The World Court's Compulsory Jurisdiction under the Optional Clause – Past, Present and Future

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Preface

The so-called Optional Clause in the Statute of the International Court of Justice had the objective of creating a universal system for compulsory jurisdiction for the solution of disputes between states. In leaving the choice to adhere to the Optional Clause system to the discretion of the individual states, it was thought that the majority of members of the international community would do so.

This did not occur, and in addition to the poor number of acceptances, those who did agree to submit to the compulsory jurisdiction of the Court frequently riddled their declarations with extensive reservations, further limiting the jurisdiction. It is also clear that the Court has been generally underused.

The object of this paper is to describe and analyze these impediments to the creation of an international system for compulsory jurisdiction, to look for the underlying factors and to elaborate briefly on the possibilities for the Court in the future. This also entails a discussion about its role in the international legal order, and a presentation of some suggestions made for enhancing it.

Suggestions for reforms of a more technical-procedural character, like revision of procedural rules; use of chambers and summary proceedings, will not be dealt with.

Primary sources for this paper have been publications from the Court and learned writings on the subject. The study has been confined to English literature.

1. Background

1.1 Short history

At the time of adoption in 1920 of the Statute of the Permanent Court of International Justice, the question was raised whether to furnish the Court with compulsory jurisdiction. The issue of a permanent tribunal endowed with compulsory jurisdiction had been discussed previously at the 1899 and 1907 Hague Peace Conferences. The vast majority of states was in favour of the idea, but most great powers rejected it. In order to attain a broad support for the tribunal and its jurisdiction, it was agreed that the statute should offer the possibility for each state to submit to the compulsory jurisdiction by an optional declaration. Although this compromised the original ambition of the majority of states, the result was, at the time, a good step forward from the traditional mode of ad hoc arbitration.

In 1945, at the San Francisco Conference, the question of compulsory juris-

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diction was raised again, and received support from a majority of states. However, due to the reluctance on the part of the Soviet and the United States, the same compromise resulted. Thus the so-called Optional Clause was retained in the Statute of the ensuing International Court of Justice. The Conference also adopted a recommendation\(^2\) to all member states, repeated several times since\(^3\), to become parties to the Optional Clause system as soon as possible.

Despite this, a relatively small number of states has accepted the competence of the Court under the Optional Clause and, in doing so, they have often made extensive reservations to their declarations. Apart from this, the Court has been generally under-utilized. While seriously concerned about the Court and its future, many observers presently regard the Court as being in decline, and the Optional Clause system in particular as a failure.

### 1.2 The Optional Clause

Article 36.1 in the Statute of the International Court of Justice provides that the Court has jurisdiction in all cases referred to it by the parties, i.e. both parties. The only difference from the traditional _ad hoc_ arbitration is the permanent character of the tribunal. According to the same article, the Court may also be invested with jurisdiction through treaties in force, of which the UN Charter is one.

Article 36.2 contains the so-called Optional Clause and reads:

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

Article 36.3 reads:

> The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

Thus a state party to the Statute can chose to submit to the Court's compulsory jurisdiction in relation to any other state which does the same. This means that no previous agreement is needed in order for the Court to have jurisdiction to try a case between two parties which have both made a declaration under Article 36.2 – the Court will be competent to handle a case (declare admissible and take binding decisions) brought to it by only one of the parties. The Optional Clause aims at creating a comprehensive system for compulsory jurisdiction where each party to the system, i.e. each state that has made a declaration under Article 36.2, can institute proceedings before the Court against any other party.

The principle of reciprocity is a central feature in the compulsory jurisdiction of the Court. There is some confusion as to the meaning of the notion, as it