Chapter Seventeen

Does the Optional Clause Still Matter?

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In recent years the International Court of Justice has given several decisions which have drawn attention once again to the significance and limitations of Article 36(2) of the Court’s Statute, the Optional Clause, as a basis for its jurisdiction. Colin Warbrick, as all who know him will readily testify, has throughout his career never hesitated to ‘tell it like it is’ and acknowledge both the value and the imperfections of international law. I therefore thought it might be appropriate in this celebration of Colin’s contribution to legal scholarship to return to a topic that has interested me for the nearly 40 years of our association and review where the Optional Clause, an experiment in ‘compulsory jurisdiction’ inaugurated in the era of the Permanent Court of International Justice, stands at the beginning of the Twenty-First Century.

In earlier articles for the British Year Book of International Law I surveyed the declarations under Article 36(2) as they stood in 1978¹ and 1993². The aim of both articles was to see whether the decline of the Optional Clause which Waldock had identified in a celebrated study in the mid-1950s³ had continued. The conclusion of my first article was that the decline had indeed continued, but that there were also some encouraging signs. In 1993 my conclusion was more optimistic. I suggested that on the evidence of recent practice the decline had been halted and the elements of a useful system of compulsory jurisdiction had begun to take shape. The purpose of this essay will be to bring the story up to date by outlining recent developments and in the light of these to gauge whether the Optional Clause still matters.

Over the last 13 years some significant changes have occurred. A number of new declarations have been made, several existing declarations have been

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modified, one State (Colombia) has withdrawn its declaration without replacing it, and the Optional Clause has been relied on in cases before the Court on various occasions. To assess these developments and consider their implications, the survey which follows is divided into three parts. The first part considers how the situation now compares with 1993 as regards the number of declarations in force and their geographical distribution. The second part then examines how the quality of States’ declarations compares with the position 13 years ago, having regard to the use of limitations and reservations. Finally, as the purpose of the Optional Clause is ultimately to provide a possible basis for litigation, the third part reviews recent decisions involving Article 36(2), along with a number of cases currently before the Court.

1. The Pattern of Declarations

In 1993, when my earlier survey was published, 56 States had made declarations under the Optional Clause. Since then 12 more States have joined the system and only one, Colombia, has withdrawn its declaration. The number of declarations therefore currently stands at 67. Most of those with declarations in 1993 have retained them in the same form, including five States with acceptances of the jurisdiction of the Permanent Court, which are maintained in force by Article 36(5) of the Statute. However, one other State in the latter category, Nicaragua, altered its declaration by adding a reservation to it in October 2001. Eight States: Canada, Nigeria, Norway, Poland, Australia, Cyprus, the United Kingdom and Portugal have changed their acceptances by making new declarations. Poland’s modification was made in 1996 to introduce some minor changes just six years after making its first declaration and the other new declarations are further discussed below.

As a result of these developments the geographical distribution of the declarations has not changed very much, but certain trends which were evident in 1993 have been maintained. Australia, New Zealand and Nauru are still the only representatives of Australasia/Oceania, and the small Asian group of five has also remained constant. The American group has risen to 14 with the addition of Paraguay, Peru and Dominica (and the loss of Colombia), while the African group, which increased significantly between 1978 and 1993, has gained

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4 The present study is based on the declarations listed as in force on 31 July 2006 on the Court’s website, together with the recent declaration of Dominica which had not yet been added. I am grateful to the Registry of the Court for providing me with this information.


6 Cambodia, India, Japan, Philippines and Pakistan.