create a norm).
that a given norm of customary international law exists? Does it matter that a state or a group of states asserts that such a norm does not exist? How does one resolve such a controversy? There are no objectively verifiable answers without a theory of how customary law is formed and of the relative weight of different types of state practice, international adjudication, and resolutions of the United Nations General Assembly.

Unfortunately, different nations have different perspectives on how norms are formed, on what kinds of actions constitute state practice, and on how one determines whether the stated norm is obligatory \textit{(opinio juris)}. There is no commonly accepted understanding of any of these concepts.

Apart from these theoretical problems with the Court assuming an important law-creating function, there are a number of significant practical legal problems.

1. The Court lacks the legal authority to perform a major law-creating function. Article 38 of the Court's statute requires the Court to apply international law that is defined by the actions of states. Even this modest recognition is limited by article 59 which declares that decisions of the Court have no binding force except between the parties. There is no doctrine of \textit{stare decisis} at the Court.

2. The Court's jurisdiction is limited and consensual, characterized by a reluctance to extend jurisdiction when none has been specifically conferred. Under the Court's statute, states confer jurisdiction by \textit{ad hoc} special agreements concerning a particular dispute or by prior consent either through declarations accepting compulsory jurisdiction or by specific treaties referring disputes to the Court. With a severely limited jurisdiction, the Court is necessarily a passive, reactive institution dependent on nations to refer disputes. Few states have chosen to do so.

3. The jurisprudence of the Court has been severely limited by the reluctance of states to submit disputes. Only forty disputes have

90. \textsc{Statute of the International Court of Justice}, art. 38, para. 1.
91. \textit{Id.} art. 38, para. 1(d).
92. \textit{Id.} art. 59. The Court often cites its former cases. However, they are not considered conclusive evidence of the law. \textit{See} Waldock, \textit{General Course on Public International Law}, 106 \textit{Recueil des Cours} 1, 91-92 (1962).
93. \textit{See} H. \textsc{Lauterpacht}, \textit{The Development of International Law by the International Court} 91 (1958).
94. \textsc{Statute of the International Court of Justice}, art. 36.
been submitted in forty years.95

There is, of course, inherently some discretion in the process of law finding either through interpreting treaties or finding and defining custom. However, the source of the norms to be interpreted is the states that have consented to the norm in a treaty or created the norm through the process of customary international law, not decisions of the World Court. Decisions of the Court bind the parties, but such decisions are declarative of international law only to the extent that the opinions accurately reflect custom or treaties created by the positive acts of states.

The Nicaragua case,96 which is the genesis of this debate, raises the fundamental disagreement between the United States government and the majority of nations about the broad substantive area of the use of force. The circumstances of the case itself involved the confluence of the prohibition against the use of force found in article 2(4) of the United Nations Charter97 and the principle of collective self-defense contained in article 51.98 The Court determined that the Multilateral Treaty Reservation in the U.S. Declaration excluded claims under the U.N. Charter and the Charter of the Organization of American States, but did not bar claims under customary international law and other sources.99

The United States in defending its activities against the Nicaraguan government argued that the mining of the harbor, arming of the Contras, and other activities were the permissible exercise of the right of collective self-defense in protection of El Salvador, Honduras, and Costa Rica.100 In order to invoke the right of collective self-defense, the Court required that El Salvador be the victim of an “armed attack” which must involve the sending of armed forces across international boundaries or a similar threat to the political integrity of El Salvador.101 This is contrary to the U.S. government’s position that indirect aggression by Nicaragua, Libya, or other nations justifies an armed intervention by the United States regardless of whether an

95. I.C.J. cases are counted in different ways, because one dispute may involve several applications. Professor Gross lists forty contentious cases, excluding “unilateral arraignments,” in which the applicant knew there was no basis for jurisdiction. See generally Gross, Compulsory Jurisdiction Under the Optional Clause, in CROSSROADS, supra note 7, at 19-57.


97. U.N. CHARTER art. 2., para. 4.

98. Id. art. 51.


armed attack has occurred.\textsuperscript{102}

The World Court rejected the justification of collective self-defense by a vote of twelve to three and decided, by a similar vote, that the training, arming, equipping, financing, and supplying of the Contras by the United States violated its obligation under customary international law not to intervene in the affairs of another state\textsuperscript{103} and not to use force against another state.\textsuperscript{104} By a vote of fourteen to one, the U.S. judge dissenting, the World Court found that the United States had breached its obligation under the Treaty of Friendship, Commerce, and Navigation with Nicaragua and its obligation to warn of the existence and location of the mines.\textsuperscript{105}

The breadth of this disagreement should not be underestimated. The United States government's view about the appropriate use of force is diametrically opposed by the overwhelming majority of judges on the World Court including a number of Western judges. Without the participation of the United States at the merits stage, we lack a clear articulation of the U.S. view on when the use of force is permitted. However, statements by U.S. officials and actions by the U.S. government indicate a view that an actual armed attack is not required to justify intervention and that retaliation for terrorist attacks including preemptive action will be taken.\textsuperscript{106}

There are also a number of indications that the United States' disagreement with the World Court on the content of the law of force extends beyond the doctrine of self-defense. The Court in its judgment examined other justifications for armed intervention to ensure that it was not overlooking a defense that the United States might have presented if it participated in the merits phase.\textsuperscript{107} The Court specifically rejected any new right of intervention in support of an opposition


\textsuperscript{103} Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 146 (Merits: June 27).

\textsuperscript{104} \textit{Id.} at 147.

\textsuperscript{105} \textit{Id.} at 147-48.

\textsuperscript{106} See supra note 29.

force within another state or past U.S. justifications for interventions in connection with a state's ideology or domestic policy.

The Court placed particular emphasis on the principle of non-intervention, defining it as prohibiting states from intervening directly or indirectly in the internal or external affairs of other states, including coercion to affect the choice of a state's political, economic, social and cultural system. The Court also explicitly rejected intervention to enforce or ensure respect for human rights in Nicaragua and to enforce a legal commitment made to the Organization of American States.

D'Amato and O'Connell excoriate the President of the World Court, Judge T. O. Elias, for denouncing the invasion of Grenada as contrary to the rule of law. For these authors, it is one of several indications of possible bias. What is most telling about that interview, and indeed a startling revelation in the Court's opinion, is that the views of the majority of members of the World Court on a whole range of law of force issues are far different from those of the U.S. government. As Judge Elias' remarks suggest, the disagreement extends beyond the concept of self-defense to include the extent to which customary forms of intervention have survived the U.N. Charter. Indeed, the views of the U.S. government on intervention are at variance with those of many Western international law experts and most governments of the world. Even the Report of the Ad Hoc Committee on

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108. Id. at 109-10.
109. Id. at 109. It is unclear whether the Court was directing its comments at statements of the U.S. government such as that of Ambassador Kirkpatrick. See Kirkpatrick, supra note 10; see also Reisman, Coercion and Self-Determination: Construing Charter Article 2(4), 78 AM. J. INT'L L. 642, 643-44 (1984); M. McDougal & F. Feliciano, LAW AND MINIMUM WORLD PUBLIC ORDER (1961). The discredited Brezhnev Doctrine is a similar ideological assertion of a right to intervene. Text of Pravda Article Justifying Invasion of Czechoslovakia, N.Y. Times, Sept. 27, 1968, at 3, col. 1, reprinted in 7 I.L.M. 1323 (1968).
111. Id. at 130-35. But see Teson, Le People C'est Moi! The World Court and Human Rights, 81 AM. J. INT'L L. 173 (1987) (author wishes to preserve "right" to intervene for human rights purposes, but agrees that the Nicaragua situation, on these facts, does not justify use of force).
112. D'Amato & O'Connell, supra note 60, at 403-21.
116. The Security Council voted 11 to 1 (U.S. against) for a resolution condemning the inter-
Grenada, a committee of the American Bar Association’s Section of International Law and Practice, found that the United States intervention in Grenada was incompatible with the U.N. Charter, the Rio Treaty, and the Charter of the Organization of American States. Whatever the merits of these arguments, it is clear that the U.S. government’s position on a broad range of law of force issues is at variance with those of most nations of the world and is a minority view even within the U.S. international law community.

Asking Judge Elias to recuse himself would not alter the large discrepancy between the U.S. government’s point of view on the law of intervention and that of other nations of the world whose views are reflected on the World Court. Given the trend toward geographic balance, even replacing Judge Elias on the Court would have little effect. Indeed all the Judges, except the Judge from the United States, Steven Schwebel, found that the United States had violated its bilateral treaty with Nicaragua, had failed to warn of the existence and location of the mines, and had an obligation to make reparations.

The general charges of bias against the Court are erroneous, as Edith Brown Weiss’ historical analysis and the overwhelming vote of the Court, including the Western judges, suggest. The problem is not one of bias, but of different perspectives about international law and ultimately of values. Judges on the World Court, unlike U.S. Supreme Court Justices, reflect their country’s and their own experience. With many government officials and scholars from a larger pool of countries being appointed to the Court as judges, it is hardly surprising that the Court reflects a wider spectrum of views. The United States, the world’s largest military power, appears to intend to preserve its military option in world affairs and does not appear willing to accept interpretations of the law of force that limit its ability to do so. A reservation excluding armed hostilities, national security, or


120. Weiss, *supra* note 42.

121. See *Compulsory Jurisdiction*, *supra* note 7, at 152-53 (statement of Mahnoush Arsanjani, Legal Officer, United Nations Office of Legal Affairs).

122. See *supra* note 102; see also *U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice*, *supra* note 5, at 64.
other law of force issues would then be a necessary predicate to any new declaration.

Such a limited subject matter reservation will not solve the fundamental problem of different perspectives about the content of international law. In many other substantive areas, the rift between the U.S. view of international law and that of other countries is, at least, equally wide. During the recent redrafting of the Restatement of Foreign Relations, the standard of compensation for expropriation was hotly disputed. The reporters in the early drafts argued that the Restatement's (Second) formulation of prompt, adequate, and effective compensation (the Hull standard), while continuing to be the position of the United States government, could not be considered international law applicable to all cases of expropriation. Recent state practice and U.N. resolutions indicate that other factors must be considered in some circumstances. After pressure from the U.S. State Department and the private bar, the old Hull formulation was finally adopted in the Restatement (Third).

The position espoused by the vast majority of nations is far different than either position within the narrow American debate. Third World nations argue that there is no international minimum standard of compensation, rather it is a matter of domestic law. International legal scholars from the Third World challenge the traditional standard from a variety of different bases. This evolving debate is affecting Western international legal scholars, even though a modifi-
ocation of the traditional standard did not ultimately prevail in the Restatement (Third).

The international law of compensation for expropriation is at a stalemate, notwithstanding the positions of the U.S. government and the Restatement. These different points of view will inevitably find expression on the World Court. Several judges of the World Court have already argued in scholarly writings against the traditional international minimum standard. Judge Jiménez de Aréchaga, former President of the World Court from 1976 to 1979, has argued that the traditional standard has been altered by the Charter of Economic Rights and Duties and that actual practice indicates that compensation is now governed by the doctrine of unjust enrichment rather than a right of restitution. Judge Mohammed Bedjaoui of Algeria, recently reappointed to a new term, has argued that the international law of the protection of foreign property formed part of the justification for Western colonial domination and must be changed. If the World Court were to hear an investment dispute today, a triumph for the United States' view of prompt, adequate, and effective compensation would be unlikely at best.

The United States' assumption of the universality of its perspective on international customary law is a product of our cultural provincialism. Our debates about international law are primarily with ourselves. When we do interact with foreign nationals about the issues of customary international law, it is primarily with Western Europeans who for the most part share our perspective and our culture. Yet many of these rules, such as the standard of compensation for expropriation, are meant to be applied to the majority of mankind with whom there is little substantive interchange and even less acceptance.

IV. The Court and Disputes About the Process of Norm Creation

Perhaps even more damaging than disagreements about the content of international law to the prospect of effective compulsory jurisdiction, is the disagreement about the process of how international law is formed. Most of the disputes about the content of international law occur in areas where norms are defined by customary international

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law. Under traditional Western international legal theory, customary law is the major source of international law. Custom, as evidenced by state practice accepted as law, has been seen as the triumph of positivism, because it is formed by the observable acts of states that are responsible for its creation. Unfortunately, for those who desire a rational system of international law, customary law is medieval in its complexity and ethereal in quality.

The content and scope of customary international law is often uncertain, permitting states to disagree about its existence, content, and scope. Custom may be the product of numerous state practices, not necessarily consistent and frequently unaccompanied by a statement describing the norm with any precision. Furthermore, it is not clear when in time state practice hardens into a rule of international law. Is contrary state practice a violation of custom or evidence of a new custom? Nor is there agreement about which states are bound by a particular custom. While the consent of states is at the root of custom, they need not specifically consent. Silence may be read as acquiescence, and the silent state bound.

Dwarfing the uncertainties about content are questions concerning the articulation of international law. Who determines whether a practice has hardened into a custom; who determines what the content of that custom is; and who determines if a custom has been replaced or modified? These questions raise different aspects of our existential conundrum — how does one know the content of custom when there is no authoritative institution to articulate norms? In a decentralized system, there are a cacophony of conflicting state voices. Such a system is ripe for manipulation and posturing. This is precisely what is occurring in our present international legal order.

The difficulties in defining norms extend far beyond the ambiguities of international customary law. They include disagreements about the fundamental processes of law formation in the international system. The emergence of the newly independent nations of the Third World has created two serious challenges to the structure of international law.

133. Custom has been seen as the original source of most international legal principles and of the concept that treaties are binding. See 1 Oppenheim, supra note 87, at 24-28, 880-81.


136. See, e.g., Waldock, supra note 92, at 1, 49-50 (customary law is not a form of tacit treaty, but rather an independent process applicable to all); J. Briery, The Law of Nations 51-53 (6th ed. 1963).

tional law that cannot be resolved by simplistic assumptions. First, they argue that new nations are not bound by norms of international law to which they have never consented and have consistently opposed as against their interests. Second, they assert that U.N. resolutions may create or modify norms of international law.

Under traditional Western theory, new states are bound by existing norms of international law. Such nations must take the obligations of statehood along with its privileges. This "bitter with the sweet" notion is articulated as a corollary to the universal character of customary law, but is not itself a norm of international law. Rather, it is a rule of convenience that helps create uniformity in the international system. While it may have a certain persuasive quality when a lone state enters the ranks of sovereign equal states, it loses much of its force when the new states are in the majority. The non-consenting states are then arguably bound to norms created by a minority of states. Such a rule of convenience creates an inequality between those states that consented to a norm and those that did not because they did not exist.

The inequality is even more pronounced if one accepts the concept of the persistent objector. Under this concept, a nation is not bound to a norm of customary international law, if it objects to the norm during the period of its formation and consistently thereafter. This concept has little support in state practice. It was recently resurrected in the Restatement of Foreign Relations (Third), even though there was no similar concept in the Restatement (Second). If one accepts the principle of the persistent objector, an additional inequality is added. New nations are bound by old rules of custom, such as the international minimum standard for expropriation, even though some older states may have objected to the norm during its formation and therefore are not bound.

The prime advantage of such an approach is that it prevents the

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138. See Waldock, supra note 92, at 52; Restatement (Third), supra note 127, § 102, comment d and § 206, comment a.
139. See Waldock, supra note 92, at 52-53.
140. See Stein, The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law, 26 Harv. Int'l L. J. 457; Restatement (Third), supra note 127, § 102, comment d.
141. There is dicta supporting the concept in the Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18), but a paucity of evidence in state practice; see Stein, supra note 140, at 459-63.
142. Restatement (Third), supra note 127, § 102, comment d.
143. Only the issue of the role of an objecting state in preventing the rule of law from being formed was addressed. Restatement (Second) of Foreign Relations Law of the United States § 1, comment e (1965).
United States or a similar country from being bound by any change in international law if it consistently objects to the new norm. The result of this confluence of doctrine is that new nations are bound to norms to which they never consented, even though a single persistent objector may not be bound to such a norm, nor need ever be bound to a change in customary international law as long as it objects.

This anomaly is further magnified by the historical fact that the majority of nations representing the vast majority of people on the globe have come into existence after the formation of most international customary law. If this theory is to be accepted, in a nominally consensual system the majority of nations are bound even though they have never consented. Such a situation would be intolerable for the United States. The resurrection of the concept of the persistent objector in the new Restatement is testament to the fact that the United States insists that it will be bound only by consent. Yet, if new nations are bound because custom has become general or universal international law, how can a single objecting state not be bound by universal international law? What is non-consensual for new nations requires actual consent from a nation that would object. The emergence of developing nations has stretched the consensual theory of customary international law to the breaking point and has decreased the perceived legitimacy of the rules of customary law.

There is a second fundamental disagreement about the process of norm formation between most Western nations and the Third World. They differ sharply about the binding character and legal weight of United Nations resolutions. Many Western scholars view U.N. resolutions that are declarative of international law as evidence of the opinio juris that may play a role in the formation of international customary law. The intent of the states in voting for the resolution and the extent to which the vote was representative of the opinio juris commonus are important factors in weighing this evidence. Others, including Stephen Schwebel, the judge from the United States on the World Court and a former Legal Advisor to the State Department, argue that U.N. votes are only recommendations to members even when they appear to be declaratory of law in form. Before U.N. resolutions can be treated as law, they must be accompanied by actual state practice. Schwebel observes that U.N. representatives may not speak authoritatively for their governments and that states may vote

144. See, e.g., Schachter, supra note 134, at 117.
145. See id. at 117-23.
to please other members rather than with the intent of creating legal obligations.\textsuperscript{147} Prosper Weil, in his influential article, \textit{Towards Relative Normativity in International Law},\textsuperscript{148} argues that resolutions may represent a sociological and political trend, but “they do not constitute the formal source of new norms.”

Many nations of the Third World and their theorists argue that U.N. resolutions that are declarative of law may create legal obligations even for the states who did not vote for the measure.\textsuperscript{149} Sometimes this conclusion is reached through treating General Assembly resolutions as authoritative interpretations of the Charter.\textsuperscript{150} At other times, the same result is achieved by treating resolutions as the practice of the General Assembly implementing the goals of the Charter.\textsuperscript{151} Judge Mohammed Bedjaoui of the World Court has gone so far as to argue that U.N. resolutions with their democratic, equalitarian character are the preferred method for the progressive development of international law.\textsuperscript{152}

The practical result of this theoretical controversy has not necessarily been that Third World judges treat U.N. resolutions as creating legal obligations. Rather Third World judges, as well as some other judges, have become more willing to find that international customary law has been created or changed when there are U.N. resolutions on point.\textsuperscript{153} Such resolutions along with some state practice are more readily seen as creating international law when scattered or inconsistent state practice alone might not be sufficient.

It is this more facile use of U.N. resolutions in \textit{Nicaragua v. U.S.}, not the substantive law of the use of force, that is the central challenge posed by that opinion to the international legal order as envisioned by the United States. The majority opinion found by a vote of twelve to three that the United States by training, arming, equipping, financing, and supplying the Contra forces had acted in breach of its obligations under customary international law not to intervene in the affairs of another state or to use force against another state.\textsuperscript{154} It was necessary

\begin{footnotesize}
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\item \textsuperscript{147} \textit{Id.} at 302.
\item \textsuperscript{148} Weil, \textit{Towards Relative Normativity in International Law}, 77 \textit{A.M. J. INT'L L.} 413, 417 (1983).
\item \textsuperscript{149} Castaneda, \textit{The Underdeveloped Nations and the Development of International Law}, 1975 \textit{INT'L ORG.} 38, 47-48 (1961); M. BEDJAOUI, supra note 132, at 186-92.
\item \textsuperscript{150} Western Sahara, 1975 \textit{I.C.J.} 12, paras. 53-57 (Advisory Opinion of Oct. 16).
\item \textsuperscript{151} See 2 F. GARCIA-ARMADOR, \textit{THE CHANGING LAW OF INTERNATIONAL CLAIMS} 646 (1984); M. SORNARAJAH, \textit{THE PURSUIT OF NATIONALIZED PROPERTY} 120-23 (1986).
\item \textsuperscript{152} M. BEDJAOUI, supra note 132, at 138-44, 186-92.
\item \textsuperscript{153} Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 \textit{I.C.J.} 14, 99-104 (Merits: June 27).
\item \textsuperscript{154} \textit{Id.} at 146.
\end{itemize}
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for the Court to find a violation of customary international law rather than of article 2(4) of the U.N. Charter because the Multilateral Treaty Reservation in the U.S. Declaration excluded disputes arising under a multilateral treaty (U.N. Charter) unless all parties to the treaty affected by the decision are also parties to the case before the Court.\footnote{155}{Provided, that this declaration shall not apply to . . . (c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (a) the United States of America specially agrees to jurisdiction . . . ." Declaration Recognizing as compulsory the Jurisdiction of the Court, deposited Aug. 26, 1946, Cal. Stat. 1218, T.I.A.S. No. 1598, 1 U.N.T.S. 9.}

In finding these principles of customary international law, the Court relied principally on two General Assembly resolutions: the Declaration on Principles of International Law Concerning Friendly Relations,\footnote{156}{G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).} and the Definition of Aggression.\footnote{157}{G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).} The Court acknowledged that state practice was inconsistent, but found that consent to these resolutions was an acceptance of the validity of rules declared by the resolutions.\footnote{158}{The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves . . . . It would therefore seem apparent that the attitude referred to expressed an \textit{opinio juris} respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter. Nicaragua v. United States, 1986 I.C.J. at 100.} Never before had the Court so clearly indicated that U.N. resolutions that are declarative of principles of law may create law. Numerous questions arise as to whether acquiescing states as well as consenting states are bound, what juridical techniques are used to interpret resolutions, and how one determines which resolutions are entitled to such legal weight.

The Court's process innovation clarifies that the exposure of the United States to decisions of the World Court adverse to its conception of international law has become far wider than any reservations can cloak. Using U.N. resolutions in this manner will, of course, increase the legislative role of the General Assembly, thereby reducing the control of the United States and other Western nations over the formation of international law. More significant for our purposes, it would grant to the World Court a broad law-creating role through its interpretative function. What kinds of behavior are encompassed by broad resolutions? Does the U.N. Resolution on Permanent Sovereignty over Natural Resources change customary international law?
What is the effect of the Charter on the Economic Rights and Duties of States on the nations that abstained or opposed it?

These process differences between the Third World and Western nations are inconsistent and irreconcilable. They affect not only the institutional capacity of the World Court to resolve conflict; they also affect the perceived legitimacy of the invocation of international law by states in international conflict. American international law writers overstate both the efficacy of the World Court in such an environment and the extent to which customary norms are perceived by other states as legitimate.

The Weil article, which is in essence a plea for voluntarism against the tide of General Assembly majoritarianism, fails to grapple with the non-voluntary imposition of customary norms on a growing Third World. It is precisely this one-sided application of the positivist premise of consent that has the Third World flexing its muscles in these international institutions where its numbers have influence. It is this discordance despite the rhetoric of consent that makes one question the universality of customary international law.

V. TOWARD A UNIVERSAL JURISPRUDENCE

In his insightful volume, Reviving the World Court, Richard Falk examines the role of the World Court in the development of international law with the stated goal of strengthening international adjudication. Noting that Third World nations have risen to a majority position in the General Assembly and most U.N. organizations, he observes that such nations have rarely utilized the Court nor played a significant role in the development of its jurisprudence. He argues that the World Court will not be revived until non-Western judges develop a pluralistic normative jurisprudence that reflects the diverse cultures and ideologies of the world. This argument forms a prescient justification for the Court’s opinion in the Nicaragua case.

Falk’s methodology is to critically examine the judicial style of World Court opinions and the relationship of the Court to world opinion in the “big case” — a controversy of major significance among political actors that shapes the perceptions and attitudes of nations toward the World Court. He chooses, as examples, the Southwest Africa cases and advisory opinions, the Tehran Hostages case, and

159. Weil, supra note 148, at 420.
160. R. FALK, supra note 7.
161. Id. at 181.
the *Certain Expenses* Advisory Opinion.164

Most disturbing to Falk was the World Court's 1966 dismissal of the Ethiopian and Liberian petitions charging South Africa with violations of its obligations to the inhabitants of the territory of Southwest Africa under the League of Nations mandate. The Court took the extraordinary step of dismissing the petition, at the merits phase, for lack of a legal interest (standing) on the part of Ethiopia and Liberia even though the Court had implicitly dismissed the legal interest challenge at the jurisdictional phase of the proceeding.165 The decision was by a threadbare, statutory majority of 8-7 with the President of the Court, Sir Percy Spender of Australia, voting twice.166 There is a serendipitous quality to this result. Small changes in the composition of the Court permitted the dissenters in the first phase to write the majority opinion in the second phase, effectively reversing the decision.167

The Court's opinion is an example, for Falk, of how the judicial style and narrow perspective of the Court has significantly impaired its functioning and isolated it from the majority of nations. First, he observes that the technical, positivist majority opinion had the appearance of scientific objectivity, yet the dissenting opinion of Judge Philip Jessup of the United States persuasively made technical arguments to the opposite conclusion.168 Second, the Court lost an opportunity to promote a new normative jurisprudence in the context of a moral and political consensus against South Africa's actions.169 Third, in creating an expectation of a decision on the merits the Court created a rift between it and the political organs of the United Nations.170

Turning to the *Tehran Hostages* case, he criticizes the Court for avoiding the broader historical circumstances, such as U.S. complicity in the coup that placed the Shah in power, that form the larger political dimensions of the taking of hostages at the American embassy.171 Here one must have doubts about the Court's ability to acquire and assess the necessary evidence and its competence to make essentially

167. *Id.* at 46-47.
168. *Id.* at 108-10.
169. *Id.* at 136.
170. *Id.* at 50-55, 120.
171. *Id.* at 14, 153-56.
political judgments in such a broad context. The Court's opinion in the Nicaragua case, later lauded by Falk, illustrates the advantages of focusing on the legal issues in a dispute and defining rights and obligations that may limit behavior in the context of an ongoing dispute.

In the Certain Expenses advisory opinion, the General Assembly requested the Court's advice on whether the expenses for peacekeeping operations authorized by the General Assembly were "expenses of the organization" and therefore could be apportioned by the General Assembly. Both the Soviet Union and France opposed such an apportionment. In comparing the Court's opinion with its contemporary decisions in the Southwest Africa cases, Falk observes that "the members of the Court most associated with strict constructionism in the South West Africa dispute were the principal teleologists in Certain Expenses." He views this decision, despite its technical appearance, as embodying a broad constitutional expansion in the role of the General Assembly. This expansion, he argues, is contrary to the bargain struck at the San Francisco Conference during the formation of the United Nations giving the Security Council responsibility for peacekeeping operations. Here Falk's concerns are that (1) the narrow, technical judicial style of the opinion masks a fundamental change in the constitutional structure of the United Nations; and that (2) the Court is willing to make a large doctrinal leap to further Western hegemony in encouraging peacekeeping operations, yet is unwilling to make a smaller leap in interpreting South Africa's obligations to the inhabitants of South West Africa under the mandate.

The gravamen of his argument through these case studies is that the opinions contain an invisible jurisprudential paradigm that is positivist in legal style, Western in its use of sources, non-normative and obtuse in character, and indeterminant. The Western positivist judicial style makes the institution alien to non-Western cultures. The substance of the decisions grounded in Western hegemony creates an institution inhospitable to non-Western interests.

What is striking about his conclusion is that it is the mirror image of Reisman's argument that the changing composition of the Court has led to a bias against the United States. For Falk it is the Western control of the jurisprudential paradigm, i.e., the language of legal

174. Id. at 170-71.
175. Id. at 179-80.
debate, that has produced a bias in favor of Western nations. Similarly, the Falk criticism of the Certain Expenses opinion as changing the authority of the Security Council is mirrored in Rostow's argument that the Court in the Nicaragua case violated the San Francisco bargain by usurping the Security Council's primary responsibility for the maintenance of international peace. The characterization of the Court's decision appears to depend on whose ox is being gored. Neither form of pluralism, Third World normative jurisprudence or Western provincial jurisprudence will, in and of itself, advance respect for the Court or international law.

The Nicaragua case is testament to the fact that the Western hegemony at the Court that Falk finds evident in Certain Expenses, Southwest Africa, and Tehran Hostages has changed, if not reversed. Neither prospect is encouraging for a system of international law with universal application. To counter Western cultural control of the images, language, sources, and jurisprudence of the World Court, Falk proposed a normative pluralistic jurisprudence that will reflect the panhumanistic commitments derived from the principles in the U.N. Charter and the diverse cultural, ideological, and national perspectives throughout the world.

While sympathetic to Falk's intention of broadening the perspectives and sources available to the Court, the proposal for a normative pluralistic jurisprudence is a prescription for the disintegration of the Court not its revival. Which normative principles are to govern particular cases? How are broad principles such as self-determination, sovereignty, human rights, and the prohibition against the use of force to be reconciled in various contexts? How will nations be able to predict which principles will be applied and how they will be interpreted? Will not these broad norms be used to promote one point of view rather than another? A tilt toward one pluralistic paradigm, arguably South West Africa or Nicaragua, alienates one group of nations, raises questions of bias, and encourages the withdrawal of disaffected countries or groups of countries from the World Court. It will not increase the utilization of the Court or respect for international law.

Forcing the Court to choose among clashing pluralistic paradigms encourages the dissolution of international law. Decisions will be deemed incorrect, biased, and ultimately ignored as the United States is attempting to do with the Nicaragua decision. Moreover, a normative approach misjudges the institutional role of the Court. In a de-

177. Rostow, supra note 27.
178. Falk, supra note 7, at 190-91.
centralized consensual legal system, the World Court is not the proper institution to create the legal rules it must apply no matter what group of nations controls the Court. This is the proper domain of nation-states. If the Court were to set such a course, disaffected states would view its decisions as illegitimate and would neither comply with its decisions nor respect the articulated legal principles.

The Third World's primary concern is not that the World Court uses an alien process in an alien language. Most developing nations have domestic courts modeled after Western courts, and their lawyers and judges are often fluent in Western languages as well as indigenous languages. Their primary concern is that they perceive that the rules of customary international law reflect the West's self-interest, not their own, and that those rules have been imposed upon them without their consent. Nations not included in the process of norm formulation understandably view them as illegitimate and lack a commitment to many customary rules. The solution must be to increase the role of developing nations in the process of norm creation, not to politicize the Court. Professor Falk recognized the imperfect nature of his pluralistic proposal in his recent review of the Court's Nicaragua decision:

No other World Court judgment is as satisfying in the quality of its legal reasoning. . . . [t]he implicit legal hegemony of Western approaches and scholarship is nowhere evident, nor, it should be added, is there any swing, latent or manifest, to Third World or Marxist viewpoints. As such, the majority opinion is of great help to all sectors of world public opinion seeking to comprehend the contours of minimum world public order on matters of war and peace. The possibility of legal universalism has been powerfully validated.\(^\text{179}\)

The difficulty even with Professor Falk's revised approach is that it is universal in form, but pluralistic in effect. The fundamental substantive issue of the legality of U.S. actions under the U.N. Charter was within the competence of the Court. The Court thought, however, that this issue was foreclosed by the Multilateral Treaty Reservation limiting the United States' acceptance of compulsory jurisdiction. The Court chose to find a new principle of customary law and to perform this law declaring function by defining a new process of norm creation to which there is no general agreement among nations. A nation's vote for General Assembly resolutions became consent to the legal rules contained therein. This in no way justifies the actions of the United States government which the Court impliedly found violated the U.N. Charter and the OAS charter. Rather, it illustrates that cus-

\(^{179}\) Falk, supra note 172, at 107. In a footnote Falk adjudges universal jurisprudence as best, but prefers a pluralistic jurisprudence to a provincial Western one. Id. at 107 n.1.
tomary international law is a malleable concept that is indeterminate, depending on the decisionmaker's perspective on norms and which sources are perceived as legitimate.\textsuperscript{180} It could be used to justify as well as proscribe the use of force.\textsuperscript{181}

Such a manipulation of universal principles is mirrored by the Reisman/McDougal approach of taking general normative concepts such as democracy and minimum world order and using them to justify actions in violation of positive principles of international law.\textsuperscript{182} Interestingly, while Falk commended the Reisman/McDougal normative approach in his discussion of the South West Africa cases when its advocates appeared to agree with his position,\textsuperscript{183} this normative approach has since become a major legal justification for U.S. intervention and its adherents, the major critics of the Court's Nicaragua decision with which Falk agrees.\textsuperscript{184} Advocates of a normative jurisprudence reach different conclusions depending upon which norms are emphasized in different circumstances.

Recently Reisman has championed a new process for determining international law, the incident methodology,\textsuperscript{185} which examines the reactions of "functional elites" to international incidents. Such reactions tend to be self-serving and reflective of power rather than legal principles.\textsuperscript{186} Such a reformulation of the process of norm creation diminishes the authoritativeness of traditional sources\textsuperscript{187} and again excludes developing nations from significant participation in the norm creation process. The creation of legal norms would be the primary domain of large developed nations with the military power to impose its will during the "incident."

The incident process of norm development provides a mechanism for denigrating the prohibition against the use of force in article 2(4). Reisman, in his analysis of customary international law, finds nine ba-

\textsuperscript{180} Judge Bedjaoui makes the point that the Western nations that oppose giving the General Assembly law creating powers are the very nations that initiated transfer of power from a blocked Security Council to the General Assembly in the Uniting for Peace Resolution in order to approve military action. M. BEDJAOUI, supra note 132, at 178.

\textsuperscript{181} See, e.g., Robinson, supra note 114 (justifying U.S. actions in Grenada, in part, under customary law exceptions that he argues survive the U.N. Charter).

\textsuperscript{182} See Reisman, supra note 109, at 642-45.

\textsuperscript{183} R. FALK, supra note 7, at 96, 119.

\textsuperscript{184} See Reisman, Has the International Court Exceeded Its Jurisdiction, 8 AM. J. INT'L L. 8 (1986); Reisman, supra note 32, at 166.

\textsuperscript{185} INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W. Reisman & A. Willard eds. 1989); see also Reisman, Special Feature — The Incident as a Decisional Unit in International Law, 10 YALE J. INT'L L. 1-117 (1984).


\textsuperscript{187} Id. at 386.
sic categories that may support the unilateral use of force including a broad doctrine of self-defense, uses of force within spheres of influence and critical defense zones, and humanitarian intervention. The key criterion in determining whether the individual use of force is lawful within these categories is whether it will enhance or undermine minimum world order. The stated intent of intervention under this criterion is to increase the probability of free choice by indigenous peoples of their political structure and government. While these are worthy goals, the mechanism is the self-judging perceptions of the world's military elite who just might act to enhance their perceived self-interest regardless of its impact on the lives and political rights of the recipient of such beneficence.

While this normative approach proceeds from a concern that the U.N. Charter system for controlling the use of force has become impotent, its self-judging and subjective character may encourage violence rather than discourage it. Nations that might be on the receiving end of such paternalism are understandably less enthusiastic. The World Court specifically rejected intervention for reasons connected with the domestic policies of a foreign state, its ideology, its level of armaments, or the direction of its foreign policy. It specifically rejected the use of force as the appropriate method to insure respect for human rights. A similar normative approach to the use of force might be developed through the cavalier use of U.N. resolutions to permit intervention in aid of "self-determination." Self-determination, while similarly a worthy goal, could be just as well manipulated for the intervenors' self-interest as minimum world order. The World Court specifically declined to discuss whether intervention in aid of the process of decolonization would be a permissible intervention. However, the World Court's expansive use of U.N. resolutions permits such a possible outcome because it broadens the Court's ability to establish new norms through its interpretative powers.

International incidents function as the law-creating process to implement the Reisman/McDougal normative approach to international law, just as the U.N. resolutions could become the norm-creating process to enact a Third World normative jurisprudence. Either manipu-

189. Id. at 282.
190. Id. at 280.
192. Id. at 134-35. But see Teson, supra note 111.
lation of normative principles is unrelated to the consent of sovereign
nations and lacks a broad legitimacy in a diverse world. Either would
be disastrous for a cohesive international legal order.

An international jurisprudence if it is to be perceived as legitimate,
must be based on the consent of nations. The indeterminant and mal-
leable concept of customary international law may have been an ac-
ceptable surrogate for actual consent when the participating
international community was small and relatively homogeneous. In
the twentieth century it has been used by different groups of nations to
attempt to impose norms without consent.

VI. CONCLUSION

The compulsory jurisdiction of the World Court cannot be saved
by clever draftsmanship. Proposals for an armed hostilities, self-de-
defense, or national security reservation are today’s reaction to the most
recent problem by the well-intentioned. None of various proposals of-
ered by international scholars and practitioners in these books and
articles deals effectively with the fundamental disagreements about the
content of international law and the process of norm creation.

A law of force reservation may plug one leak in the dike, but fur-
ther leaks are inevitable. The fundamental disagreements about norms
and processes will reemerge at the World Court around other issues
including the very ones Thomas Franck mentioned as susceptible to
principled development — terrorism, freedom of the seas, and protec-
tion of foreign investment. Differing perspectives will create differing
conclusions about legal standards in these areas and compulsory juris-
diction will again be disfavored.

The Court’s use of General Assembly Resolutions in the *Nicara-
gua* case portends further rancor about the process of norm creation.
Nations may be reluctant to vote for resolutions that might be con-
strued as norm creating. In other substantive areas decisions can be
expected that will be unacceptable to the United States’ vision of the
international legal order. For those with a sense of irony, the indeter-
minate concept of customary international law that has been used by
the West to impose rules on nonconsenting Third World nations is
now being used by the World Court to impose norms unacceptable to
the United States. Neither are good bases for a universal international
law. Both do violence to the concept of international law as a consen-
sual body of rules developed by nations for their mutual self interest.

Proposals to permit the United States to choose the panel of judges
through the special chambers procedures would be, as was the Con-
nally Reservation, a triumph of form over substance. Such a reserva-


tion would permit the United States or, reciprocally, the other party-litigant, to escape compulsory jurisdiction by rejecting the panel. If the co-litigant is a nation with a different perspective on the content and process of international law, agreement on a panel is unlikely. If the co-litigants have similar perspectives, then, as Professor Morrison suggests, jurisdiction is essentially voluntary and could have been obtained by the special agreement procedures of article 36(1) without the pretense of compulsory jurisdiction.

More fundamentally, the frequent use of special chambers procedures, voluntary or not, in contested substantive areas, is a prescription for a fragmented, pluralistic jurisprudence. The principles of law applied and the result may be dependent on the composition of the panel. Such a procedure may give new meaning to the admonition of article 59 that the Court’s decisions are only binding upon the parties. Divergent results will only decrease respect for the Court and international law.

What is needed is a universal jurisprudence agreed upon by all nations. The little used and nearly powerless World Court is not the proper institution to resolve fundamental disagreements about the content of norms and how international law is made. The Court lacks both the authority to do so and the power to impose its decisions. Unlike a domestic supreme court, the World Court is not the final interpreter of international law. Its jurisdictional mandate is limited to disputes voluntarily referred to it either by an ad hoc agreement or by a prior acceptance of jurisdiction. There is, as yet, no common ethos of values, no constitution with vague natural law provisions such as due process, equal protection, or natural justice entrusted to the Court to interpret and impose on all states.

Proposals for a normative jurisprudence, whether based on Third World control of the General Assembly or on the Reisman/McDougal model of military elites pursuing their self-judging perception of community goals, will undermine the legitimacy of the international legal order rather than promote it. International law is essentially a positivist enterprise where sovereign states place limits on their behavior in their mutual self-interests. The development of an international law worthy of its name, recognized as legitimate by all major groups of states, requires the agreement of nations of diverse cultures, ideologies, and experiences upon the norms and principles that will limit their behavior. Neither the historical imposition of norms upon developing countries nor the use of a normative jurisprudence to change international law are conclusive to a legitimate international legal order.
The world in the latter part of the 20th Century is an economically interdependent one with the rapid movement of capital and technology. The United States, Japan, and the nations of the Third World are all dependent upon international trade for increases in national income and employment. Such interdependence creates common concerns and needs despite cultural diversity. For example, the national origin of end products has become blurred as component parts are manufactured in different countries around the globe, assembled, and then exported.194

There is a need for the development of international mechanisms of cooperation to apportion jurisdiction and to regulate activities beyond the boundary of any one state. The frightening prospects of major climatic changes have propelled unwilling states to develop new international legal regimes for environmental problems that defy a national solution.195 The nations of the world were able to negotiate limits on the production and use of chlorofluorocarbons despite different economic interests and divergent economic systems and political ideologies.196 Bargains can be struck around common concerns, and appropriate legal standards and regulatory mechanisms developed to address international problems. These bargains (negotiated legal standards) must be determined by sovereign states not by the World Court.

The increased economic interdependence of the world has created the conditions for negotiated bargains to achieve common concerns. However, a fundamental problem remains: the world's domestic and international political institutions have not kept pace with the rapid technological changes that are creating common concerns. Solutions to common concerns require consent if they are to be perceived as legitimate. Advances in telecommunications and information tech-

197. Blumenthal, supra note 194, at 540; see also Asahi Metal Ind. Co., Ltd. v. Superior Court of California, 480 U.S. 102 (1987) (Supreme Court struggles with personal jurisdiction over Japanese manufacturer of tire value assemblies used in tire tubes produced in Taiwan and exported to California).
198. Blumenthal, supra note 194, at 532.
Technology have increased economic and political expectations around the globe. The citizenry in developing nations and Communist Bloc nations are demanding economic growth and development. This political pressure inclines governments to attract capital and technology for economic growth. The opportunity is present for the negotiation of legal principles to protect capital investment and to regularize legal relations between countries in a manner perceived as legitimate by all major groups of countries.

The multilateral treaty process encourages negotiation and compromise. It may also change a nation's perspective about the relative merits of a new norm. During the early rounds of negotiation of the Law of the Sea Convention, the United States insisted that customary international law defined the limit of the territorial sea at three miles and no new standard would be accepted. Later the number of nations asserting broader jurisdiction from 12 to 200 miles doubled, imperiling the free movement of U.S. ships and submarines. The United States finally determined that it was to its advantage to agree to a consensus standard that would stop the expanding territorial claims. Compromise is essential if nations with diverse interests and cultures are to ever agree on norms that meet mutual interests. Agreement is essential if the norms are to be accorded legitimacy and followed. The present mode of posturing about legal norms and the process of norm creation discourages respect for law and encourages manipulation.

The negotiation of universal principles will be difficult and painful. It will be painful because it requires the jettisoning of deeply held beliefs about the content and process of international law. Until this arduous task of compromise and negotiation is undertaken, the acceptance of compulsory jurisdiction will be a meaningless gesture accompanied by self-satisfied statements signifying nothing.


201. Id. at 75.