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The Works of the International Round Table on Promoting the Jurisdiction of the International Court of Justice (Bucharest, VTC, 24 June 2021)
Introductory Foreword

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The Works of the International Round Table on *Promoting the Jurisdiction of the International Court of Justice (Bucharest, VTC, 24 June 2021)*

Introductory Foreword

by *Professor Dr. Bogdan Aurescu*[1]

On 24 June 2021, I have hosted, as Foreign Minister of Romania, the works of the International Round Table on *Promoting the Jurisdiction of the International Court of Justice*, thus starting the implementation of an initiative I had following a meeting of mine, in November 2020, in The Hague, with the then President of the International Court of Justice (ICJ), and with the Registrar of the Court.

Our discussions during that important meeting focused on ways of encouraging States towards a wider use of the Court's jurisdiction and its judicial function, as a peaceful mechanism to solve international disputes.[2]

I suggested, during that visit, the idea of launching a global campaign aimed at encouraging States to accept the ICJ's jurisdiction, through promoting a political declaration to be endorsed by as many as possible UN member States. This is how the idea behind Romania's initiative was born. The ICJ high officials welcomed the proposal I have advanced at that point.

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[2] On the occasion of that visit of mine to The Hague, I also donated to the International Criminal Court, on behalf of Romania, the portrait of Vespasian Pella, the illustrious Romanian diplomat and lawyer, one of the ”founding fathers” of the concept of the International Criminal Court and of international criminal law as a sub-branch of international law.

This initiative is integral part of the strong support of Romania for the ICJ.

As this year we mark the 75th anniversary of the inaugural sitting of the ICJ and contemplate the outstanding contribution of the Court to the development of international law and its judicial application in support of maintaining peace and security worldwide, it is even more appropriate to look into ways of encouraging a wider use of the Court's jurisdiction.

Beyond my position of current Minister of Foreign Affairs of Romania, I am also a Professor of international law and member of the UN International Law Commission, as well as a former pleading Agent before the International Court of Justice. This is why, for me, it is more than natural to attach great importance to the peaceful settlement of disputes, not only from theoretical, but also from practical perspectives. The respect for this fundamental principle also lies at the heart of Romania's foreign policy, together with the respect for the whole body of international law and the promotion of the international rule of law. This should be integral part of the foreign policy of each and every State in the world. I firmly believe that one concrete way through which we can accomplish this goal is strengthening ICJ.

The objective of the *international round table* of 24 June 2021 was multi-purposed: to promote the idea of a *political declaration* as a means to stimulate to the acceptance of the ICJ jurisdiction; to build a *cross-regional Core Group of States* to decide upon a text for the declaration – States that would then assume the leading role in their respective regions for gathering as many State adhesions as possible to the initiative and the declaration, underlying, thus, States' determination to make recourse to the ICJ for the purposes of solving their disputes; to engage in a technical exchange of views with professionals in the field – the Registrar of the ICJ, former legal advisers at the ministries of foreign affairs, professors of international law, all well familiarised with the ICJ and its procedures – with the aim of identifying the appropriate avenues to take in order to make the initiative as successful as possible and to understand, in a pragmatic way, what lies at the roots of States' reticence to engage with the ICJ.

All interventions that you will find in this special number of the Romanian Journal of International Law, as well as the discussions these generated, provided substance for the political declaration which was discussed and further agreed within the Core Group of States, which includes Japan, Liechtenstein, Mexico, The Netherlands, New Zealand, Norway, Poland, Spain and Switzerland.

The Declaration was launched on 3 November 2021 during a second event dedicated to this initiative, an online event that I and hosted at the Romanian Ministry of Foreign Affairs. The Declaration is at the heart of the global campaign, which we launched on that occasion, aimed at encouraging States to accept the jurisdiction of the ICJ.

The text of the Declaration was subsequently circulated to all UN Member States and opened for endorsement by any interested State, through a Note Verbale submitted to the Permanent Mission of Romania to the United Nations in New York, acting as "depositary" for this initiative on behalf of the Core Group of States.

The ultimate purpose of the initiative is to turn ICJ into a *de facto* universal international court through the combination of the various means for accessing its jurisdiction provided in its Statute.

This aim plays as a concrete application of the international legal obligation States have to settle their disputes peacefully. In this way, States are encouraged to make the International Court of Justice competent to solve their disputes when other mechanisms to settle the dispute fail.

No State can be forced to submit its disputes to the Court: the jurisdiction of the Court is firmly rooted in the States' consent. This justifies the initiative to figure out ways to bring the matter to the active interest of States and determine them to take action at national level with the final aim of recognizing as compulsory the jurisdiction of the ICJ (through depositing a declaration with the Court in this respect – the so-called *optional clause*).

If this is too ambitious of an aim for some States, there are other ways envisaged by the Statute of the International Court of Justice, leading to inter-State disputes be entertained by the Court:

- *by special agreement*: the parties jointly conferring jurisdiction to the Court to settle a dispute;
- *by compromissory clause*: a treaty provision granting the ICJ jurisdiction to entertain possible future cases concerning disputes related to the application and interpretation of that treaty or any other type of disputes decided by the parties;
- *forum prorogatum*: if a State has not recognized the jurisdiction of the Court at the time when an application instituting proceedings is filed against it, that State has the possibility of subsequently accepting such jurisdiction to enable the Court to entertain the case: the Court thus has jurisdiction as of the date of acceptance under the *forum prorogatum rule*;

Hence, the only real limit for States to submit a dispute to the Court is their willingness to do so. *If there is a will, there is a way,* to quote a known saying, and certainly many ways to reach the Court are already in place, if the will to do so is there.

Apart from positive steps that States can take in order to enable the jurisdiction of the ICJ in relation to international disputes involving them, States can also take action to remove circumstances that impede or block the jurisdiction of the ICJ. For instance, States can withdraw reservations to provisions in various international treaties conferring jurisdiction to the Court in relation to disputes concerning the interpretation and application of the respective treaty.

Why Romania of all States took the lead and articulated this initiative? For a number of reasons:

First, as I stated at the beginning, Romania's foreign policy is deeply rooted in the respect for the international rule of law; it is my firm belief that all disputes must be resolved through peaceful means as an underlying requirement for ensuring peace and good neighbourliness.

Second, it is a belief that we practice. Romania brought before the International Court of Justice its dispute with Ukraine over the maritime delimitations in the Black Sea, after almost 40 years of bilateral negotiations that were unable to lead to a satisfactory result; the decision to refer the dispute to the ICJ improved the political bilateral dialogue and was conducive to contributing to the building of trust between the two States, which implemented the 2009 judgment of the Court without questioning it or any of the legal arguments included therein. I was honored to be the pleading Agent of Romania before the ICJ for this case which brought to Romania 9700 km² of continental shelf and exclusive economic zone out of the disputed area of about 12200 km² of maritime zones, i.e., almost 80% of this disputed area – the single extension of sovereign rights and jurisdiction of Romania since the Great Union of 1918.

Also, Romania withdrew almost all its reservations to ICJ jurisdiction in multilateral treaties, reservations that were formulated as part of the communist strict policy towards sovereignty.

At the same time, Romania became a party to the Optional Protocols to the Vienna Convention on Diplomatic Relations and to the Vienna Convention on Consular Relations for the peaceful settlement of disputes.

Last but not least, Romania deposited, in 2015, during my first mandate as Foreign Minister, its declaration on the acceptance as compulsory of the ICJ

jurisdiction, following a similar approach already undertaken back in 1930, when Romania deposited a declaration for the acceptance as compulsory of the jurisdiction of the Permanent Court of International Justice. Thus, in 2015, Romania became the 72nd State to accept the compulsory jurisdiction of ICJ (now there are 73 such States in total).[1]

These are really good arguments for Romania taking the lead in reenergizing initiatives aimed at promoting the ICJ jurisdiction and making the court truly a *World* Court.

Romania's actions can serve as a model for other States hesitant towards the International Court of Justice as it promoted a step-by-step approach that ultimately led to the deposit of the declaration of the acceptance as compulsory of the Court's jurisdiction.

At present, out of the 73 States that have deposited an article 36 paragraph (2) declaration, among them being almost all EU Member States (23). Six out of the States having accepted as compulsory the jurisdiction of the Permanent Court of International Justice – the predecessor of the International Court of Justice – have not withdrawn their declaration until now, those declarations acting, pursuant to Art. 36 paragraph (5) of the Statute of the ICJ, as recognition of the ICJ's jurisdiction as well. Those States are: Uruguay (before 28 January 1921), Haiti (4 October 1921), Panama (25 October 1921), Dominican Republic (30 September 1924), Nicaragua (24 September 1924), Luxembourg (15 September 1930).

At the same time, on overview of the information on the ICJ's website shows that all bases for the ICJ's jurisdiction were used by States lodging cases before the Court, a statistic in this respect being provided in the intervention of the Registrar of the Court during the June round table. This should be the case in future as well, and more energetic demarches must be undertaken in order to provide for the recourse to the ICJ as a mechanism for the dispute settlement in multilateral and bilateral treaties, as a negative trend in this respect can be noticed already for some decades now.

Therefore, although a powerful political message of support for the jurisdiction of the Court would be recognizing its jurisdiction as compulsory *ipso facto* via a declaration to that end, States should have in mind that they could always access the Court for solving their disputes and that there are good arguments that justify this avenue. The most powerful of all such reasons is that the values of a State lie in the strength of its legal arguments,

[1] See https://www.icj-cij.org/en/declarations.

as the most precious asset a State has is the lasting peace, to quote the Romanian diplomat Nicolae Titulescu.

To extrapolate, I would add that the most precious asset humanity has is lasting international peace and security and States should continuously work to its achievement through dialogue, negotiations, good offices, mediation, conciliation, and ultimately through recourse to international jurisdictions.

Concept Note
of the
International Round Table
on
Promoting the jurisdiction of the International Court of Justice

(24 June 2021)

9.30 - 11.30 am (GMT- 4); 3.30 - 5.30 pm (GMT + 2); 4.30 – 6.30 pm (GMT + 3) via Webex

Background

The International Court of Justice (ICJ) is the most important forum for the settling of disputes in accordance with international law. Nevertheless, in respect of its contentious competence, the jurisdiction of the Court is non-compulsory. The consent of the States is necessary in order for this international court to settle a certain dispute.

Thus, States have the possibility to submit cases to the ICJ by *compromise* (a special agreement concluded by the parties especially for this purpose) or *compromissory clauses* (provisions in treaties and conventions conferring jurisdiction upon the Court for matters provided for therein), on the basis of Article 36 (1) of the Statute of the Court, by *forum prorogatum* (the possibility of subsequently accepting the ICJ's jurisdiction to enable it to entertain the case), or by means of the "*optional clause*" (a declaration made at any time by a State Party by which it recognizes the jurisdiction of the Court as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation), as provided by Article 36 (2) of the Statute.

In recent years, the Court's activity has intensified, covering disputes in the most various fields and concerning issues of major importance such as those related to territorial settlements or the delimitation of maritime spaces. This indicates increased trust in the professionalism and impartiality of the Court.

Nevertheless, the acceptance of the compulsory jurisdiction is far from being universal. Up to now about a third of the States of the world (73) have availed themselves of the relevant provisions of the ICJ Statute and have filed a declaration by which the compulsory jurisdiction of the Court was accepted.

In order to understand the reasons for this reluctance, one must take into account that the acceptance of jurisdiction implies acquiring certain rights,

but also incurring certain obligations. On the one hand, the State that makes such a demarche has the right to institute proceedings unilaterally against another State that has made a similar declaration. On the other hand, it undertakes to accept the jurisdiction of the Court if such a declaration is invoked by other State to serve as basis for seizing the Court.

As regards the limitations on the jurisdiction of the Court, States have the option, when filing a declaration by which they accept the compulsory jurisdiction, to exclude certain disputes. When making this decision, each State takes into account its own interests, but also various issues with a litigious potential on its foreign affairs agenda. Moreover, States have the liberty to include other exemptions than those traditionally found in the declarations filed, under the condition to be consistent with international law. The system of declarations is thus flexible and leaves room to States to protect their vital interests.

On 23 June 2015, Romania deposited with the Secretary General of the United Nations the declaration of acceptance of the jurisdiction of the Court and, therefore, became a party to this complex system of interconnected declarations.

The significance of submitting such declarations is manifold:

Firstly, it signals the desirability to have inter-State disputes settled by an impartial legal actor in the framework of international law. It is, consequently, a reaffirmation of trust in the potential of international law to serve the cause of peace and in particular in the role of the ICJ as promoter and guarantor of the supremacy of law in international relations.

Secondly, it expresses the willingness of a State to ground its foreign policy on strict compliance with international law, given that a State which makes such a declaration must be prepared to defend its interests by advancing legal arguments before the most important international court.

Thirdly, from a pragmatic perspective, the acceptance of the Court's jurisdiction would facilitate the settlement of disputes that could not be solved through negotiations. Practical experience shows that, inevitably, in relations between States certain situations may arise when the accommodation of different interests cannot be achieved bilaterally, and it is useful to benefit from the possibility to seize a court having universally recognized expertise, as the ICJ.

At the same time, it is worth mentioning that Romania, as other ex-communist States, used to refuse the compulsory jurisdiction of the International Court of Justice, by formulating reservations excluding the

jurisdiction of the ICJ with respect to all international treaties that provided for such a dispute settlement mechanism. After the fall of the communist regime and the changes in the political culture, Romania joining the group of states which strongly favours the rule of law in international relations. Consequently, it withdrew the above-mentioned reservations and even became a party to the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes (1961) and to the Optional Protocol to the Vienna Convention on Consular Relation concerning the Compulsory Settlement of Disputes (1963).

This discussion is expected to focus on the added value of declarations recognizing the jurisdiction of the International Court of Justice as compulsory, as well as of making use of the compromissory clauses in conventions and treaties, on the rationale that accepting the ICJ's jurisdiction acts in support of maintaining peace and consolidating the rule of law globally.

Objectives

- Examining the ICJ's contribution to the peaceful settlement of disputes and the importance of access to the Court's jurisdiction;
- Identifying adequate modalities of promoting the compulsory jurisdiction of the ICJ, by means of its recognition ipso facto in relation to any other state accepting the same obligation, by withdrawing certain reservations to existent treaties and by including compromissory clauses in future treaties establishing the ICJ as the dispute settlement mechanism;
- Encouraging States to further resort to this instrument for international adjudication, including by exploring the benefits of a declaration on this topic, open for endorsement by all interested States, which should set the framework for an outreach campaign to the above-mentioned end.

The Programme of the International Round Table on

Promoting the Jurisdiction of the International Court of Justice (Bucharest, VTC, 24 June 2021)

9.30 - 11.30 am (GMT- 4); 3.30 – 5.30 pm (GMT+2), 4.30 – 6.30 pm (GMT+3)

4.30 – 5.00 pm ***Introduction***

Introductory remarks by H.E. Mr. Bogdan Aurescu, Minister of Foreign Affairs of Romania, Member of the International Law Commission

Remarks by H.E. Ms. Ine Marie Eriksen Søreide, Minister of Foreign Affairs of the Kingdom of Norway (recorded message)

Opening speech by Mr. Miguel de Serpa Soares, United Nations Under-Secretary-General for Legal Affairs and UN Legal Counsel (recorded message)

5.00 – 5.50 pm ***Discussion***

Moderator: *H.E. Mr. Bogdan Aurescu*, Minister of Foreign Affairs of Romania, Member of the International Law Commission

Speakers: *Mr. Philippe Gautier*, Registrar of the International Court of Justice

H.E. Mr. Rolf Einar Fife, Ambassador of Norway to the European Union, former Legal Adviser of the Ministry of Foreign Affairs of Norway

Sir Michael Charles Wood, Member of the International Law Commission, former Legal Adviser to the Foreign and Commonwealth Office

Mr. Alain Pellet, Professor of Public International Law at the Paris Quest Nanterre La Défense University, former Member and Chairperson of the International Law Commission

5.50 – 6.25 pm ***Interventions from representatives of Core Group and Supportive States and other participants***

Dr. René Lefeber, Legal Adviser, Ministry of Foreign Affairs of the Kingdom of the Netherlands

Ms. Corinne Cicéron Bühler, Ambassador, Director, Directorate of Public International Law, Federal Department of Foreign Affairs of the Swiss Confederation

Mr. Alejandro Celorio, Legal Adviser, Ministry of Foreign Affairs of Mexico

H.E. Mr. Hidehisa Horinouchi, Ambassador Extraordinary and Plenipotentiary of Japan to the Kingdom of the Netherlands

H.E. Mr. Agustín Santos Maraver, Ambassador, Permanent Representative of Spain to the United Nations – New York

H.E. Mr. Marcin Czepelak, Ambassador Extraordinary and Plenipotentiary of the Republic of Poland to the Kingdom of the Netherlands

H.E. Mr. Arnoldo Brenes Castro, Ambassador Extraordinary and Plenipotentiary of Costa Rica to the Kingdom of the Netherlands

Dr. Penelope Ridings, Honorary Professor, University of Auckland, Former Chief International Legal Adviser to the Ministry of Foreign Affairs and Trade, New Zealand

H.E. Mr. Collen Vixen Kelapile, Ambassador, Permanent Representative of the Republic of Botswana to the United Nations – New York

Questions & Answers

6.25 – 6.30 pm ***Final remarks***

H.E. Mr. Bogdan Aurescu, Minister of Foreign Affairs of Romania, Member of the International Law Commission

Concept Note
of the
Launch event of the
Declaration on promoting the jurisdiction of the International Court of Justice

VTC format

3 November 2021, 8.45 – 9.45 am (New York time)

Core Group States

Japan, Liechtenstein, Mexico, the Netherlands, New Zealand, Norway, Poland, Romania, Spain, Switzerland.

Background

On 24 June 2021, the Minister of Foreign Affairs of Romania, H.E. Mr. Bogdan Aurescu, hosted a virtual *High-Level Round Table on Promoting the Jurisdiction of the International Court of Justice* (ICJ), with the participation of the Registrar of the ICJ, the UN Under-Secretary–General for Legal Affairs and prominent personalities in the field of international law, as well as representatives of interested UN Member States.

The objective of the Round Table was to highlight the important contribution of the International Court of Justice to maintaining international peace and make better use of its potential, by building on previous efforts in this area and re-energizing them into a more systemic campaign for broader recognition of the ICJ's jurisdiction.

More specifically, the event was intended to put forth an initiative to promote expanding access to the ICJ's jurisdiction on a stable and predictable basis, in accordance with the Statute, including by means of encouraging States to submit declarations recognizing *ipso facto* the Court's jurisdiction as compulsory in relation to any other States accepting the same obligation, to withdraw relevant reservations blocking access to the ICJ jurisdiction in existent treaties and to include compromissory clauses in treaties establishing the ICJ as the dispute settlement mechanism, whenever possible.

Taking into consideration that the contentious competence of the Court is rooted in the consent of the States, the Core Group States drafted a *Declaration* that encourages States to accept the jurisdiction of the Court as

a means of contributing to fostering stability through the judicial application of law. The document will be circulated for endorsement to all States with the open invitation to join in this demarche. Such an endorsement could be seen as an expression of States' willingness to ground their foreign policies on strict compliance with international law and to turn the leading international court into a judicial body having *de facto* universal jurisdiction.

Objective of the event

This virtual event is meant to present the purpose and the content of the above-mentioned initiative and its outcome – the *Declaration* encouraging States to accept the jurisdiction of the Court – to all interested States, including details regarding the possibility of endorsement and the follow-up process.

Programme

8.45 – 8.50 am Presentation by H.E. Mr. Bogdan Aurescu, Minister of Foreign Affairs of Romania

8.50 – 9.20 am Statements by representatives of the Core Group States (3 minutes)

Ms. Victoria Hallum, Chief International Legal Adviser and Divisional Manager, New Zealand Ministry of Foreign Affairs and Trade

Mr. Kristian Jervell, Director General, Legal Department of the Ministry of Foreign Affairs of Norway

H.E. Ms. Corinne Cicéron Bühler, Ambassador, Director of the Directorate of International Law and Legal Adviser of the Federal Department of Foreign Affairs of Switzerland

H.E. Mr. Kimihiro Ishikane, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Japan to the United Nations

H.E. Mr. Christian Wenaweser, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of the Principality of Liechtenstein to the United Nations

H.E. Ms. Yoka Brandt, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of the Kingdom of the Netherlands to the United Nations

H.E. Mr. Krzysztof Szczerski, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of the Republic of Poland to the United Nations

H.E. Mr. Agustín Santos Maraver, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Spain to the United Nations

H.E. Mr. Juan Gómez Robledo Verduzco, Ambassador, Deputy Permanent Representative of Mexico to the United Nations

9.20 – 9.45 am Interventions from the floor

Concluding remarks by H.E. Mr. Bogdan Aurescu, Minister of Foreign Affairs of Romania

Declaration

on promoting the jurisdiction of the International Court of Justice

We firmly believe that the principle of peaceful settlement of disputes must guide the conduct of all States, as enshrined in the United Nations Charter and reiterated by the United Nations, in particular in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[1] the 1982 Manila Declaration on the Peaceful Settlement of International Disputes,[2] the 2005 World Summit Outcome[3] and other relevant resolutions of the United Nations General Assembly, such as the 2012 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels.[4]

We express our appreciation for the International Court of Justice ("the Court") as the principal judicial organ of the United Nations and the overarching forum for the judicial settlement of disputes between States in accordance with international law.

We highlight the fact that the authoritative value of the Court's decisions, its unique mandate, its universal character and consent-based jurisdiction have placed the Court as the crucial mechanism for the adjudication of legal disputes for many States, with due regard to States' free will in choosing the most appropriate means of peaceful settlement of disputes in a given context.

We emphasize the important role of the Court in promoting the rule of law globally, thus fostering harmonious relations among States, and *believe* that the contribution of the Court in maintaining international peace can be reinforced by widening the access to its contentious jurisdiction.

We notice at least the following reasons for accepting the Court's jurisdiction as a mechanism for dispute settlement:

- ❖ The Court can hear any legal dispute concerning international law; thus by making recourse to this mechanism and through the judgments rendered based on law, both States and the Court contribute significantly to the consolidation of the rule of law at the international level;

[1] Adopted by United Nations General Assembly resolution 26/25 (XXV) of 24 October 1970
[2] Adopted by United Nations General Assembly resolution 37/10 of 15 November 1982
[3] Adopted by United Nations General Assembly resolution 60/1 of 16 September 2005
[4] Adopted by United Nations General Assembly resolution 67/1 of 24 September 2012

- ❖ The Court has a vast expertise in dispute settlements, developed during a century of activity, including that of its predecessor, the Permanent Court of International Justice (the "PCIJ"), and comprehensive jurisprudence concerning various areas of international law;
- ❖ The jurisdiction of the Court (in contencious cases) is based on the consent of the States, thus enabling the Court to settle disputes between States peacefully, through authoritative judgments, and contributes to building inter-State harmonious relations;
- ❖ The Court offers an efficient and affordable dispute settlement mechanism;
- ❖ The Court actively contributes to the realization of the principles and purposes of the United Nations, in particular the maintenance of peace.

We take into consideration and build upon previous initiatives at the international and regional levels aimed at promoting the jurisdiction of the Court and especially upon the *Handbook on accepting the jurisdiction of the International Court of Justice,*[1] developed by Switzerland, the Netherlands, Uruguay, the United Kingdom, Lithuania, Japan and Botswana.

We believe in the added value of declarations recognizing the jurisdiction of the Court as compulsory, as well as in the benefits of compromissory clauses in bilateral and multilateral treaties on the rationale that accepting the Court's jurisdiction serves the cause of international peace and builds expectations of stability and consistency in international relations thus contributing to the consolidation of the rule of law at the international level.

We encourage States to have recourse to the jurisdiction of the Court for settling their inter-State disputes; to that end they could confer jurisdiction on the Court by:

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[1] https://legal.un.org/avl/pdf/rs/other_resources/Manual%20sobre%20la%20aceptacion%20jurisdiccion%20CIJ-ingles.pdf

- ❖ unilaterally accepting the jurisdiction of the Court, in accordance with Article 36 (2) of the Statute of the Court, through a declaration deposited with the UN Secretary General;[1]
- ❖ including specific clauses in bilateral and multilateral treaties,[2] taking into account the provisions of Article 36 (1)of the Statute of the Court; two categories of treaties can be identified:
  - o bilateral or multilateral treaties dealing with a specific subject matter containing a clause conferring jurisdiction on the Court with regard to legal disputes relating to the interpretation or application of that specific treaty;
  - o bilateral or multilateral treaties concluded specifically for the purpose of peaceful settlement of disputes (including *inter alia* the category of Friendship Treaties), and providing for the jurisdiction of the Court over any legal dispute between the Parties, irrespective of its subject matter.
- ❖ concluding a special agreement,[3] in order to submit a specific dispute to the Court, in view of Article 36 (1) of the Statute of the Court;
- ❖ *forum prorogatum*,[4] thus accepting the jurisdiction of the Court.

We further encourage States to exercise great care when drafting titles of jurisdiction with due regard to the importance of avoiding disputes over the jurisdiction of the Court.

We further encourage States to consider withdrawing, where appropriate, the reservations made to the specific dispute settlement provisions in international treaties conferring jurisdiction on the Court to deal with disputes related to the application and interpretation of the specific treaty, in order to allow the Court to exercise jurisdiction on all treaty-related disputes concerning all States parties to that treaty.

[1] Models of such declarations are to be found in the *Handbook on accepting the jurisdiction of the International Court of Justice* at Chapter II

[2] See Chapter III of the *Handbook on accepting the jurisdiction of the International Court of Justice*

[3] See Chapter IV of the Handbook

[4] See Chapter V of the Handbook

We further encourage the inclusion of compromissory clauses in new bilateral and multilateral treaties, where appropriate, conferring jurisdiction on the Court to deal with disputes between States parties.

We further encourage States to accept the jurisdiction of the Court seized with a case against them, on the basis of the *forum prorogatum*, where appropriate, in view of the mandate of the Court to find a solution based on law and of the effect of the Court's judgment in the specific dispute, namely building harmonious inter-State relations and thus potentially contributing to the consolidation of bilateral cooperation.

We invite all interested States to engage in a systemic manner in efforts to further promote the ideal of universal acceptance of the jurisdiction of the Court.

Speech of the Minister of Foreign Affairs of Romania, Bogdan Aurescu,[1] on the occasion of the International Round Table of 24 June 2021

Excellencies,

Ladies and gentlemen,

Distinguished participants,

Dear friends,

Thank you all for being with us for a dialogue on a topic of great importance for my country and not only, namely the promotion of the use of the jurisdiction of the International Court of Justice.

It is a great honor for me to be the host of today's event.

As a professor of international law and member of the International Law Commission, a career diplomat, a former pleading Agent before the International Court of Justice, and as current Minister of Foreign Affairs of Romania, it's natural for me to attach great importance to the peaceful settlement of disputes, both from a theoretical and from the practical perspectives. The respect for this fundamental principle lies at the very heart of Romania's foreign policy, together with the respect for international law and the promotion of the international rule of law. This should be integral part of the foreign policy of each and every State in the world. And one concrete way through which we can accomplish this is strengthening the ICJ and this is the main objective of the event I am hosting today.

Looking into the lessons drawn from the post-Second World War history, Romania believes that *the role of the international courts and tribunals should be further acknowledged and strengthened,* in order to consolidate the rules-based international order and international rule of law.

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[1] *Dr. Bogdan Aurescu is Professor of Public International Law of the Faculty of Law, University of Bucharest and Member of the UN International Law Commission. President of the Romanian Branch of the International Law Association – London and editor-in-chief of the Romanian Journal of International Law. Also member of the Permanent Court of Arbitration, substitute member of the Venice Commission of the Council of Europe. Former Government Agent for the European Court of Human Rights (2003-2004), former Secretary of State for European Affairs (2004-2005), for Strategic Affairs (2009-2010, 2012-2014), for Global Affairs (2012) within the Ministry of Foreign Affairs, former Agent of Romania before the International Court of Justice in the Maritime Delimitation in the Black Sea case (2004-2009). Former Presidential Advisor for Foreign Policy to the President of Romania (2016-2019). Minister of Foreign Affairs of Romania (2014-2015 and 2019-present).* The opinions expressed in this article are solely the author's and do not engage the institutions he belongs to.

Moreover, in our globalized and technologically advanced society, the settlement of disputes through peaceful means, including by using international justice, is required more than ever, the costs of doing otherwise being too dangerously high.

During my last visit at The Hague on November 9, 2020, I have exchanged views with the President of the ICJ and the Registrar of the International Court of Justice, Mr. Gautier, regarding the potential means through which us, as States, could contribute to increasing the essential role that the Court has for the international community.

And it was in this context that I have advanced the idea of launching a campaign of intensifying the *outreach demarches* by States supportive of the ICJ in favour of an enhanced use of the World Court. The ICJ high officials welcomed this proposal, which is part of the strong support of Romania to the ICJ.

Against this background, we have organized today's event.

Although the ICJ is both a contentious and an advisory jurisdiction, the *objective of our* today's *discussion* is to examine how the role and contribution of the ICJ in maintaining international peace can be reinforced - in other words, how the access to the Court's contentious jurisdiction could be widened.

The increasing number of cases on the docket, including ones of utmost complexity, as well as the reference to the jurisdiction of the ICJ in numerous conventions are indicative of the States' confidence in its high-quality judicial work.

Many cases involve issues of interest not only for the parties directly concerned, but also for the international community as a whole. Thus, the influence of the Court in international relations is felt more and more broadly, whilst its judgments are perceived as unbiased, fully built upon international law, and contributing to its development.

However, the ICJ's jurisdiction is rooted in State consent. Consequently, States must agree to bring their disputes before the Court, either in advance of a particular dispute or when a dispute has arisen. And as we all know, consent can be given in four ways: *by special agreement*, *by compromissory clause*, *by depositing unilateral declarations recognising as compulsory the jurisdiction of the ICJ*, *and* by *forum prorogatum*.

In a nutshell, *the only real limit for States to submit cases to the Court is their willingness to do so*.

The jurisdiction of the Court based on the *optional clause*, as envisaged in art. 36 of the Statute, implies that each State which has recognized, *ipso facto* and without special agreement, the compulsory jurisdiction of the Court has the right to bring any other State which has accepted the same obligation before the Court, by filing an application instituting proceedings with the Court. Conversely, it undertakes to appear before the Court, should proceedings be instituted against it by any other such State.

Therefore, in this instance, the jurisdiction of the Court is based on the convergence of the *wills* of States expressed independently of each other, through *unilateral acts*, namely the declarations recognizing as compulsory the jurisdiction of the Court. So the necessary condition is, of course, that the respective dispute should not have been excluded by one or the other of the parties from the jurisdiction of the Court.

The possible reservations that States may formulate when depositing such declarations establish exceptions or qualifications to the commitments made in the declarations to recognize the jurisdiction thus protecting the declaring State against undesired judicial involvement to the extent specified. Needless to say, this goes both ways, as the reservation, made on conditions of reciprocity, will weaken to the same extent the opportunity of the declaring State to bring a case to the Court against another State.

It was believed that, *if states were progressively to adhere to the optional clause, the Court would also gradually achieve universal compulsory jurisdiction*. Up to now, 74 States have deposited unilateral declarations, recognizing the Court's compulsory jurisdiction and cases have been submitted based on such declarations. But we cannot afford to stop at the threshold of two thirds of United Nations member states.

Distinguished participants,

As I have mentioned before, *while acceptance of the Court's contentious jurisdiction can be achieved in various modalities, I would like to underscore the importance of building a stronger commitment of States to widely access the ICJ's jurisdiction for finding solutions based on law for any disputes arising between them.*

And this can only be attained not only by promoting the compulsory jurisdiction of the Court, by means of its recognition *ipso facto* in relation to any other state accepting the same obligation, but also by inclusion of compromissory clauses in treaties establishing the ICJ as the dispute settlement forum.

Securing in this manner the resort to the ICJ as a permanent option on the table would reinforce the Court's leverage to help maintain or even restore peace and reassure States that a settlement to any legal dispute is within reach, in accordance with international law.

Ladies and gentlemen,

As a State which has seized the Court in the past with a Maritime Delimitation case, for which I had the honor to serve as Agent, and which has subsequently accepted the compulsory jurisdiction of the Court, *Romania* is highly appreciative of the effectiveness and fairness of the Court and thus well placed to plea for the widest recognition of its jurisdiction.

Romania's engagement with the World Court has started with the acceptance of the compulsory jurisdiction of the Permanent Court of International Justice on whose bench also served a Romanian judge, Professor Demetru Negulescu.

The communist period registered a downturn, given that Romania followed the same approach as other socialist countries, which did not trust the ICJ sufficiently to accept its jurisdiction as compulsory. In addition, all ex-communist States formulated reservations excluding the jurisdiction of the ICJ with respect to all international treaties that provided for such a dispute settlement mechanism.

Further to the fall of communism, Romania rejoined the group of States that upholds and promotes the rule of law in international relations, which is what the Court actually stands for. Consequently, after its return to democracy, Romania withdrew the reservations excluding the jurisdiction of the ICJ to the conventions concerned and favored the insertion of compromissory clauses in the bilateral and multilateral treaties it concluded.

In 2004, Romania decided to seize the Court with an important matter, namely the *Maritime Delimitation in the Back Sea* between Romania and Ukraine based on a compromissory clause included in a bilateral treaty.

Romania's experience in relations to these proceedings before the Court has been fully positive and constituted a significant impetus for the decision to initiate the process leading, in 2015, to the acceptance of the mandatory jurisdiction of the ICJ. It was with great honor for me to have signed the Declaration recognizing as compulsory the jurisdiction of the International Court of Justice on behalf of Romania during my first mandate as Minister of Foreign Affairs of Romania. The actors involved in the internal

consultations have been very supportive to this step, which was seen as being in harmony with the core guiding lines of Romania's foreign policy. This was a proof that international law was one of the most important pillars of the Romanian foreign policy, and that it needed efficient instruments to be enforced, the International Court of Justice being the paramount tool.

Distinguished participants,

It is in this spirit that we have decided to organize today's event as a springboard to launch an outreach campaign aimed at promoting both the acceptance by more States of the compulsory jurisdiction of the Court and the inclusion of compromissory clauses in treaties. We wish to build on previous efforts in this area and re-energize them in a more systemic manner.

For this to happen, we considered useful to take the initiative of the *establishing a Core Group of supportive States* willing to work together in building the follow-up process and decide on the most appropriate means of promoting the ICJ's jurisdiction.

I am extremely thankful to the Mrs. Ine Soreide, the Foreign Minister of the Kingdom of Norway for taking the time to send us her recorded intervention, to Japan, Switzerland, Liechtenstein, Norway, Spain, New Zealand and Mexico for their decision to already join the *Core group*, as well as to other States, such as Netherlands, Poland, Costa Rica, and Botswana for their expressions of support and willingness to cooperate in this exercise. We will hear from several government representatives and other participants in the discussion the views of their countries known for their activism in support of the Court's work. After today, we will continue our demarches to rally like-minded States around this project.

The contribution of the academic community is also tremendously important both in today's event and in our future endeavors. We are privileged and grateful to have with us distinguished speakers to address this topic and help us better frame the future steps in promoting the jurisdiction of the ICJ.

I anticipate at this point our intention to elaborate a declaration promoting the jurisdiction of the World's Court, which after being negotiated and convened upon by the *Core Group States*, will be open for endorsement to all States willing to turn the International Court of Justice into a judicial body having *de facto* universal jurisdiction.

Not last, we will also hear a recorded message of the UN Under-Secretary-General for Legal Affairs, Miguel de Serpa Soares, who will provide useful input from the perspective of the Secretary General's depositary function under multilateral treaties, as well as depositary of declarations recognizing the jurisdiction of the Court as compulsory.

So, I look forward to the discussions today.

Introductory intervention by H. E. Mr. Bogdan Aurescu, minister of foreign affairs of Romania, [1]

at the launching event of the

Declaration on promoting the jurisdiction of the International Court of Justice (3 November 2021)

Distinguished participants,

Ladies and gentlemen,

Thank you all for taking the time to join this discussion on a very important topic, namely broadening the recognition of the jurisdiction of the International Court of Justice.

As we mark this year the 75th anniversary of the inaugural sitting of the ICJ and contemplate the outstanding contribution of the Court to the developments of international law and its judicial application in support of maintaining peace and security worldwide, it is even more appropriate to look into ways of encouraging a wider use of the Court's jurisdiction.

Therefore, it is a great honor for me to host today's event, which follows the virtual *High-Level Round Table* on the same topic, organized by Romania on June 24 this year, and which I also had the pleasure to host. As we announced on that occasion, we intended to launch a campaign aimed at encouraging States to accept the ICJ's jurisdiction, building upon previous initiatives in this area. *Today we are starting this campaign!*

Beyond my position of current Minister of Foreign Affairs of Romania, I am also a Professor of international law and member of the International Law Commission, as well as a former pleading Agent before the

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International Court of Justice. This is why, for me, it is more than natural to attach great importance to the peaceful settlement of disputes, not only from theoretical, but also from practical perspectives. The respect for this fundamental principle also lies at the heart of Romania's foreign policy, together with the respect for the whole body of international law and the promotion of the international rule of law. This should be integral part of the foreign policy of each and every State in the world. I firmly believe that one concrete way through which we can accomplish this is strengthening ICJ.

Expanding the Court's compulsory jurisdiction, through various options, may consolidate the "normalcy" of submitting a legal dispute to the Court even if, or especially when, it is a matter of importance to the security or the international profile of the respective country.

I have advanced the idea of launching a campaign for intensifying the outreach demarches by States supportive of the ICJ in favour of an enhanced use of the World Court during a visit I made one year ago at The Hague, on November 9, 2020. Then, I have exchanged views with the President and the Registrar of the Court regarding the potential means through which us, the States, could contribute to increasing the essential role that the Court has for the international community. The ICJ high officials welcomed the proposal I have advanced at that point, which is part of the strong support of Romania for the ICJ.

We initiated this demarche with a group of supporting States composed of Japan, Liechtenstein, Mexico, the Netherlands, New Zealand, Norway, Poland, Spain and Switzerland, whose contribution and involvement in this exercise are highly appreciated. Together, we have elaborated the Declaration on promoting the jurisdiction of the ICJ, which will lie at the heart of the global campaign dedicated to this goal.

Immediately after today's event, the text of the Declaration will be circulated to all UN Member States and opened for endorsement by any interested State through a Note Verbale submitted to the Permanent Mission of Romania to the United Nations in New York, acting as "depositary" for this initiative on behalf of the Core Group. Updated information on the endorsing States will be posted on the websites of our Permanent Mission in New York and the Romanian Ministry of Foreign Affairs.

Insofar as the structure and the content of the Declaration are concerned, this document refers to the ICJ's important role in promoting the rule of law globally and inventories the main reasons for accepting the Court's jurisdiction, specifically: its competence over any legal dispute among States, its vast expertise in dispute settlement; its efficiency and

affordability as a dispute settlement mechanism; its anchoring in State consent as the basis for its contentious jurisdiction and its contribution to the realization of the principles and purposes of the United Nations, such as the maintenance of international peace and security. Not least, it encourages States to have recourse to the ICJ and confer jurisdiction on the Court by any of the means envisaged in its Statute.

In addition, the Declaration states the added value of declarations recognizing the jurisdiction of the Court as compulsory and the benefits of the compromissory clauses in treaties on the rationale that accepting, on a predictable basis, the ICJ's jurisdiction builds expectations of stability and consistency in international relations and, thus, serves the cause of international peace.

At the same time, the Declaration encourages States, where appropriate, to consider withdrawing the reservations made to the specific dispute settlement provisions in international treaties conferring jurisdiction on the Court and to include compromissory clauses in new bilateral and multilateral treaties. On a general note, the Declaration invites States to exercise great care when drafting titles of jurisdiction, in order to avoid disputes over the jurisdiction of the Court.

Moreover, the Declaration recognizes the merit of, and draws on previous initiatives at the international and regional levels, such as the Handbook on accepting the jurisdiction of the International Court of Justice, developed by Switzerland, the Netherlands, the United Kingdom, Lithuania, Japan and Botswana. These demarches should be seen as mutually reinforcing, given that the purpose of this initiative is to reenergize efforts dedicated to expanding the access to the ICJ's jurisdiction by putting forth a platform of political commitment to work systemically towards this goal.

By endorsing this Declaration, States will reaffirm their support for international law in conducting their foreign affairs and their readiness to advance legal arguments in defence of their positions before the leading international court, as a means of translating into practice the principle of peaceful settlement of disputes, enshrined in the UN Charter.

We see the growing docket of the Court, covering a wide array of topics and involving States from various geographical areas of the world, together with the references to the jurisdiction of the Court in numerous conventions of universal application, as indicative of the States' rising confidence in its high-quality judicial work and in its ability to prompt solutions that bring the disputes to a peaceful resolution. Therefore, we hope to gather substantial support for this Declaration. The more we rally around this

initiative, the more we can convince States to bring their disputes to the Court. A high number of endorsements could serve for other States as a springboard for action at the domestic level towards accepting the ICJ's jurisdiction.

In terms of follow-up measures, Romania envisages undertaking outreach activities by the Core Group States within their respective regional groups and in their bilateral contacts. We also intend organizing dedicated events or using related conferences or opportunities, like the presentation of the annual report of the ICJ to the UN General Assembly, to disseminate information about this declaration and continue to persuade all States to join in.

While countries exert their free will in choosing the most appropriate means of peaceful settlement of disputes in each context, I cannot underscore enough the importance of judicial adjudication mechanisms and, in particular, the authoritative value of ICJ's judgments, as reliable instruments bringing durable solutions, based on law, for any disputes between States.

The Court is the essential element of the international justice system, while its jurisprudence provides guidance to States in the interpretation of international norms and, hence, fosters dialogue and cooperation among governments.

To conclude, let me reiterate the invitation included in the Declaration, to all interested States, to join us in the efforts to further promote the ideal of universal acceptance of the jurisdiction of the Court.

I thank you and I am looking forward to the enriching discussions on this topical initiative.

Contribution by Mr. Philippe Gautier[1]

1. Introduction

At the outset, I should recall that the golden rule of international adjudication is "State consent".[2] In other words, States are free to accept or not the jurisdiction of the Court, and their consent determines the possibility for the Court to entertain their disputes.

My presentation will focus on two procedural tools through which States may express their consent to the jurisdiction of the Court: compromissory clauses, and Optional Clause declarations under Article 36, paragraph 2, of the Court's Statute.

States can consent to the jurisdiction of the Court by virtue of a compromissory clause,[3] a treaty clause that provides for the jurisdiction of the Court over a defined category of disputes, as provided under Article 36, paragraph 1 of the Statute of the Court. They also have the possibility to make a declaration under Article 36 paragraph 2 that allows a State to "recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation" the jurisdiction of the Court, which are known as "Optional Clause" declarations.[4]

There are two other ways through which States can consent to the jurisdiction of the Court – either through a Special Agreement[5], or through *forum prorogatum,*[6] but I will focus on the acceptance of the jurisdiction of the Court prior to the emergence of a dispute. Indeed, both compromissory clause and Optional Clause declarations are a way for States to express consent to the jurisdiction of the Court before any dispute is materialised.

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[1] *Mr. Gautier was elected Registrar of the ICJ on 22 May 2019, after having served as Registrar (2001-2019) and Deputy Registrar (1997-2001) of the International Tribunal for the Law of the Sea. He also has relevant expertise within the national administration system, as former Deputy Director, Head of the Law of the Sea/Antarctica Office and Director, Head of the Treaties Division in the Belgian Ministry of Foreign Affairs. Mr. Gautier is a member of various scientific and learned bodies, extraordinary professor at the Université catholique de Louvain and a visiting professor at various other universities, where he lectures on several aspects of international law, in particular the law of the sea.* The opinions expressed in this article are solely the author's and do not engage the institutions he belongs to.

[2] *See Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32; See JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW, 41 (Oxford University Press, 2006).

[3] Article 36, paragraph 1 of the Statute of the Court.

[4] Article 36, paragraph 2 of the Statute of the Court.

[5] Article 40 of the Statute of the Court.

[6] Article 38, paragraph 5, Rules of Court.

This is important to underline since it it is easier for States to consent to the Court's jurisdiction when they are not facing a dispute. Such an observation is supported by evidence as illustrated by the following figures. Out of 151 contentious cases submitted to the Court, a large majority, i.e., 111 cases were instituted on the basis of compromissory clauses or optional declarations while only 19 were instituted on the basis of special agreements or compromise. In brief, more than 70% of cases were instituted on these two bases.[1]

In this paper, I will deal in turn with compromissory clauses and Optional Clause declarations, before offering some concluding remarks.

2. Compromissory Clauses

The term 'compromissory clauses' can refer to two different categories of instruments.

The first category concerns treaties (general or regional) which exclusively address disputes settlement mechanisms. Through these treaties, States express their consent to submit to the Court disputes which might arise between the contracting parties. It may be noted that these treaties, such as the European Convention for the Peaceful Settlement of Disputes of 1957 and the General Act for the Pacific Settlement of International Disputes of 1928, have been invoked in a limited number of cases.[2] Nevertheless, they may play an important role as a basis for the jurisdiction of the Court, as can be observed from the *Jurisdictional Immunities of the State* case between Germany and Italy.[3]

One particular treaty, however, stands out. The Pact of Bogotá of 1948 has proved to be a very successful regional agreement which, so far, has been used as a legal basis to establish the competence of the Court in 16 cases.[4] Despite the important role played by such treaties, they have not

[1] The other 21 cases were either based on *forum prorogatum* (2 cases) or other means (such as Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case and *Corfu Channel (United Kingdom of Great Britain and Northern Ireland* v. *Albania)*) or were applications for revision or request for interpretation (9 cases).

[2] For instance, *see Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*; *see also Certain Property (Liechtenstein* v. *Germany)*.

[3] *See Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*.

[4] *See Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)* (discontinued on 19 August, 1987); *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* (discontinued on 27 May, 1992); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras); Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*; *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua); Maritime Dispute (Peru* v.

been adopted with respect to all regions of the world; only for Latin-American and European countries. In bringing stability to neighboroud relations, they play a major role in bolstering relations amongst regional States and their adoption in all parts of the world should be promoted.

The second category of instruments containing compromissory clauses are provisions contained in treaties (bilateral and multilateral) regulating various substantive matters ranging from investments, human rights, environment to the law of the sea. Often, these clauses provide that the Court will be competent to settle disputes arising out of the implementation or application thereof.

As an illustration, one may refer to the *Treaty of amity, economic relations and consular rights* between the United States of America (USA) and Iran of 1955,[1] the Convention on the Elimination of All Forms of Racial Discrimination of 1965,[2] or the Optional Protocol Concerning the Compulsory Settlementof Disputes attached to the Vienna Convention on Consular Relations.[3]

Currently, there are more than 250 treaties, that have been notified to the Registry of the Court, after being registered, classified, or recorded by the Secretariat of the United Nations, which contain clauses providing for the jurisdiction of the Court in contentious proceedings.[4] In the last 20

Chile); *Aerial Herbicide Spraying (Ecuador* v. *Colombia)* (discontinued on 13 September, 2013); *Certain Questions concerning Diplomatic Relations (Honduras* v. *Brazil)* (discontinued on 12 May, 2010); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)*; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia); Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)*; *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua)*; *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia).*

[1] *See Oil Platforms (Islamic Republic of Iran* v. *United States of America)*; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America).*

[2] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation)*; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates).*

[3] *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*; *Jadhav (India* v. *Pakistan).*

[4] International Court of Justice, Treaties (https://www.icj-cij.org/en/treaties).

years, 59 contentious cases have been instituted before the Court. Out of these 59 contentious cases, in 26 cases, States exclusively relied on compromissory clauses to found the basis of the Court's jurisdiction.

At the same time, it should be highlighted that there is a large variety of dispute settlement mechanisms stipulated in the compromissory clauses of such treaties. Some provisions simply indicate that the Court may be competent if the parties so agree, other clauses enable any party to the treaty to institute proceedings unilaterally, some clauses provide for prior requirements - such as negotiations - before a case could be brought to the Court. This shows that compromissory clauses are a flexible tool that can be modelled to adjust to the needs of the States concerned.

Another characteristic of compromissory clauses is the crucial role they play in ensuring compliance with treaty commitments. In the absence of such clauses, there is no access to international justice – either the International Court of Justice or another international jurisdiction – in the event of a dispute. Given the importance of these clauses, it would be advisable for treaty negotiators to consider this matter at a earlier stage of the negotiations.

I should also stress the fact that, whenever a robust mechanism for the settlement of disputes is included in a treaty, it is extensively used by States to settle their disputes peacefully. This is illustrated by Part XV of UNCLOS. Pursuant to Article 287, paragraph 1, of the UNCLOS a State may choose the ICJ as its preferred forum. Although, so far no case has been submitted to the Court on the basis of declarations made under Article 287, 28 States have (out of the 168 States Parties), until now, opted for the ICJ. States should keep this option in mind, particularly in light of the fact that, under Article 287 of UNCLOS, if the parties to a dispute have not made declarations selecting the same forum, arbitration is the default mechanism.[1]

3. Declarations accepting the Compulsory Jurisdiction of the Court

As of today, out of 193 member States of the UN, 74 States have submitted Optional Clause declarations recognizing the compulsory jurisdiction of the Court.[2] Since 1947 and until now, 27 contentious cases have been based on applications solely based on the Optional Clause declarations.

[1] Article 287, paragraph 5, of UNCLOS.

[2] International Court of Justice, *Declarations recognizing the jurisdiction of the Court as compulsory* (https://www.icj-cij.org/en/declarations).

As stated by the Court (in its Judgement in the *Military and Paramilitary Activities),* States are “absolutely free” to make or not to make such unilateral declaration.[1] At the same time, States should be aware of this option to be able to take an informed decision as to whether they wish to make such a declaration. The organisation of the Round Table event by the Ministry of Foreign Affairs of Romania is a wonderful opportunity to promote the use of this tool. In this connection, it should be noted that 10 States have chosen to make such a declaration in the past 20 years,[2] bringing the number of States in the world entrusting the Court to settle their dispute to almost 40%.

An Optional Clause declaration is a flexible tool. It provides States with the ability to exclude certain matters from the jurisdiction of the Court, thereby increasing the willingness of States to accept the compulsory jurisdiction of the Court for non-excluded matters. This flexibility is crucial to the Optional Clause declarations system. Out of 74 declarations, 55 contain a reservation. To quote the Court, State “may limit its effect to disputes arising after a certain date; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it”,[3] to which we could add reservation *ratione materiae*, excluding disputes concerning with a specific subject-matter, or *ratione personae*, excluding disputes with certain State or group of States, such as the Commonwealth. Of course, to remain meaningful, a declaration should keep the door open to a number of disputes.

4. Concluding Remarks

To conclude, I would say that, in the recent experience of the Court, there are both positive and less positive developments.

On one hand, we may note that there is an apparent “decline” in compromissory clauses, in the sense that fewer compromissory clauses are

[1] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418, para.59.

[2] Côte d'Ivoire (2007); Djibouti (2005); Dominic Commonwealth (2006); Equatorial Guinea (2017); Marshall Islands (2013); Slovakia (2004); Timor-Leste (2012); Romania (2015); Lithuania (2012); Latvia (2019).

[3] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418, para.59.

being negotiated and inserted in treaties.[1] In addition, several States have withdrawn from certain multilateral treaties in recent times.[2]

But, on the other hand, the recent activity of the Court is evidence of the vitality of both compromissory clauses and the Optional Clause declarations system: more cases than ever have been brought before the Court in the last decades. Since 2010, 31 contentious cases were brought before the Court, of which 15 cases (48%) were based the jurisdiction of the Court on compromissory clauses, 6 cases (19%) on Optional Clause declarations, and 4 cases (13%) invoked both bases.[3]

I could therefore conclude on a positive tone. Nevertheless, it is important to keep in mind that nothing is to be taken for granted in international relations. That means that it is extremely important to promote and explain the advantages of these tools as a way of providing States with a forum for the settlement of disputes, whenever they need it. In this respect, I am grateful to the Ministry of Foreign Affairs of Romania for taking the initiative of organizing this event to promote the jurisdiction of the Court.

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[1] The recent multilateral treaties to include such clause, for instance, are the International Convention for the Protection of All Persons from Enforced Disappearance, which entered into force in 2010, or the 2013 Minamata Convention on Mercury which provides for an "opt-in" compromissory clause that stipulates that a State party "may declare" that it recognizes either arbitration or compulsory jurisdiction of the Court. *See* Filippo Fontanelli, *Once burned, twice shy. The use of compromissory clauses before the International Court of Justice and their declining popularity in new treaties*, 104 RIVISTA DI DIRITTO INTERNATIONALE 1, 7-20 (April 2021).

[2] Such as Colombia from the Pact of Bogotá in 2012, or the United States from the 1955 Treaty of Amity with Iran.

[3] The remaining contentious cases were either applications for revision or requests for interpretation (4 cases) or were based on special agreements (3 cases).

Contribution by Professor Alain Pellet[1]

As I thought I have been a bit isolated in this eminent panel since contrary to the other panelists who, with, it is true, important nuances, showed much sympathy in favour of optional declarations under Artcle32, paragraph 2, of the Statute of the ICJ while I am quite reluctant to encouraging States to accept, not the jurisdiction of the Court on a case-by-case basis but the optional clause system which I find too rigid. And I note that all the States represented by these most distinguished diplomats have made declarations under Article 36.

That said, when I received the invitation to participate in this exchange of views, from my old friend, Minister Bogdan Aurescu, I warned him that, given the theme of this encounter, it might not be very advisable to have me on the panel. But the organisers have maintained their invitation, which I think is to their credit.

And I wish to make another *caveat*: my country, France does not accept the compulsory jurisdiction of the Court. However, even if in this matter I am supportive of its position, I am not a spokesman for the French Government. As a professor, I tended, in the now distant past, to consider the compulsory jurisdiction of the Court as a kind of panacea, a Holy Grail that would make international law look like "real" law. It was practice (above all, a great deal of ICJ practice) that convinced me that such a purely doctrinal belief was not self-evident and that there were more dangers and counter-indications to accepting the Court's compulsory jurisdiction than one might think *a priori* and indeed than most of my excellent colleagues seemed to think - even though they are all particularly eminent practitioners.

I don't want to take the floor too long. I only wish to stimulate discussion by giving some arguments that go against the quasi-consensual view that has characterised the other presentations – with the noticeable

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exceptions of the Legal Adviser of the United Nations and the Registrar of the ICJ who showed more balanced views – maybe because their functions induce them to some caution in view of the reluctance of a majority of States to make the 36, paragraph 2, declaration, maybe by realism dictated by the observation of the real world.

I have three main objections (in large part overlapping):

- *First*, accepting the compulsory jurisdiction is, more often than not, a tactical step which does not correspond to a real adhesion to the idea of compulsory jurisdiction;

- *Second*, this tactical purpose is often reflected in the number and scope of reservations which quite often empty the acceptance of the allegedly compulsory jurisdiction of any real significance;

- *Third*, optional declarations do not guarantee a better compliance with the Courts' judgments.

First then: a tactical step.

When and why does a State subscribe to the optional clause?

- Sometimes because it genuinely trusts in the virtue of compulsory jurisdiction. This is probably the case of several Latin American countries many of which have been the strongest supporters of the compulsory jurisdiction of the Court.

But it also happens that:

- You will make a "surprise declaration" because you have a case and want to take the opponent to the Court on a particular case (there are several well-known precedents: *India v. Portugal*; *Cameroon v. Nigeria*; or *mutatis mutandis* recently *Ghana v. Côte d'Ivoire*); of course there is a way out for the potential Defendant State: specify that jurisdiction is not accepted for a single case and, above all, impose a time limit (usually one year) between the declaration and the referral to the Court (as is done in the Norwegian declaration). Or

- You will make a "propaganda declaration": you accept the Court's jurisdiction but with so many reservations that you, in fact, empty it from any substance.

And this is my *second* point: if you take just the three declarations made by way of examples, by Norway, Romania and the United Kingdom

- Norway has only one, rather sophisticated reservation, but it concerns the subject-matter on which that country probably has the biggest risk of being attracted before the ICJ: the law of the sea;

- Romania's 2015 declaration includes no less than six reservations, two are technical (preservation of other agreed modes of settlements and twelve months prior notice) but the four others concern very important matters: the protection of the environment, "any dispute relating to, or connected with, hostilities, war, armed conflict…" or "connected with, the use for military purposes of the territory of Romania" and, more classically, the indeterminate and rather obscure reservation concerning "any dispute relating to matters which by international law fall exclusively within the domestic jurisdiction of Romania".

- And, last but not least, the United Kingdom, which prides itself on being the only permanent member of the Security Council to accept the Court's compulsory jurisdiction and has repeatedly amended its declaration, usually to limit its scope, and whose current declaration (from 2017), which also includes six reservations that largely render it meaningless; these reservations concern notably: "any dispute with the government of any other country which is or has been a Member of the Commonwealth" (indeed one of the most likely situation lending itself to settlement by the ICJ); "any claim or dispute that arises from or is connected with or related to nuclear disarmament and/or nuclear weapons, unless all of the other nuclear-weapon States Party to the Treaty on the Non-Proliferation of Nuclear Weapons have also consented to the jurisdiction of the Court and are party to the proceedings in question." an obviously unrealistic – not to say absurd condition); moreover, "[t]he Government of the United Kingdom also reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, *and with effect as from the moment of such notification*, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added", which aims at permitting the UK to escape any possible judgment if it deems it appropriate.

Clear cut acceptances of the Court's jurisdiction are indeed most respectable but I sometimes wonder whether case-by-case sincere acceptance of judicial settlement are not, together, more dignifying and more efficient than "optional acceptations" with numerous and important reservations inspired by questionable ulterior motives.

This takes me to my *third remark*: States subscribing the optional clause are not less inclined to challenge the Court's jurisdiction when a case

is brought against them. There are many examples of this in the practice before the Court, some of which being downright caricatural.

This is the case of the frankly outrageous behaviour of Kenya in the case introduced against it by Somalia. In that case, brought before the Court by Somalia on the basis of the respective optional declarations of both Parties, Kenya, as was its right raised preliminary objections, which were dismissed by a quasi-unanimous Court’s Judgment of 2017. It is from this point onwards that Kenya's conduct became quite outrageous and it multiplied unacceptable procedural demands to obstruct the Court's exercise of jurisdiction, even going so far as to dismiss its first team of counsel to give itself time to conduct a diplomatic campaign to pressure Somalia to withdraw its application, ending up refusing to participate in the oral proceedings on futile pretexts. One can also think of the procedural incidents multiplied by Nigeria to delay the settlement of the case brought by Cameroon on the basis of the optional declarations of the two States (it is true that the Cameroonian declaration was filed less than a month after the filing of its application...).

And, if you go back to more remote times, you may also have in ind the (bad) examples of France I the *NuclearTests* cases or the USA in the “big case” against Nicaragua, who challenged the jurisdiction of the Court then having lost on the preliminary objections withdrew their optional declaration.

Now, far from me to dispute the importance of peacefully settling disputes in general and more specifically by the ICJ, even if it is not the panacea. My only point is that Article 36, paragraph 2, declarations might not be the best way to reinforce the role of the Court.

First, what is important is not the *means* of settlement of disputes, but the settlement itself, provided it is effective and fair; there is no inherent superiority in legal settlement. It can happen that the very mention of a seizin of the World Court acts as a red rag, while a conciliation solution might achieve satisfactory results.

Second, it is completely unrealistic to expect that a universal acceptation of the Court’s jurisdiction could be obtained in a foreseeable future all the more so that when I speak of acceptation, I mean real acceptance, without reservation limiting or excluding *de facto* the Court’s jurisdiction.

Third, I maintain that *considered* consent to jurisdiction is more important than tactical or propaganda optional declarations. Referring

disputes to the Court is not an end in itself: what matters is that they are effectively and definitely settled.

To that end, the other bases for the Court's jurisdiction are at least as– and probably more – efficient than Article36, paragraph 2, declarations. This is partially true of compromissory clauses included in a more general treaty. However, very unfortunately, they are more and more rarely included in contemporary conventions. Moreover, these clauses have the same disadvantages as optional declarations: inserted into the treaty at the time of its conclusion, they are rejected by the respondent State when they are invoked in relation to a specific dispute; or, but this is only the other side of the coin, they are used in a totally artificial manner to bring secondary disputes to the attention of the Court, as a pretext for pleading the "real" issue: The multiplication of cases allegedly directed against violations of the Convention on the Prevention and Elimination of Racial Discrimination is one of the manifestations of this drift, which can be compared, for example, to the cases directed by Ukraine against Russia on various pretexts when in reality it is the re-annexation of Crimea that is at issue.

Ultimately, it is probably when the Court's jurisdiction is accepted on a case-by-case basis, in full knowledge of the facts, that it can be exercised most effectively, either when this acceptance is given jointly in a special agreement concluded for the purpose, or when it is given by the respondent State following a referral made on the basis of Article 38, paragraph 5, of the Rules of Court "when the applicant State proposes to find the jurisdiction of the Court upon a consent thereto yet to be given or manifested...". In these two hypotheses, the acceptance of jurisdiction, more real, better informed, will be the guarantee of a more effective implementation of the judgment to be made. And it is to be regretted, that this possibility is not much used and even more rarely accepted by the requested State.

This all to say that, while a strong supporter of the Court's jurisdiction, I deem it more important to encourage effective and efficient recourse to all means of peaceful settlement of disputes than to focus exclusively on the ICJ, and, when it comes to the Court, to insist on the necessity of the real will of the States concerned to submit themselves to the Court's jurisdiction.

Contribution by Sir Michael Wood[1]

This is an important initiative by Romania.

I recall a most interesting and enjoyable seminar, held in Bucharest, about Romania and the International Court of Justice (and the PCIJ).[2] That was just before Romania submitted its declaration accepting the Court's compulsory jurisdiction under the optional clause in 2015.

The UN Legal Counsel has just reminded us of various efforts by the UN Secretary-General and the UN General Assembly to encourage States to accept the compulsory jurisdiction of the Court.

Other initiatives have also been mentioned, including in the Council of Europe[3] and the Swiss-led initiative a few years ago to prepare a *Handbook on accepting the jurisdiction of the International Court of Justice*.[4]

I note in passing that the UNGA's Sixth (Legal) Committee has still not taken forward the proposal to update the excellent UN *Handbook on the peaceful settlement of disputes between States*, the first edition of which was published as long ago as 1992. I find the reasons why one or two States have blocked this incomprehensible. I hope that an update can be prepared in time for the 30th anniversary of this publication.

So, this initiative is not the first of its kind, and—as is always the case with international law—we need to be realistic. It has to be recognised that the results of these various prior initiatives have been quite meagre. Some States are perhaps more willing than they were to accept compromissory

[1] *Sir Michael Wood, KCMG, is a member of the International Law Commission, and a Senior Fellow of the Lauterpacht Centre for International Law, University of Cambridge. He is a barrister in London. He was Legal Adviser to the Foreign and Commonwealth Office (FCO) between 1999 and 2006. During that period, he was, inter alia, he was Agent for the United Kingdom for a number of years before the European Court of Human Rights, and was Agent in the Lockerbie and Legality of Use of Force cases before the International Court of Justice, as well as in the Sellafield proceedings before the International Tribunal for the Law of the Sea and two international arbitral tribunals. Since leaving the FCO in 2006, Sir Michael has acted for many governments in cases before the International Court of Justice (ICJ), European Court of Human Rights (ECHR), International Tribunal for the Law of the Sea and inter-state arbitral tribunals. He has written extensively on public international law.* The opinions expressed in this article are solely the author's and do not engage the institutions he belongs to.

[2] For the proceedings, see B. Aurescu (ed.), *Romania and the International Court of Justice* (2014).

[3] Recommendation CM/Rec (2008)8 of the Committee of Ministers of the Council of Europe on the acceptance of the jurisdiction of the International Court of Justice.

[4] UN Office of Legal Affairs – Codification Division, *Handbook on accepting the jurisdiction of the International Court of Justice: Model clauses and templates* (July 2014), available at https://www.eda.admin.ch/publikationen/en/eda/voelkerrecht/handbook-jurisdiction-international-court.html The group of countries involved in this project comprised Switzerland, the Netherlands, Uruguay, the United Kingdom, Lithuania, Japan and Botswana.

clauses in international conventions,[1] and to refer disputes to the Court by special agreement.[2] But little progress has been made towards acceptance of the Court's compulsory jurisdiction under the optional clause. Seventy-four optional clause declarations are not a lot, especially when one recalls that not many are as 'clean' as that of The Netherlands (which only excludes disputes arising out of situations or facts that took place no earlier than one hundred years before the dispute is submitted to the Court).[3] Indeed, there have been steps backward if one looks at recent revisions of optional clause declarations. In any event, we should not regard acceptance of the optional clause as the unique touchstone of a State's commitment to the Court (or to international law more broadly), notwithstanding its symbolic importance.[4] Even where States have accepted jurisdiction, failure to appear before the international courts and tribunals seems to be on the increase.

There is an understandable reluctance on the part of Governments to place foreign policy decisions in the hands of international judges. There are also, no doubt, more specific considerations that are particular to the case or matter at hand. Rolf Einar Fife has already mentioned the importance of confidence, though I do not necessarily fully share his assessment. There is indeed a need for States to have confidence in international courts and tribunals if they are to accept to submit to their jurisdiction.

Confidence may be affected both by a court or tribunal's decisions on the substance of the law, and its decisions on jurisdiction.

As to substance, decisions that are viewed as poorly reasoned or politically motivated – and here I am referring to international courts and tribunals generally – are hardly likely to inspire confidence in judicial settlement, among Governments at least.

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[1] In recent decades, particularly following the end of the Cold War, a number of States have accepted compromissory clauses in multilateral treaties, sometimes by withdrawing reservations to such clauses. This trend should be encouraged.

[2] For an impressive example, where the special agreement was approved by referendum in both countries, see the ICJ case *Guatemala's Territorial, Insular and Maritime Claim (Guatemala/Belize)*. To date, 19 cases have been submitted to the Court by means of special agreements.

[3] Declaration of The Netherlands dated 21 February 2017.

[4] In the words of the late John Merrills, a perceptive observer of the optional clause: "Those who devised the Optional Cluse hoped for a culture shift in international affairs which obviously has not yet occurred. But as States continue to make declarations under Article 36 (2) and to use them, that worthy ideal retains its value.": J.G. Merrills, 'Does the Optional Clause Still matter?', in K.H. Kaikabad and M. Bohlinder (eds.), *International Law and Power: Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick* (Martinus Nijhoff Publishers, 2009) 431 at 454. For a much earlier, moderately sceptical overview of the optional clause, see C.H.M. Waldock, 'Decline of the Optional Clause', 32 *British Year Book of International Law* (1955-1956) 244.

Confidence is also likely to vary depending on the subject-matter, which explains at least some of the exceptions included in optional clause declarations: for example, the exclusion of 'any dispute regarding to the protection of the environment',[1] or, perhaps more understandably, of law of the sea disputes from time to time excluded under the United Nations Convention on the Law of the Sea.[2] It was often argued in the past that international law was not clear enough, either generally or as regards specific points, for States to subject themselves to judicial settlement. This is less true today, though may still be a concern in fields such as the use of force.

Other exceptions may be explained by a State's concerns about the legality of its actions, which may, for example, be carried out with a view to changing the existing law.

In the present context, confidence depends perhaps above all upon the soundness of an international court's decisions on jurisdiction. There have been some rather questionable decisions on jurisdiction in the last few years, by the ICJ and by other international courts and tribunals. When a court is seriously divided in finding that it has jurisdiction, one may wonder whether it has approached the question with the necessary caution. As the UN Legal Counsel has just reminded us, for Governments it remains fundamental that consent is the basis of jurisdiction.

Hersch Lauterpacht put it very well, in words that are as true today as when they were written:

> *Nothing should be done which creates the impression that the Court, in an excess of zeal, has assumed jurisdiction where none has been conferred upon it.*[3]

There are two final points that anyone seeking to encourage States to accept compulsory jurisdiction of international courts and tribunals should bear in mind.

First, there is the need for States to draft titles of jurisdiction with great care, whether they are *compromis* (special agreements) submitting disputes to an international courts or tribunals, general dispute settlement treaties, compromissory clauses in bilateral and multilateral treaties, declarations accepting compulsory jurisdiction under the Optional Clause, or even acceptances of jurisdiction by way of *forum prorogatum.* At the very least,

[1] For example, Romania's declaration of 23 June 2015; Slovakia's declaration of 28 May 2004; Poland's declaration of 25 March 1996.
[2] For example, Norway's declaration of 24 June 1996.
[3] *The Development of International Law by the International Court* (Stevens & Sons, 1958) 91.

careful drafting may limit disputes over jurisdiction. A particular point to bear in mind when drafting compromissory clauses for multilateral treaties is that an opt-out clause is likely to be much more effective than an opt-in clause.[1]

Second, as Judge Xue wrote over a decade ago,

> *When States opt for diplomatic process to settle their disputes, it should not be deemed solely as political expediency, or negation of the rule of law. Legal regulations may bring about stability and predictability, but they may also unduly cause rigidity and unfairness in State relations, particularly when conditions are not ripe for normative arrangements.*[2]

In other words, submission to the jurisdiction of international courts and tribunals is by no means the only way to settle international disputes, and not always the most effective way.[3]

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[1] For an example of an opt-out clause, see article 27 of the 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property.

[2] H. Xue, 'The Role of the ILC's Work in Promoting Peace and Security – Definition and Evaluation', in G. Nolte (ed.), *Peace through International Law: The Role of the International Law Commission* (Springer, 2009) 183 at 185.

[3] One may recall, in this regard, the successful UNCLOS conciliation at the Permanent Court of Arbitration [2016-10] *Timor Sea Conciliation (Timor-Leste* v. *Australia).*

Contribution by Rolf Einar Fife[1]

The freedom of choice of mechanisms for peaceful settlement of international disputes and the promotion of the compulsory jurisdiction of the International Court of Justice

1. Origins

Ten widely recognized jurists convened on 16 June 1920 in the newly constructed Peace Palace in The Hague to discuss the establishment of a Permanent Court of International Justice (PCIJ). Entrusted by the Council of the League of Nations pursuant to Article 14 of the Covenant of the League of Nations to make proposals to this effect, the Advisory Committee of Jurists contributed decisively to the framing of issues and to the elaboration of the draft Statute for such a court. By the time it had concluded its debates on 24 July 1920, the committee's proposals also included the compulsory jurisdiction of such a court, i.e. a generalized obligatory system of jurisdiction. That suggestion was, however, rejected in the ensuing examination of the draft Statute by the League of Nations. Instead, it was provided for an optional clause permitting States to voluntarily accept in advance the compulsory jurisdiction of the Court in a sphere delimited by Article 36 of the Statute.[2]

After the Second World War, in the context of the elaboration in 1945 of the Statute of the International Court of Justice (ICJ), a "predominant sentiment" seemed to have emerged among States in favour of a less limited compulsory jurisdiction. This was recognized in the explanatory material

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[1] *Currently Ambassador of Norway to the European Union, Rolf Einar Fife has been for 12 years (2002-2014) Director General for Legal Affairs and Legal Adviser in the Norwegian Ministry of Foreign Affairs. In this capacity he was Chair of the Council of Europe Committee of Advisers on Public International Law (CAHDI) (2009-2010), was involved, as Head of the Norwegian delegation, in negotiations on maritime delimitations in the Barents Sea and the Arctic Ocean, as well as in between Greenland and Svalbard, and chaired multilateral treaty negotiations at the United Nations including on the Rome Statute for the International Criminal Court. He also participated in international dispute settlement, including before the International Court of Justice and as arbitrator. Ambassador Fife has extensively published in the fields of Arctic and polar issues, law of the sea, international criminal law, international criminal courts and tribunals and general international law and has taught international law including at the University of Oslo and the Norwegian Defence University College.* The opinions expressed in this article are solely the author's and do not engage the institutions he belongs to.

[2] Report on Draft of Statute for an International Court of Justice Referred to in Chapter VII of the Dumbarton Oaks Proposals (Jules Basdevant, Rapporteur), submitted by the United Nations Committee of Jurists to the United Nations Conference on International Organization at San Francisco, U.N. Committee of Jurists, XIV Documents of the United Nations Conference on International Organization San Francisco, 1945 (1945), 840-841.

prepared by the Committee of Jurists meeting at Washington in April 1945 prior to the San Francisco Conference.[1] Nevertheless, "the counsel of prudence was not to go beyond the procedure of the optional clause inserted in Article 36, which has opened the way to the progressive adoption, in less than 10 years, of compulsory jurisdiction by many States which in 1920 refused to subscribe to it".[2] Ultimately, "the chain of continuity" between the PCIJ and the ICJ was not broken.[3] Manley O. Hudson wrote in 1946 that "from a practical point of view it is more accurate to say that the same Court will go on under a new name and with but slight modifications of its basic Statute".[4]

General acceptance of the compulsory jurisdiction of the court thus continues to require a voluntary declaration under the optional clause of the Statute. The question of compulsory jurisdiction had been considered a "stumbling block" for adherence to the Statute, notably for the United States Senate in 1945, in the words of Senator Vandenberg. However, he added that the optional clause would "leave its development to evolution".[5] This left scope for considerations of policy - and continues to do so. To reach out to policymakers and a broader public in this context, it may be useful to speak of "acceptance of the compulsory jurisdiction" of the Court, as mere references to the notion of the "optional clause" do not necessarily convey the essence of this topic – at least not to the many who are not familiar with the system of the Statute. More importantly, the scope that is left to considerations of policy fully justifies a continuous discussion on how to promote broader acceptance of compulsory jurisdiction by States. This was usefully done in the Bucharest Virtual Round Table of 24 June 2021 dedicated to promoting the jurisdiction of the International Court of Justice.

2. The prospective analysis of preconditions for broad acceptance of the Court's jurisdiction

In 1920, Francis Hagerup was among the members of the Advisory Committee of Jurists. He had twice been prime minister of Norway, was a

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[1] Loc.cit.

[2] Id.

[3] "*The creation of the new Court will not break the chain of continuity with the past.*" Report of the Rapporteur (Nasrat Al-Farsy, Iraq) of Committee IV/1 to Commission IV of the San Francisco Conference, Doc. 913, IV/1/74 (1), 12 June 1945, XIII Documents of the United Nations Conference on International Organization San Francisco 1945 (1945), 384.

[4] Manley O. Hudson, "*The Twenty-Fourth Year of the World Court*", 40 American Journal of International Law, 1946, 1.

[5] Congressional Record, 27 July 1945, 8247, quoted by Preuss, "*The International Court of Justice and the Problem of Compulsory Jurisdiction*", XIII Bulletin, Department of State, No. 327, 30 September 1945, 471 at 477; see Whiteman, Digest of International Law, Department of State Publication, 1971vol. 12, at 1286.

former president of the *Institut de droit international* and had been head of the Norwegian delegation to the 1907 Second Peace Conference in The Hague. To him a standing world court would contribute to the realization of the objectives of the latter conference, highlighting interaction between peace and justice. He advocated that "(t)he principle of the equality of States is the Magna Charta of the smaller States" and vigorously spoke in favour of responding to ambitious expectations of international justice.[1] At the same time, his "experience with the difficulties which arose at the 1907 Peace Conference when it attempted to define cases in which arbitration should be compulsory had a great weight with him".[2] The French member, Albert de La Pradelle, spoke in favour of giving the Court the widest possible competence as concerns both the obligation of States to make use of it and the actual rules to be applied by it. However, there was a definite proviso: "(t)he only limit should be imposed by practical possibilities; they should go as far as they felt sure the States would follow them".[3] Certain other interventions, including by the former US Secretary of State Elihu Root, expressed in various contexts doubts that States would sign on if the court were to be given too broad a competence.[4] The proposal to include compulsory jurisdiction, as strongly advocated by the Swiss member, Loder,[5] was as mentioned ultimately not adopted by the League of Nations. The questions raised in the committee remain relevant. However, in 1920 they were characterized by *prospective* reflection on a future institution, without the benefit of experience of the court's actual activity and of its reception by States.

3. "Eppur si muove" (*And yet it moves*)[6]

A hundred years later, we do have the benefit of experience gained. On the occasion of the one hundredth anniversary in 2020 of the first standing World Court, the president of the International Court of Justice, Abdulqawi Ahmed Yusuf, summarized the continued relevance and viability of the Statute, as originally debated by the Advisory Committee of Jurists in 1920:

[1] Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee June 16th-July 24th 1920 with Annexes (Van Langenhuyen Brothers, 1920) 103.
[2] Advisory Committee of Jurists, op.cit. 227. The Swiss member of the Committee, Loder, was in favour of compulsory jurisdiction for all disputes, op.cit. 224, while the British member, Lord Phillimore, was against, id. 225.
[3] Advisory Committee of Jurists, op.cit. 312.
[4] Advisory Committee, op.cit., see for instance Annex 2, Statement of Fernandes referring to Root, 345.
[5] See note 9 supra.
[6] Words attributed to Galileo Galilei (1564-1642) as to the fact that the Earth actually moves (around the Sun).

"If time is the ultimate test of quality, the work of the drafters of the Statute was certainly a masterpiece. Even if we were to draft a new Statute today, I do not think that we would find much to change in its provisions."[1]

The best argument today for accepting the compulsory jurisdiction of the ICJ and the inclusion of compromissory clauses in bilateral and multilateral treaties might be summarized as the demonstrated *quality* of that Court's work. In 2021, the International Court of Justice has been celebrating its 75th anniversary.[2] A lot of ground has been covered since, among others, Herbert W. Briggs in 1960 described issues of *confidence* in the predictability of the International Court of Justice.[3] While questions related to actual State practice in support of the Court are admittedly still raised,[4] Alain Pellet has recently underlined that the Court's legitimacy is related to the *trust* upheld in her by States, and that the Court's actual role and importance goes in reality beyond the mere wording of the relevant provisions in the Statute.[5] Confidence and trust in the Court have been highlighted in its annual reports to the General Assembly of the United Nations.[6] In 2012, the Security Council of the United Nations issued a statement that "called upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute".[7]

The perceived enhanced predictability giving rise to confidence may have several reasons, as also highlighted by quantitative empirical studies related to the evolution in citation practice and related working methods of the Court.[8]

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[1] Speech to the General Assembly of the United Nations on 10 December 2020, https://www.icj-cij.org/public/files/press-releases/0/000-20201210-STA-01-00-EN.pdf, accessed on 25 August 2021).
[2] Speech of Judge Joan E. Donoghue, President of the International Court of Justice (Video Message), https://www.icj-cij.org/public/files/press-releases/0/000-20210419-STA-01-00-EN.pdf, (accessed 25 August 2021).
[3] Herbert W. Briggs, "*Confidence, Apprehension and the International Court of Justice*", in Proceedings of the American Society of International Law at its annual meeting, Vol. 54 (April 28-30, 1960), Cambridge University Press, 25-38.
[4] E.g., Bimal N. Patel, "*Recommendations on the enhancement of the Role and Effectiveness of the International Court of Justice and State Practice: The Gap between Recommendations and Practice (1971-2006)",* in 11 Singapore Yearbook of International Law and Contributors, 2007, 99-122.
[5] Alain Pellet, *Le droit international à la lumière de la pratique – L'introuvable théorie de la réalité, Cours général de droit international public*, Académie de droit international de La Haye, 2021, at 487 p. 292.
[6] See e.g. A/75/4, para. 15.
[7] S/PRST/2012/1.
[8] Wolfgang Alschner and Damien Charlotin, "*The Growing Complexity of the International Court of Justice's Self-Citation Network*", in European Journal of International Law, vol. 2, issue 1, February 2018, 83-112 (https://doi.org/10.1093/ejil/chy002, accessed 16.8.2021).

4. Consideration of concrete recommendations to promote broader acceptance

After the collapse of the Berlin Wall, Elihu Lauterpacht reminded us in 1991 that "(t)he question of whether it is desirable for States to accept the compulsory jurisdiction of judicial organs is not a new one".[1] Several initiatives have been taken over the years to promote a broader use of the International Court of Justice and other means for the peaceful settlement of such disputes.[2]

While the question of how to promote broader use of the Court is not new, and it is safe to assume that it will remain on the agenda for future discussions, there are continuously lessons to be drawn from efforts devoted to this end. This author should like to recall a particular experience from the Council of Europe, in 2007 and 2008, when Michael Wood was chairing the Council of Europe Committee of Legal Advisers on Public International Law, the CAHDI, and this author was its vice-chair. Based on an idea by Sir Michael a proposal was circulated by the Chair and Vice-Chair to the Committee in March 2007.[3] It concerned Model Clauses for accepting the compulsory jurisdiction of the Court to promote the very aims under discussion. A revised draft was considered in September 2007 by the CAHDI.[4] In July 2008, the Committee of Ministers of the Council of Europe eventually adopted a recommendation to this effect.[5] The initiative in the Council of Europe was taken some years after that incredibly productive decade of the 1990s in terms of advances made, including institution building, in international law. With hindsight, we might say that those years were particularly aptly named the United Nations Decade of international law, and truly deserved that characterization.

The recommendations made did not depart from the principle that States maintain a broad freedom of choice when resorting to mechanisms for the

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[1] Elihu Lauterpacht, *Aspects of the Administration of International Justice*, Hersch Lauterpacht Memorial Lectures, Cambridge, Grotius Publications Ltd., 1991, 25.

[2] See, for example, the relevant resolutions of the General Assembly of the United Nations, including, among others, resolutions 171 (II) in 1947, 3232 (XXIX) in 1974, 44/23 of 1989, 61/37 of 2006..

[3] Council of Europe, CAHDI (2007) 4 rev, Strasbourg, 22 March 2007, "*International Court of Justice: Model Clauses for Accepting the Compulsory Jurisdiction*", Document submitted by the Chair and Vice-Chair of the CAHDI.

[4] Council of Europe, CAHDI (2007) 8 rev, Strasbourg, 22 June 2007. Preliminary Draft Recommendation, Document prepared by the Secretariat of CAHDI, with Appendix to the draft Recommendation containing "*Model Clauses for Possible Inclusion in Declarations of Acceptance of the Compulsory Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute*".

[5] Council of Europe, Recommendation CM/Rec (2008) 8 of the Committee of Ministers to member States on the acceptance of the jurisdiction of the International Court of Justice, adopted by the Committee of Ministers on 2 July 2008 at the 1031s meeting of the Ministers' Deputies.

peaceful settlement of disputes, which remains the overarching and essential objective. The recommendations noted that there is no requirement to make any reservations when accepting the jurisdiction of the International Court of Justice. It put forward suggestions as to using basic and clear language when accepting the Court's jurisdiction. This did not exclude, however, the consideration of certain issues or situations that may give rise to particular reluctance or caution on the part of States, in order to reduce the risk that such considerations prevent the acceptance of the jurisdiction of the Court for other cases.

In addition to the need for clauses concerning the possibility of termination (or amendment) of a declaration of acceptance, a long-standing dispute may give rise to caution in policy considerations (sometimes this situation may be referred to as a "stale conflict"). Concerns might in this regard be alleviated by including a clause excluding prior disputes. It is not contrary to international law to phrase an acceptance of the compulsory jurisdiction of the ICJ in such a way that it would avoid giving it a retro-active effect ("clause excluding prior disputes"). Moreover, there may ways to provide additional clauses ensuring that recourse may instead be given to other methods of settlement for particular issues ("settlement by other method"). Furthermore, concerns may arise as to so-called "surprise applications". There may be ways to formulate an acceptance in such a way as to prevent giving effect to the acceptance by any other party deposited just before filing an application bringing the dispute before the Court.

Among later initiatives, the one taken by several States in 2014 to publish a Handbook on Model Clauses and Templates is particularly noteworthy.[1] It is freely available on the web – and builds further on the idea of how to help, how to assist states in a very practical manner when considering how to approach the issue.

No attempt was made to exclude the possibility of other clauses. However, it is fair to state that the way one approaches this issue has a bearing on legal clarity, but also as to overarching, essential goal of strengthening predictability and usefulness both to States and the international community at large. What would be detrimental, is of course if caution, which in some cases may be perceived to be politically necessary, were to translate into obscurity of declarations. Lack of clarity in such cases

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[1] *Handbook on Accepting the Jurisdiction of the International Court of Justice – Model Clauses and Templates*, 2014, Switzerland, the Netherlands, Uruguay, the United Kingdom, Lithuania, Japan and Botswana. It was published by the Swiss Confederation and made available on the internet by the Office of the Legal Adviser of the United Nations Secretariat at https://legal.un.org/avl/pdf/rs/other_resources/Manual%20sobre%20la%20aceptacion%20jurisdiccion%20CIJ-ingles.pdf, (accessed 25 August 2021).

has rarely prevented recourse to dispute settlement, and in some cases spending an unforeseen amount of resources in dealing with such lack of clarity. Fifty shades of grey may here, so to speak, neither be conducive to responding to the needs of States or of the international community.

Moreover, reservations which in reality "carve out" the contents of the declaration by vaguely referring to domestic jurisdiction and leaving it to domestic authorities to decide on its contents, are controversial and may undermine the purposes of legal certainty and predictability. The lively debate in the wake of the so-called "Connally Amendment" reservation of the United States in 1946, which provided a model for several other States, was instructive.[1] That amendment excluded from the acceptance of the compulsory jurisdiction of the Court disputes regarding matters which are essentially within the domestic jurisdiction of the State concerned, as determined by that State.[2]

When attempting to encapsulate key messages from discussions that have regularly taken place as regards declarations of acceptance of the compulsory jurisdiction of the Court, in one simple formula, it might be to use plain language and promote as much clarity as possible.

[1]See for instance the classic article of Herbert W. Briggs, "*The United States and the International Court of Justice: A Re-Examination*", 53 American Journal of International Law, 1959, 301-318.
[2] Op.cit. 301.