diplomats. In recent years, the Court has addressed an increasingly wide range of international law questions, many of which have involved sensitive political issues, such as allegations of genocide and the unlawful use of force.

Sixteen contentious cases were pending before the Court as of February 2011. The cases are listed on the Court's Web site at http://www.icj-cij.org.

2. *Jurisdiction of the ICJ in Contentious Cases*

Article 34(1) of the ICJ Statute provides that "[o]nly states may be parties in cases before the Court." Under Article 35(1), the Court is "open to the parties to the [ICJ] Statute," namely, the 192 members of the United Nations. Yet not every dispute between two countries falls within the Court's jurisdiction. Instead, jurisdiction depends on the consent of the parties, manifested in one of the ways described in Article 36 of the Statute.

Statute of the International Court of Justice

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. 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.

3. 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.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

The question of whether a country is a member of the United Nations, and consequently a party to the Statute of the ICJ, rarely arises. It proved to be contentious — and gave rise to seemingly inconsistent outcomes — in cases involving the Federal Republic of Yugoslavia (FRY), later known as "Serbia and Montenegro," and today as the Republic of Serbia. After the former Socialist Federal Republic of Yugoslavia (SFRY) disintegrated, the former Yugoslav Republics of Serbia and Montenegro in 1992 designated themselves as the "Federal Republic of Yugoslavia"; that state claimed to continue the international legal personality of the SFRY, including the SFRY's status as a U.N. member state. In Resolution 777 (1992), the Security Council decided that the FRY could not automatically continue the SFRY's membership and should apply to join the United Nations, as had the other states that emerged from the break-up of Yugoslavia. Eventually, in 2000, the FRY requested, and was granted, admission to membership in the U.N., effective November 1 of that year.

In 1999, before the FRY's application for membership in the U.N. was approved, it brought suit in the ICJ against eight NATO states challenging the legality of NATO's bombing campaign against the FRY during the Kosovo crisis. The Court found that the FRY "was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application." Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections Judgment, 2004 I.C.J. 279, 311 (Dec. 15) (similar judgments were issued in cases brought against Canada, France, Germany, Italy, the Netherlands, Portugal, and the United Kingdom). The ICJ accordingly dismissed the case for lack of jurisdiction. Id. at 328.

The Court employed a different approach in its November 2008 judgment in a case brought in 1999 against the FRY by Croatia. The judges acknowledged that FRY was not a Member of the United Nations when Croatia initiated the case, but noted that it would have been possible for Croatia to file a new application — over which the Court *would* have had jurisdiction — at any time after the FRY became a member of the United Nations in November 2000. Under the circumstances, the Court elected to show "realism and flexibility . . . [where] the conditions governing . . . jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction." The ICJ accordingly rejected the argument that it did not have jurisdiction over the FRY (by then called Serbia). Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections Judgment, 2008 I.C.J. 412, 438, 440 (Nov. 18).

a. Jurisdiction by Special Agreement

Once a dispute between countries has arisen, they may conclude a special agreement to submit the matter to the ICJ. Such an agreement, also known as a *compromis*, will define the question or dispute the parties wish the Court to resolve.

Although the parties' intent to submit a case to the ICJ is ordinarily clear, in some cases this has itself been disputed. The question arose in the context of a dispute between Qatar and Bahrain regarding sovereignty over certain islands and the maritime boundary between the two countries. In 1987, with the mediation assistance of King Fahd of Saudi Arabia, Qatar and Bahrain agreed in an exchange of letters to submit the dispute to the ICJ. The countries remained divided, however, about the scope of the dispute, namely, precisely which of their territorial conflicts to submit to the ICJ. Bahrain, Qatar, and Saudi Arabia continued to negotiate to define the scope of the dispute, but failed to reach agreement.

Renewed efforts to resolve the question were made at a meeting in December 1990, when Qatar indicated it was prepared to accept the formulation of the scope of the dispute that Bahrain had proposed ("the Bahraini formula"). The parties agreed that Saudi Arabia would continue to mediate in hopes of negotiating a settlement, but set a May 1991 deadline for those efforts. After the December 1990 meeting, the Foreign Ministers of Bahrain, Qatar, and Saudi Arabia signed "Minutes" recording the consultations that had taken place among them. The text of the Minutes was in Arabic, and Qatar and Bahrain submitted slightly different English translations. According to Qatar, the Minutes included the following provision regarding what would happen in the event no settlement was concluded by May 1991:

> "The following was agreed: . . .
>
> After [May 1991], the parties may submit the matter to the International Court of Justice in accordance with the Bahraini formula, which has been accepted by Qatar, and the proceedings arising therefrom. . . ."

Bahrain's translation was in most respects identical to Qatar's, but provided as follows on the question of recourse to the ICJ:

> "The two parties may, [after May 1991], submit the matter to the International Court of Justice in accordance with the Bahraini formula, which the State of Qatar has accepted, and with the procedures consequent on it. . . ."

On the basis of the 1987 exchange of letters and the 1990 Minutes, Qatar filed an application in the ICJ in July 1991. Bahrain argued that the 1990 Minutes did not constitute a legally binding instrument manifesting its consent to the Court's jurisdiction, and that the Minutes did not in any event enable Qatar to initiate a case unilaterally.

The Court concluded that the Minutes were "not a simple record of a meeting," but rather constituted an international agreement. It also rejected Bahrain's argument that the 1990 Minutes contemplated that the two states would have to act jointly to submit their dispute to the ICJ. The Court found that the instruments negotiated by the parties "left open the possibility for each of the Parties to present its own claims to the Court, within the framework thus fixed." Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Preliminary Objections Judgment, 1994 I.C.J. 112, 121, 123 (July 1).

Notes and Questions

1. Consider the discussion in Chapter 2 about the difference between treaties and political commitments. Are you persuaded that the Foreign Ministers of Qatar, Bahrain, and Saudi Arabia intended to conclude a legally binding instrument when they signed the Minutes of the December 1990 meeting?

2. In 2001, the ICJ issued its merits judgment in the *Qatar v. Bahrain* case. The judgment was a partial victory for each side; the Court awarded certain disputed

islands (the Hawar Islands and Qit'at Jaradah) to Bahrain, but others (Zubarah and Janan Island) to Qatar. The Court determined the maritime boundary between the two states and affirmed the right of innocent passage of Qatari vessels in Bahrain's territorial sea, as delimited by the Court's judgment. Despite the long-standing intransigence of the parties concerning their claims to all of the disputed territories, the governments of Qatar and Bahrain both accepted the ICJ's judgment "and declared the following day a national holiday to celebrate the end of the dispute and better relations between the countries." Colter Paulson, Compliance with Final Judgments of the International Court of Justice since 1987, 98 Am. J. Int'l L. 434, 455 (2004).

b. Jurisdiction under a Dispute Settlement Clause in a Treaty

When states negotiate a treaty, they may agree in advance that any party may submit a dispute concerning the interpretation or application of that treaty to the ICJ. Over 300 treaties, both bilateral and multilateral, contain such ICJ dispute resolution clauses, also known as "compromissory clauses." Consider the following examples of ICJ dispute settlement clauses.

Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran Signed August 15, 1955

Article XXI

2. Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

Convention on the Prevention and Punishment of the Crime of Genocide Opened for Signature December 9, 1948

Article 9

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other [prohibited] acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Oil Platforms (Islamic Republic of Iran v. United States of America)

Int'l Court of Justice
Preliminary Objections Judgment, 1996 I.C.J. 803 (Dec. 12)

[Iran challenged the lawfulness of the destruction by U.S. military forces of a number of Iranian oil production platforms in the Persian Gulf. The attacks arose during the last stages of the 1980-1988 war between Iran and Iraq, when

Iranian forces increased attacks against ships engaged in commercial trade with Arab Persian Gulf countries. In Iran's view, these states were supporting Iraq, even though they formally retained neutral status. The United States, which sought to ensure that commercial shipping in the Gulf was not impeded, concluded that Iran was using the oil platforms as command and control centers for Iranian attacks against neutral commercial vessels.

[Iran grounded jurisdiction on the ICJ dispute resolution clause in Article XXI of the 1955 U.S.-Iran Treaty of Amity, Economic Relations, and Consular Rights. It argued that the destruction of the platforms violated several articles of the Treaty, including: (a) Article I, which provided that there "shall be firm and enduring peace and sincere friendship between the United States of America and Iran"; (b) Article IV(1), which provided that the parties "shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises"; and (c) Article X(1), which provided that there "shall be freedom of commerce and navigation" between the territories of the two parties.

[In objecting to the ICJ's jurisdiction, the U.S. argued that the dispute over the destruction of the platforms was governed by the law regulating the use of force and self-defense, and did not fall within the ambit of the Treaty of Amity.]

16. . . . [T]he Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute "as to the interpretation or application" of the Treaty of 1955. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction . . . to entertain, pursuant to [the compromissory clause in] Article XXI, paragraph 2. . . .

28. . . . Article I cannot be interpreted as incorporating into the Treaty all of the provisions of international law concerning [peaceful and friendly] relations. Rather, by incorporating into the body of the Treaty the form of words used in Article I, the two States intended to stress that peace and friendship constituted the precondition for a harmonious development of their commercial, financial and consular relations and that such a development would in turn reinforce that peace and that friendship. It follows that Article I must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied. . . .

31. . . . Article I is thus not without legal significance . . . but cannot, taken in isolation, be a basis for the jurisdiction of the Court. . . .

36. . . . Article IV, paragraph 1, states that the nationals and companies of one of the contracting parties, as well as their property and enterprises, must be treated by the other party in a "fair and equitable" manner. This text prohibits unreasonable or discriminatory measures that would impair certain rights and interests of those nationals and companies. It concludes by specifying that their legitimately acquired contractual rights must be afforded effective means of enforcement. The whole of these provisions is aimed at the way in which the natural persons and legal entities in question are, in the exercise of their private or professional activities, to be treated by the State concerned. In other words, these detailed provisions concern

the treatment by each party of the nationals and companies of the other party, as well as their property and enterprises. Such provisions do not cover the actions carried out in this case by the United States against Iran. Article IV, paragraph 1, thus does not lay down any norms applicable to this particular case. This Article cannot therefore form the basis of the Court's jurisdiction. . . .

37. It remains to consider what consequences, in terms of the jurisdiction of the Court, can be drawn from Article X, paragraph 1, of the Treaty of 1955 [, which provides:]

> "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

38. . . . [T]he question the Court must decide, in order to determine its jurisdiction, is whether the actions of the United States complained of by Iran had the potential to affect "freedom of commerce" as guaranteed by the provision quoted above. . . . [The United States argued that the attacks on the platforms did not fall within the scope of Article X on the grounds that the term "commerce" in that provision: (1) was confined to maritime commerce; (2) was limited to commerce between the United States and Iran; and (3) referred solely to the actual sale or exchange of goods.]

43. . . . [Regarding the first argument,] the view that the word "commerce" in Article X, paragraph 1, is confined to maritime commerce does not commend itself to the Court.

44. [Regarding the second argument, the] Court does not have to enter into the question whether this provision is restricted to commerce "between" the Parties. It is not contested between them that oil exports from Iran to the United States were — to some degree — ongoing at least until after the destruction of the first set of oil platforms.

45. [Regarding the third argument, the] Court must now consider the interpretation according to which the word "commerce" in Article X, paragraph 1, is restricted to acts of purchase and sale. According to this interpretation, the protection afforded by this provision does not cover the antecedent activities which are essential to maintain commerce as, for example, the procurement of goods with a view to using them for commerce.

In the view of the Court, there is nothing to indicate that the parties to the Treaty intended to use the word "commerce" in any sense different from that which it generally bears. The word "commerce" is not restricted in ordinary usage to the mere act of purchase and sale; it has connotations that extend beyond mere purchase and sale to include "the whole of the transactions, arrangements, etc., therein involved."

In legal language, likewise, this term is not restricted to mere purchase and sale because it can refer to

> "not only the purchase, sale, and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means and appliances by which it is carried on, and transportation of persons as well as of goods, both by land and sea."

Similarly, the expression "international commerce" designates, in its true sense, "all transactions of import and export, relationships of exchange, purchase, sale, transport, and financial operations between nations" and sometimes even "all economic, political, intellectual relations between States and between their nationals."

Thus, whether the word "commerce" is taken in its ordinary sense or in its legal meaning, at the domestic or international level, it has a broader meaning than the mere reference to purchase and sale. . . .

49. The Court concludes from all of the foregoing that it would be a natural interpretation of the word "commerce" in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general, not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce. . . .

51. . . . On the material now before the Court, it is indeed not able to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil; it notes nonetheless that their destruction was capable of having such an effect and, consequently, of having an adverse effect upon the freedom of commerce as guaranteed by Article X, paragraph 1, of the Treaty of 1955. It follows that its lawfulness can be evaluated in relation to that paragraph. . . .

Notes and Questions

1. The ICJ's judgment in the *Oil Platforms* case concerned only the preliminary question of whether the Court had jurisdiction under the ICJ dispute settlement clause in the Treaty of Amity. The Court's Rules provide that when presented with a preliminary objection, the Court "shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an *exclusively preliminary character.*" Rules of Court, Article 79(6) (emphasis added). Was the Court's interpretation of the relevant Treaty provisions "exclusively preliminary," or did the Court essentially have to decide the merits of Iran's claims in ascertaining whether the destruction of the oil platforms was covered by the Treaty? Was the Court's extensive analysis of the meaning of the phrase "freedom of commerce" in Article X of the treaty jurisdictional, or was it substantive?

In a later decision, the Court described the scope of its inquiry at the preliminary objections stage as follows:

> In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits. . . . The determination by the Court of its jurisdiction may touch upon certain aspects of the merits of the case. [Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections Judgment, 2007 I.C.J. 832, 852 (Dec. 13).]

2. Nearly seven years later after its judgment on jurisdiction, the Court issued a merits judgment in the *Oil Platforms* case. Informed by a full presentation of evidence at the merits stage, the ICJ concluded that at the time of the U.S. attacks, no oil produced through the platforms could have been shipped from Iran to the

In March 2005, U.S. Secretary of State Condoleezza Rice sent a letter to the Secretary-General of the United Nations announcing the withdrawal by the United States from the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations. "As a consequence of this withdrawal," the letter stated, "the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol."

5. In a case between the Democratic Republic of the Congo (DRC) and Rwanda, the Court upheld Rwanda's reservation to the ICJ dispute resolution clause of the Genocide Convention, even though it characterized the prohibition against genocide itself as a non-derogable *jus cogens* norm. In *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the DRC sought to base jurisdiction in part on Article IX of the Genocide Convention, quoted above. Although Rwanda is a party to the Genocide Convention, it had taken a reservation to Article IX. The DRC argued that Rwanda's reservation was incompatible with the object and purpose of the Genocide Convention because "its effect is to exclude Rwanda from any mechanism for the monitoring and prosecution of genocide, whereas the object and purpose of the Convention are precisely the elimination of impunity for this serious a violation of international law." The Court concluded that

> the fact that a dispute relates to compliance with a norm having such a [*jus cogens*] character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties. . . .
>
> Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect the substantive obligations relating to acts of genocide themselves under that Convention . . . [T]he Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as incompatible with the object and purpose of the Convention. [Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Preliminary Objections Judgment, 2006 I.C.J. 6, 30-3 (Feb. 3).]

c. Jurisdiction under the Optional Clause

Under Article 36(2) of the Statute of the ICJ, sometimes referred to as the "Optional Clause," countries may consent in advance to compulsory ICJ jurisdiction over any claim concerning an international legal dispute. That *ex ante* consent, however, extends only to disputes with other states that have also accepted the compulsory jurisdiction of the ICJ under Article 36(2). States that have accepted the compulsory jurisdiction of the Court in this fashion have, in essence, created a subset of states that are prepared, as against one another, to accept mandatory third-party resolution of their international law disputes.

The Comment to section 903 of the Restatement provides further explanation of the Court's compulsory jurisdiction under the Optional Clause.

> *Compulsory jurisdiction under Article 36(2).* Under the Statute of the Court, a state may declare that it recognizes as compulsory the jurisdiction of the Court with respect to all

> legal disputes concerning the interpretation of a treaty, any question of international law, the existence of any fact constituting a breach of an international obligation, or the nature or extent of the reparation for such a breach. Such a declaration by a state applies only in relation to another state that has made a similar declaration. A declaration may accept the jurisdiction of the court for all legal disputes, or may exclude certain categories of disputes. A declaration is, however, subject to reciprocity, and a defendant state against which a proceeding is brought may invoke an exclusion or other reservation not stipulated in its own declaration but included in the declaration of the plaintiff state. A declaration may be of indefinite duration, or for a limited time only. A declaration for a given time is binding for the period indicated. . . . [Restatement section 903 Comment b.]

As of September 2010, 66 states had declarations in force under Article 36(2) accepting compulsory jurisdiction of the Court. As indicated in the Reporters' Notes to section 903 of the Restatement:

> Several of the declarations antedate the International Court of Justice and originally conferred jurisdiction on the Permanent Court of International Justice, but under Article 36(5) of the Statute of the International Court of Justice such declarations are deemed to be acceptances of the jurisdiction of the successor Court.
>
> Some of the declarations are without limit of time; others are for a specific period (usually five or ten years), in many instances with an automatic renewal clause. Many declarations reserve the right to terminate by a notice of withdrawal effective upon receipt by the Secretary-General of the United Nations. Some declarations specify that they apply only to disputes arising after the declaration was made or concerning situations or facts subsequent to a specified date. Seventeen declarations are without any reservation; the remaining declarations are accompanied by a variety of reservations. Many states have modified their reservations, some of them several times.
>
> The most common reservation excludes disputes committed by the parties to other tribunals or which the parties have agreed to settle by other means of settlement. Another common reservation excludes disputes relating to matters that are "exclusively" or "essentially" within the domestic jurisdiction of the declarant state; some of these reservations provide in addition that the question whether a dispute is essentially within the domestic jurisdiction is to be determined by the declaring state (a so-called "self-judging" clause). Several declarations exclude disputes arising under a multilateral treaty "unless all parties to the treaty affected by the decision are also parties to the case before the Court" or, more broadly, "unless all parties to the treaty are also parties to the case before the Court." . . . [Reporters' Note 2.]

States that have accepted the compulsory jurisdiction of the ICJ may be concerned that other states, which have not accepted the Court's jurisdiction under Article 36(2), may file such a declaration solely for the purpose of initiating a particular case. Consider how the declaration of the United Kingdom — the only one of the five permanent members of the U.N. Security Council that accepts the compulsory jurisdiction of the ICJ — addresses this problem.

United Kingdom

5 July 2004

1. The Government of the United Kingdom of Great Britain and Northern Ireland accept as compulsory ipso facto and without special convention, on condition

of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance, over all disputes arising after 1 January 1974, with regard to situations or facts subsequent to the same date, other than:

(i) any dispute which the United Kingdom has agreed with the other Party or Parties thereto to settle by some other method of peaceful settlement;
(ii) any dispute with the government of any other country which is or has been a Member of the Commonwealth;
(iii) any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court.

2. The 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.

The ICJ addressed the validity and legal effect of reservations in a state's Optional Clause declaration in the following case:

Certain Norwegian Loans (France v. Norway)

Int'l Court of Justice
1957 I.C.J. 9 (July 6)

[French nationals owned bonds issued before World War I by the Kingdom of Norway and two Norwegian banks. These bonds initially contained varying clauses that France claimed expressly promised and guaranteed payment in gold. Norway later passed legislation allowing payment of the bonds with Bank of Norway notes, which were not convertible into gold.

[The French government espoused the claims of its nationals, and proposed to resolve the matter through an international dispute resolution mechanism. The Norwegian government maintained that the bondholders' claims were within the jurisdiction of the Norwegian courts and that these claims were solely matters of domestic law. The French government then brought the case to the ICJ.

[Both parties had declared their acceptance of the compulsory jurisdiction of the ICJ under Article 36(2). The French declaration, however, was not unconditional.]

It will be recalled that the French Declaration accepting the compulsory jurisdiction of the Court contains the following reservation:

> This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic.

In the Preliminary Objections filed by the Norwegian Government it is stated:

> The Norwegian Government did not insert any such reservation in its own Declaration. But it has the right to rely upon the restrictions placed by France upon her own undertakings.
>
> Convinced that the dispute which has been brought before the Court by the Application of July 6th, 1955, is within the domestic jurisdiction, the Norwegian Government considers itself fully entitled to rely on this right. Accordingly, it requests the Court to decline, on grounds that it lacks jurisdiction, the function which the French Government would have it assume.

In considering this ground of the Objection the Court notes in the first place that the present case has been brought before it on the basis of Article 36, paragraph 2, of the Statute and of the corresponding Declarations of acceptance of compulsory jurisdiction; that in the present case the jurisdiction of the Court depends upon the Declarations made by the Parties in accordance with Article 36, paragraph 2, of the Statute on condition of reciprocity; and that, since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the Declarations coincide in conferring it. A comparison between the two Declarations shows that the French Declaration accepts the Court's jurisdiction within narrower limits than the Norwegian Declaration; consequently, the common will of the Parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservation. . . .

France has limited her acceptance of the compulsory jurisdiction of the Court by excluding beforehand disputes "relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic." In accordance with the condition of reciprocity to which acceptance of the compulsory jurisdiction is made subject in both Declarations and which is provided for in Article 36, paragraph 3, of the Statute, Norway, equally with France, is entitled to except from the compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its national jurisdiction. . . .

For these reasons, the Court, by twelve votes to three, finds that it is without jurisdiction to adjudicate upon the dispute which has been brought before it by the Application of the Government of the French Republic of July 6th, 1955.

Questions

1. The Norwegian Optional Clause declaration stated that Norway recognized the Court's jurisdiction as compulsory "in relation to any other State accepting the same obligation, that is to say, on condition of reciprocity." Was that essential to the Court's decision? What if the Norwegian declaration did not include the reciprocity condition — that is, what if it had been made unconditional? Based on the reasoning in the opinion above, would the Court have found jurisdiction? Professor Rosenne concludes, "[W]here two declarations are in different terms, jurisdiction exists only to the extent that they coincide." Gill, Rosenne's The World Court, supra, at 74.

2. The Court in the *Norwegian Loans* case did not examine the legality of France's "within the national juridiction" reservation because neither of the parties questioned the validity of the reservation. If the facts in the case were reversed so that Norway sued France in the ICJ over French bonds, would Norway have any basis for challenging the reservation in response to a claim by France that the matters were "essentially within [its] national jurisdiction?" What if France, in the *Nuclear Tests* cases discussed in Chapter 2, claimed that it understood the nuclear tests to be essentially within its national jurisdiction? Should the Court always accept the invocation of a self-judging reservation of this type?

3. Judge Lauterpacht, in a separate opinion in the *Norwegian Loans* case, argued that France's self-judging reservation, which he called the "automatic reservation," was invalid. In his view, the reservation was incompatible with Article 36(6) of the ICJ Statute, which provides that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Judge Lauterpacht also concluded that France's declaration accepting the Court's jurisdiction did not constitute a legal obligation. In his view:

> The effect of the French reservation relating to domestic jurisdiction is that the French Government has . . . undertaken an obligation to the extent to which it, and it alone, considers that it has done so. This means that it has undertaken no obligation. An instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. It is not a legal instrument. It is a declaration of a political principle and purpose. [Certain Norwegian Loans, 1957 I.C.J. 34, 48 (July 6) (separate opinion of Judge Lauterpacht).]

If Judge Lauterpacht had persuaded a majority of the Court to declare a self-judging reservation to be invalid, what would the result be? Would the Court have jurisdiction?

4. What law would the Court have applied if it had decided that it had jurisdiction in this case? What legal documents or sources would the Court have looked to?

5. What precedential value would an ICJ judgment on the merits have? See Article 59, which provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."

d. Jurisdiction Under the Optional Clause Applied: The Nicaragua Litigation

The Court faced a contentious dispute regarding its Optional Clause jurisdiction when Nicaragua sued the United States in 1984 over U.S. support of the "*contras*," an insurgent group seeking to overthrow the Soviet-supported Sandinista Nicaraguan government. (As we shall see, the case also proved to be a challenge to respect for the ICJ's judgments.) In its application initiating proceedings, Nicaragua alleged that the United States "is using military force against Nicaragua and intervening in Nicaragua's internal affairs. . . . The United States has created an 'army' of more than 10,000 mercenaries . . . installed them in more than ten base camps in Honduras along the border with Nicaragua, trained them, paid them, supplied deemed necessary under domestic constitutional law. Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law. In short, the question is not decided in the Court's original Judgment and thus cannot be submitted to it for interpretation under Article 60 of the Statute.

Mexico's argument . . . concerns the general question of the effects of a judgment of the Court in the domestic legal order of the States parties to the case in which the judgment was delivered, not the "meaning or scope" of the *Avena* Judgment, as Article 60 of the Court's Statute requires. By virtue of its general nature, the question underlying Mexico's Request for interpretation is outside the jurisdiction specifically conferred upon the Court by Article 60. [Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, ¶¶44-45 (Jan. 19, 2009), reprinted in 48 I.L.M. 199 (2009).]

4. *Advisory Opinions*

In addition to its jurisdiction in contentious cases between states, the International Court of Justice is empowered under the United Nations Charter and its Statute to render advisory opinions on legal questions presented by various international organizations.

U.N. Charter, Article 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions on legal questions arising within the scope of their activities.

ICJ Statute, Article 65

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request. . . .

Currently, the Economic and Social Council (as a U.N. organ) and 16 specialized agencies are authorized to seek advisory opinions from the Court in accordance with Article 96(2) of the Charter.

a. Jurisdiction

In 1993, the World Health Organization (WHO) — one of the specialized agencies empowered to request an advisory opinion under Article 96(2) of the U.N. Charter — requested an opinion on the question of whether, in view of the anticipated health and environmental effects, "the use of nuclear weapons by a State in war or other armed conflict [would] be a breach of its obligations under international law including the WHO Constitution." The request required the Court to determine the scope of its advisory opinion jurisdiction.

> [T]he provisions of [the WHO Constitution] may be read as authorizing the Organization to deal with the effects on health of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in.
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> The question put to the Court in the present case relates, however, *not to the effects* of the use of nuclear weapons on health, but to the *legality* of the use of such weapons *in view of their health and environmental effects.* Whatever those effects might be, the competence of the WHO to deal with them is not dependent on the legality of the acts that caused them. Accordingly, it does not seem to the Court that the provisions of . . . the WHO Constitution, interpreted in accordance with the criteria referred to above, can be understood as conferring upon the Organization a competence to address the legality of the use of nuclear weapons, and thus in turn a competence to ask the Court about that. . . .
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> [T]he Charter of the United Nations laid the basis of a "system" designed to organize international co-operation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers. The exercise of these powers by the organizations belonging to the "United Nations system" is co-ordinated, notably, by the relationship agreements concluded between the United Nations and each of the specialized agencies. . . .
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> . . . And there is no doubt that questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialized agencies. Besides, any other conclusion would render virtually meaningless the notion of a specialized agency; it is difficult to imagine what other meaning that notion could have if such an organization need only show that the use of certain weapons could affect its objectives in order to be empowered to concern itself with the legality of such use. [Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, 76, 80 (July 8).]

Notes and Questions

1. How is the ICJ's advisory opinion function consistent with the notion that the Court's jurisdiction must be grounded in consent? Won't almost any advisory opinion issued by the Court address the rights and obligations of—or at least affect the interests of—states, including states that may not have consented to the Court's jurisdiction under the Optional Clause?

2. Independently of the WHO, the General Assembly also requested an advisory opinion from the Court on the legality of the use of nuclear weapons. Because the General Assembly is authorized by Article 96(1) of the U.N. Charter to request an advisory opinion "on any legal question," the General Assembly's request did not confront the same jurisdictional barrier as the WHO's request. In its response to the General Assembly's request, the Court noted that nuclear weapons were not specifically prohibited under existing treaties and obligations. It nevertheless indicated that the use of such weapons "seems scarcely reconcilable with" international law rules governing the conduct of warfare. The Court nevertheless concluded that that