EDITORIAL COMMENT

THE UNITED STATES ACCEPTS THE OPTIONAL CLAUSE

On August 26, 1946, a declaration by President Truman recognizing, on behalf of the United States, the compulsory jurisdiction of the International Court of Justice, was handed to the Secretary-General of the United Nations by Mr. Herschel V. Johnson, Acting United States Representative to the United Nations. The declaration of the President stated that, in accordance with the resolution of August 2, 1946, of the Senate of the United States of America (two-thirds of the Senators present concurring therein), the United States of America recognized as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes thereafter arising concerning

> A. The interpretation of a treaty; B. Any question of international law; C. Existence of any facts which, if established, would constitute a breach of international obligation; D. The nature or extent of the reparation to be made for the breach of an international obligation;

subject, however, to certain provisos. They were these. The declaration was not to apply to:

> A. Disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or
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> B. Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or
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> C. Disputes arising under a multilateral treaty, unless (1) All parties to the treaty affected by the decision are also parties to the case before the Court, or (2) The United States of America specifically agrees to jurisdiction; and
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> Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.[1]

Proviso A acknowledges the freedom of the United States, in harmony with existing or future agreements, to have recourse to other types of "tribunals" for the adjustment of international differences when such action seems feasible and preferable to adjudication before the International Court. This is consistent with the thought expressed in Chapter VI, Article 33, of the Charter of the United Nations which states that

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first

[1] See United Nations, Press Releases IC/1 and IC/2 of August 26, 1946.

of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The flexibility of action retained by virtue of Proviso A suggests that the United States may in fact oftentimes deem it preferable to invoke the aid of *ad hoc* tribunals for the adjustment of minor issues concerning, for example, matters growing out of claims for pecuniary indemnities concerning which controversy has arisen, and yet where questions concerning the existence of international liability, and the appraisal of damages, ought to be easily susceptible to adjustment in short order and without great expense by a relatively small body of jurists empowered to adjudicate thereon.

Proviso B with regard to matters which are "essentially within the domestic jurisdiction of the United States" as determined by itself, presents a more intriguing problem. It will be recalled that Article 2, paragraph 7 of the Charter of the United Nations announces that nothing therein shall authorize the United Nations "to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter"; but it is added that "this principle shall not prejudice the application of enforcement measures under Chapter VII." Chapter VII (Articles 39–51) relates to "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression."

In the course of the development of international law, there has grown up a practice which yields to the individual State, if it be an independent one, freedom to deal as it sees fit with very many matters pertaining peculiarly to itself; and they are roughly described as lying within the "domestic jurisdiction" of such State.[2] Fear lest a country, such as our own, be sub-

[2] The writer had observed elsewhere:

> There is a broad zone within which the activities of the individual State, even in respect to certain matters affecting the interests of others, have in practice been left so completely to the local control as to inspire the statement that they are not, in principle, regulated by international law. There is suggested a distinction between matters which by virtue of the law of nations a State enjoys a broad right to control, and those respecting which it enjoys unmolested freedom because they fall within a domain where international law is not deemed to be applicable. Such a distinction may be useful in portraying or identifying special activities or situations wherein a State has long been permitted to be the sole judge of the propriety of its conduct, and where the absence of outside interference has revealed the remoteness of any general international interest. It fails, however, to offer a satisfactory explanation of the latitude accorded or enjoyed. If a State is unhampered in its activities that affect the interests of any other, it is due to the circumstance that the practice of nations has not established that the welfare of the international society is adversely affected thereby. Hence that society has not been incited or aroused to endeavor to impose restraints; and by its law none are imposed. The Covenant of the League of Nations takes exact cognizance of the situation in its reference to disputes "which arise out of a matter which by international law is solely within the domestic jurisdiction" of a party thereto. It is that law which as a product of the acquiescence of States permits the particular activity of the individual State to be deemed a domestic one. (*International Law Chiefly as Interpreted and Applied by the United States*, 1945 (2 ed.), Vol. I, p. 7.)

jected to the obligation to adjudicate in an international forum a question arising out of a contention that is seemingly defiant of its exercise of a privilege acknowledged by the law of nations to be its own has been responsible for the incorporation in numerous treaties of a reservation designed to cover the point. Thus, for example, in Art. III of the arbitration treaty between the United States and France of February 6, 1928, it was declared that the provisions thereof should not be invoked in respect to any dispute the subject matter of which "is within the domestic jurisdiction of either of the high contracting parties." [3] This is doubtless an effective mode by which a State may free itself from the obligation to defend its conduct in an arbitral forum when that conduct is in its judgment a mere manifestation of acts which, as tested by the standards of international law, a State is generally free to commit without external restraint. Nevertheless, controversy may arise as to whether a particular dispute is within the "domestic jurisdiction" of the State that is haled before an international court. The interpretative problem may baffle adjudication and frustrate it.

As noted above, in Proviso B of the declaration of the United States accepting the optional clause, the United States itself determines whether a dispute falls within the reservation, as an instance of a matter essentially within the domestic jurisdiction of the country. By this process the problem of interpretation is to be settled by itself. It thereby asserts the right unilaterally, and regardless of the differing view of any other party to a dispute, to decide whether the issue is one which it is obliged to submit to the Court of International Justice.

It might be optimistic to assert that the United States would never abuse its privilege and never attempt to evade an obligation to adjudicate before the International Court on colorable grounds. It is to be hoped that it will never declare that an issue which another party thereto seeks to adjudicate before the Court concerns a matter which is essentially within the domestic jurisdiction, unless evidence of the law of nations as revealed in the acquiescence of States generally sustains its decision. It must be remembered, however, that the development of international relations has within the past fifty years produced changing estimates of the effect of the conduct of the individual State upon the life of the international community. In a word, matters which might in 1910 generally have been regarded as essentially

[3] U. S. Treaty, Vol. IV, 4180. "Disputes legal in their nature may arise between two States with regard to matters falling exclusively within the domestic jurisdiction of one of them. No State can agree to the submission to an international tribunal of matters falling exclusively within the range of its national sovereignty. Similarly, there are some political questions even of a justiciable nature as to which a country feels that for the reasons indicated in paragraph 4 the stage has not yet been reached when it can agree unreservedly in advance to submit them to an arbitration tribunal." *Observations of His Majesty's Government in Great Britain on the Programme of Work of the Committee on Arbitration and Security of the Preparatory Commission for the Disarmament Conference*, League of Nations Publications, Disarmament, 1928. IX. 3, p. 51.

within the domestic jurisdiction of a country such as our own, may, in 1948 or 1950, be regarded by the family of nations as having attained a new significance in the international life, and as having such a sinister aspect as to be regarded with real concern by States generally, and as subversive of the maintenance of justice in an international sense. The very theory and structure of the Charter of the United Nations are indicative and prophetic of fresh limitations upon the freedom of the individual State. Still, it is not believed that the American Government would at any time be disposed to press for an interpretation in the application of Proviso B that would be contemptuous of prevailing opinion.[4]

Proviso C is self-explanatory and calls for no comment. It is perhaps to be regretted that the declaration in behalf of the United States is to remain in force, to start with, merely for five years rather than for a longer period before the expiration of six months' notice of desired termination begins to run.

In presenting the President's declaration to the Secretary-General of the United Nations, Mr. Johnson said that the action taken was further testimony of the determination of the United States that the United Nations would fulfill the role assigned to it, which was nothing less than the preservation of world peace.[5] Acceptance by the United States of the optional clause is a real step forward in American diplomacy. It reflects a conviction widespread throughout the country that international controversies within a broad field should, when other methods fail, be adjudicated before a permanent international tribunal; and it attests the general confidence that the Court of International Justice is that tribunal. The existence of that confidence reveals a prodigious change in American thinking since the close of World War I. The fact, rather than the cause of it, is here noted. In plowing the soil that events made fertile for the growth of a sense of the vast desirability to the United States in obligating itself to adjudicate a broad class of differences before the Court of International Justice, there will never be forgotten the sturdy and vigorous labors of one particular plowman —the Honorable Manley O. Hudson.

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President of the Society

THE DRAFT TREATIES OF PEACE

The official release to the public, on July 30, 1946, of the texts[1] of the draft treaties of peace with Bulgaria, Finland, Hungary, Italy and Rumania, was

[4] See discussion in the Senate, August 2, 1946, *Congressional Record*, Vol. 92, pages 10828–10850.

[5] United Nations Press Release IC/2, August 26, 1946.

[1] The texts of the Bulgarian, Finnish, Hungarian, and Rumanian draft treaties are given in *The New York Times*, July 31, 1946, pp. 15–21, under a Washington dateline of July 30, that of the Italian treaty in a cable despatch from Paris in its issue of July 27, 1946, pp. 7–10. [These documents are not reprinted in the JOURNAL under our standing rule against printing agreements until finally concluded.—Ed.]