BOOK REVIEWS

Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice by S.A. Alexandrov. Martinus Nijhoff Publishers, Dordrecht, 1995, ISBN 0-7923-3145-1, *x* and 176 pp., US$ 75.-/ £ 48.50/ Dfl. 115.-.

In recent years, the International Court of Justice has been experiencing something of a renaissance in its case load and in the attention given to it in scholarly literature. States have shown a renewed interest in resorting to it in a wide variety of disputes, both on the basis of mutual agreement and on the basis of unilateral application. As a part of this renewed interest, a number of states have made or renewed existing declarations accepting the compulsory jurisdiction on the basis of Article 36(2) of the Court's Statute.

Stanimar A. Alexandrov's book on reservations in declarations under Article 36(2) is, thus, a timely addition to the list of recent works on the Court and focuses on a topic of importance for states that have made, or are considering making, declarations under the so-called Optional Clause.

Alexandrov's stated purpose "is to examine the reservations to the acceptance of compulsory jurisdiction included in declarations made by States under Article 36(2) of the Statute of the Court and to discuss the practical application by the Court of the principle of reciprocity to such reservations in contentious cases submitted to it under Article 36(2)" (p. *ix*).

The author's approach to the question of reservations contained in unilateral declarations accepting the Court's compulsory jurisdiction is refreshingly pragmatic. In contrast to the widely held view that such reservations are an obstacle to increased use of the Court, the author starts in the premise that reservations in fact "provide for the flexibility which many states consider essential in accepting the compulsory jurisdiction" and therefore "may in fact contribute to the wider acceptance of compulsory jurisdiction" (p. *x*).

The element of reciprocity is of key importance to an understanding of the effect of reservations, and it forms a central theme in Alexandrov's analysis. He sets out "to evaluate the practical significance, usefulness and effectiveness of the different types of reservations" with the goal of drawing "some conclusions as to the necessity and desirability of including them in declarations of acceptance as well as to suggest some improvements in their drafting" (p. *x*).

The book is divided into six substantive chapters that deal successively with the nature of compulsory jurisdiction; reservations in unilateral declarations and the application of the principle of reciprocity (Chapters II and III); reservations *ratione temporis* and the application of reciprocity; reservations *ratione materiae* and the application of reciprocity; and, finally, reservations *ratione personae* and the application of reciprocity. This rather traditional structure of the analysis is used to analyse the various types of reservation through an extensive review of the Court's jurisprudence and of the individual opinions of judges, both in cases before the Permanent Court as well as before the present Court. In addition, the views contained in a number of classic works on the Court by such authorities as Briggs, Fitzmaurice, Gross, Hudson, Kelsen, Lauterpacht, Rosenne, Sohn, Verzijl, and Waldock, as well as some more recent works, are cited frequently as references.

Chapter I discusses the basic nature of compulsory jurisdiction and, in particular, of the legal nature of the Optional Clause and of the declarations made under Article 36(2). Starting with the basic principle that inter-state dispute settlement is based upon the consent of the state, the author reviews the basic methods under the Statute for a state to express its consent to the Court's jurisdiction, as well as tracing briefly the drafting history of the Optional Clause.

The essential legal nature of the declarations made under Article 36(2), namely that they collectively form a network of unilateral acts that enables the states making them to bring a particular dispute before the Court without the need for subsequent consent, is illustrated by the author through numerous references to the Court's jurisprudence.

The element of reciprocity, which lies at the heart of the whole system of Optional Clause jurisdiction, signifies that "wherever a specific dispute is submitted to the Court under the Optional Clause, the Court has to establish the extent to which the obligations assumed by the parties coincide" (pp. 33-34). In practice, this means that the Court can only exercise jurisdiction to the extent contained in the narrower of the two declarations, because of the effect on the principles of state consent and reciprocity that underlie the Optional Clause systems (p. 39).

All of this is well established and is covered in all the classic publications on the Court. As such, these chapters do not so much contain new information or insight as they serve to provide a useful introduction and some examples of how this rule has been developed and applied by the Court over a long period (since 1920).

The chapters dealing with *ratione materiae* are the most inter-

esting chapters in the book. They provide valuable insight into how such reservations operate to effect the scope of the Court's jurisdiction and the extent to which they serve the purpose intended: that of excluding certain types of disputes being brought before the Court against the will of the states making them, while neither preventing the states that include reservations in their declarations from making effective use of the possibility of bringing a dispute before the Court when they so wish, nor unnecessarily restricting the jurisdiction of the Court.

In relation to the former type of reservation, Alexandrov discusses various types of reservations *ratione temporis*, including the so-called Belgian formula,[1] which excludes both disputes and facts or situations that arise before a specific date. Alexandrov is critical of this formula as being overly restrictive. He also sheds light on some of the problems involved in applying such reservations, such as determining the critical date of a dispute. Many states have explicitly reserved their right to modify or terminate their declarations upon notice, and while this principle has been criticized by many commentators, it is clear, as Alexandrov points out, that the inclusion of this type of provision is on the rise (p. 63). He is also correct in pointing out that the state which does not include such a provision is at a significant disadvantage *vis-à-vis* the state which does (p. 66).

With regard to reservations *ratione materiae*, Alexandrov discusses a variety of reservations relating to specific types or categories of disputes. Of these, he gives the most attention to what, in many respects, is the least interesting, namely the reservations relating to domestic jurisdiction, both 'objectively' determined (i.e., by the Court on the basis of international law) and 'subjectively' determined (i.e., by the state invoking the reservation on the basis of its appreciation of what constitutes domestic jurisdiction). This type of reservation is less interesting because - as Alexandrov points out - objective domestic jurisdiction reservations are redundant, while subjective ones, like the well-known Connally Amendment contained in the 1946 US declaration,[2] are violative of the principle of *Kompetenz-Kompetenz*. Moreover, they are self-defeating in that they make it impossible for the states including them in their declarations to effectively bring an adversary before the Court. Both of these

1. This formula was introduced by Belgium in its declaration of 25 September 1925; *see* M.O. Hudson, The Permanent Court of International Justice 1920-1942: A Treatise 684 (1943).

2. *See* 1 UNTS 9 (1946).

points have been made repeatedly in the past, and Alexandrov could probably have made them more quickly and with less ado.

Another point of criticism is whether reservations relating to national security and defense-related matters are as similar to domestic jurisdiction reservations, as the author contends (p. 91). To be sure, those reservations that contain a 'subjective' reservation (as determined by the state in question) certainly resemble similarly framed reservations relating to domestic jurisdiction and suffer from the same deficiencies of both a legal and a policy nature. However, those that do not contain such self-judging clauses do not so much resemble 'objectively' framed reservations relating to domestic jurisdiction as they do the traditional 'vital interest' exclusion clauses in earlier arbitration treaties. As the author points out, such reservations can backfire against the state including those due to reciprocity, and they can probably be over-exclusive if too broadly or vaguely framed. However, they can also serve a legitimate purpose, or at least an understandable one, by excluding certain types of highly sensitive disputes from the Court's jurisdiction. While such disputes may well be justiciable or, at any rate, may contain justiciable elements, it may be questioned whether the Court is always necessarily the most appropriate or effective forum to handle them - especially in the context of unilateral application based upon the compulsory jurisdiction. At any rate, such reservations are not redundant in the way objectively framed reservations relating to domestic jurisdiction are, and they leave the Court room to assess their applicability to specific cases, while providing the states making them with a degree of protection from having situations adjudicated that they may have no interest in bringing before the Court.

However, these criticisms do not signify that there is not much that is of interest in the author's treatment of reservations *ratione materiae*. In particular, the section of Chapter V (pp. 97-103) relating to the relationship and effect of reservations under the Optional Clause, and reservations contained in treaties in cases brought under 'double basis' of jurisdiction (cases in which compromissory clauses contained in treaties under Article 36(1) of the Statute are simultaneously invoked alongside jurisdiction based upon declarations under Article 36(2) as basis of jurisdiction) is of particular interest.

In sum, Alexandrov's book is a useful addition to the library of anyone interested in the International Court of Justice. Although parts of the book repeat well-known facts and discussions relating to the compulsory jurisdiction and certain types of reservations to this jurisdiction, it contains compre-

hensive references to jurisprudence relating to reservations that any student or researcher interested in the Court will find useful. It rightly stresses the fact that reservations are a legitimate part of a state's litigation strategy and can play a useful role in helping a state to accept compulsory jurisdiction, while at the same time providing interesting insights concerning the effectiveness and acceptability of reservations.

One of the author's most interesting comments in this respect is contained in the conclusion (pp. 124-125), where he discusses what he refers to as 'the affirmative approach', i.e., contracting into specific types of disputes rather than contracting out. This is certainly an interesting and original idea, which, although it may appear as a 'second best' option to purists, could well stimulate increased acceptance of the Court's compulsory jurisdiction by states that have hitherto shunned the Court or have withdrawn declarations as a result of disaffection with a decision of the Court.

Mr. Alexandrov is to be congratulated for offering such a useful, realistic, and informative book in a period in which the Court has begun to play a role of importance in international relations and in the settlement of disputes.

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The New World Order and the Security Council - Testing the Legality of its Acts by M. Bedjaoui. Martinus Nijhoff Publishers, Dordrecht, 1994, ISBN 0-7923-3434-5, 531 pp., US$ 244.-/£154.-/Dfl. 375.-.

Due to the topical nature of the subject-matter and the eminence of its author, this monograph - an English edition of a slightly earlier French version published by Bruylant, Brussels - already occupies a prominent place among the major publications on public international law in recent times; it is an outstanding contribution to solving a major problem facing the international community.

The monograph contains the actual analysis made by the President of the International Court of Justice (comprising 148 pages), and includes a documentary of almost 400 pages containing a wide selection of relevant instruments and documents originating from the UN and the Court, as well as from learned bodies and writers. The sheer size and quality of this collection constitutes an extremely valuable wealth of sources for further research in its own right, while at the same time supporting the analysis presented in the first part of the publication.

The combination of a thorough and sharp treatment of the subject and the supplementary documentation have made this monograph a

true '*livre de chevet*', which I unreservedly and warmly recommend as compulsory reading for practising and academic international lawyers alike. It seems more than appropriate, therefore, to make an attempt to indicate the main ideas in this fascinating book.

In an introductory chapter, President Bedjaoui explains how the recent revival of the Security Council was bound to give 'the kiss of life' to the problem of verifying the legality of acts of political organs, a theme which had been effectively 'dormant' over four decades of cold war. If the Security Council legitimately wants to claim credibility, authority, and effectiveness, this highest international political organ must act in accordance with its Charter and general international law. Any real democratization of the United Nations depends upon an effective legal control of the Council's acts, which can be put into operation at minimal expense now.

A new look at the 'San Francisco legacy' and the way it was managed is presented in a natural manner in Chapter II. This main challenge to the proclaimed new international order was already facing the founders of the Charter, who deliberately did not include a specific legality-test clause. The core issue of assessing the constitutional validity of acts of UN organs was severely clouded by the dispersal of the power of interpretation of the Charter among the principal organs and the states themselves. Subsequent practice provided us with an unsuccessful attempt to confide the task of Charter interpretation to the Court (General Assembly Resolution 171(II))[1] and gave rise to a series of arguments against a legality review, each of them being persuasively refuted by President Bedjaoui. Moreover, the lack of references to precise Charter provisions before 1990 made any control of legality of acts of the Security Council virtually impossible.

The Court, itself, was alert to the need for the actions of the UN to succeed. From time to time it suggested that the irregularity of an act may be overcome by the legality of its purpose (the *Certain Expenses* case).[2] On other occasions, the Court examined, albeit cursorily, the question of validity of resolutions that did not actually form the subject of the request for an advisory opinion, but this was done only after the Court had made it perfectly clear that it did not possess powers of judicial review or appeal with respect to decisions taken by the UN organs concerned (the 1971 *Namibia* Opinion).[3] How-

1. *See* UN Doc. A/RES/171(II) (1947).
2. Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 ICJ Rep. 155.
3. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Not-

ever, the Security Council is not released from its obligation to observe the provisions of the Charter by a mere declaration of the Court's incompetence.

The proposition that the Security Council is also subject to general international law has found expression in the Charter (Article 1(1)). In a critical analysis of H. Kelsen's approach, President Bedjaoui examines the several gradations of concurrent existence of Charter Rules and rules of general international law. Cardinal prescriptions of international law - humanitarian law, human rights, right of self-determination - impose themselves upon the Council even, and even particularly, when it is deciding on collective measures for the maintenance or restoration of peace.

The recent adoption of a number of resolutions led to calls for their legality to be verified and for the ill-defined legacy of San Francisco to be remedied without further delay. In Chapter III of the monograph, the eminent author presents us with a remarkable picture of the arguments raised by delegations against acts of the Council as exceeding the UN Charter or the Council's mandate: claims that they are not in accordance with the provisions of international law, that they overlap with the General Assembly's competences, that they are unacceptable extensions of the territorial scope of previous decisions, or even that they are examples of abuse of power leading, in the *Lockerbie* case,[4] to a jurisdictional conflict between the Council and the Court. Actions undertaken by the Council, which are based upon its discretionary power to qualify under Article 39 (a power which must be left untouched), come within the scope of legality review.

The very core of President Bedjaoui's monograph is found in Chapter IV, which addresses the possible contribution of the Court to testing the legality of the acts of international political organs. As a starting point, he took the efforts of established institutions in the past to realize the potential of the San Francisco legacy. The proposals included 'advisory arbitration' through the Court's opinions referred to by challenging states and having no practical effect (American Society of International Law (ASIL)), the rejection of the idea of an optional annulment procedure against all decisions allegedly being

withstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Rep. 16.

4. Questions of Interpretation and Application of the 1971 Montreal Conventions Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya *v.* United Kingdom and Libyan Arab Jamahiriya *v.* United States of America) (Provisional Measures), Order, 1992 ICJ Rep. 3 and 114, respectively.

ultra vires or constituting an abuse of power (Grotius Society), the obligation for political organs to request an opinion of the Court in such cases (International Law Association (ILA)), and proposals favouring, or at least not completely excluding, the possibility of judicial remedy without counting on new conventional law or the amendment of the Charter (Institut de Droit International).

This last, and most attractive approach consists of making use of the Court's acknowledged role. In this regard, the maintenance of respect for the Court's judicial function in the time during which a lawsuit is pending is a vital precondition to be fulfilled. The opposite situation arose in the *Lockerbie* case,[5] in which the Council transformed a purely inter-state dispute into an open conflict between the Council and the Court. The Court adopted binding Resolution 748 after the closing of the oral hearings and before it had an opportunity to render a decision on Libya's request for the indication of provisional measures of protection.[6] The non-discretionary rejection of that request resulted from the Council's action striking at the very *raison d'être* of the judicial function.

Elaborating on his dissenting opinion in the *Lockerbie* case,[7] the eminent author argues that the legal validity of both resolutions should have been settled by the Court even at that preliminary stage, as such an interference by the Security Council was manifestly incompatible with the Charter: the Court was prevented from fulfilling its vocation, and it was *de facto* placed in a state of subordination. Such a situation runs counter to the distribution of tasks between various UN organs and disregards the duty of functional cooperation.

President Bedjaoui provides an in-depth look at possible improvements afforded by the existing texts. The first possible remedy to overcome the gap left by the San Francisco legacy comprises a wider use of the Court's advisory competence. President Bedjaoui rightly points out the reasons for the General Assembly's hesitation to confer on the Secretary-General the power to request an advisory opinion. If a state, challenging the legal validity of a draft resolution, were able to obtain a substantial minority, the Security Council would feel duty-bound to consult the Court. The state(s) concerned, or the Council, would then be able to proceed after having benefitted from the services of the UN's Legal Counsel.

Pursuant to the Charter (Article

5. *Id.*
6. *See* UN Doc. S/RES/748 (1992).
7. Lockerbie case, *supra* note 4, at 33 and 143, respectively.

96(1)), the Court's advisory competence *ratione materiae* includes the question of the constitutional validity of acts of the political organs. The Court's conviction that it was assisting the organ in question and was contributing to the proper functioning of the UN had led it to declare unequivocally that, if the exercise of its judicial function so requires, it would test the validity of a decision in terms of the Charter, but would stop short of spelling out the possible consequences of such a test.

Functional arrangements internal to the Court, with a view to responding to any development of its advisory function and an increased demand for speedy dispatch, would not be difficult to implement, e.g., the extension of the chamber system to its advisory function. Given the Court's restraint in the *Lockerbie* case[8] and the hypothetical nature of an increased use of Article 63 of the Statute in other cases, President Bedjaoui reaches the conclusion that the Court's advisory competence offers an opportunity that could be fully exploited. However, the potential and prospects of the Court with respect to legality review of Security Council acts has to be assessed against the background of the myths and realities of the judicial settlement of international differences in general.

The Court's so-called revival is, according to President Bedjaoui, more apparent than real: in a number of appropriate cases, the Court has not been called upon to exercise its functions. A number of impediments to a *de facto* revival stem from the conduct of the parties, such as the use of seisin as a means of pressuring the opponent, the increase in the number of objections to the Court's jurisdiction, and the use of *ad hoc* declarations under the optional clause. The existence *de jure* of a revival is hampered by the Court coming close to saturation point, competition from other judicial institutions and, more importantly, from the structural limitations of the Court, such as the nature of the international 'dispute' and the quality of the actors involved. In the final part of this core chapter, the eminent author carries out a wide-ranging, comprehensive, and realistic analysis of the prospects for judicial settlement and the future of the Court.

In contrast to an approach based upon the subject matter or nature of the dispute to determine '*le champ opératoire*' of the Court, a categorization of disputes according to the character of the protagonists, i.e., *ratione personae,* imposes itself. The continuance of the exclusive eligibility of states to gain access to the Court in contentious proceedings may lead to a gradual mar-

8. *See* note 4, *supra.*

ginalization of the Court. This point of view is supported by an extraordinary and highly persuasive analysis of a number of qualitative changes taking place in present-day international relations: intra-state disputes affect international peace and security but escape the Court's present field of operation. The same holds true for the risks of large-scale disputes between groupings of states. Finally, in spite of the fact that its organs have, in many respects, become the major protagonists in international relations, the UN has no access to the contentious function of the Court.

The Court's advisory competence, although of cardinal importance, does not measure up to these new challenges. That the doors of the Court should be opened more widely for contentious proceedings is a statement of necessity, as the present system of judicial settlement is structurally incapable of coping with these future disputes.

The degree of scepticism expressed in Chapter IV of the monograph naturally prompts one to look for other forms of supervision, such as political control by the General Assembly, which is dealt with in the penultimate chapter of this fascinating publication. However, any real power of control, recommendation, or injunction over the way the Security Council discharges its function is excluded by the equilibrium built into the Charter.

In his concluding chapter, President Bedjaoui rightly observes that the clear demarcation of the paths for the Court to follow with regard to legality review would be premature and counter-productive. Although judicial review of the legality of the acts of international organs is at a rudimentary and tentative stage, room should be made for a judicial verification of legality, providing a remedy for a state challenging a decision of a political organ of the UN likely to affect its rights and obligations contracted under the Charter.

The preceding, almost unusually extensive summary of the main ideas put forward in this publication is fully warranted, not merely because of the prominent place the author occupies both as an academic and as a practising lawyer, but above all by the high-quality standard of the analysis made. The clarity of the legal reasoning is refreshing in this difficult area of 'legalitycontrol'. President Bedjaoui's book is comprehensive, and exceptionally rich in its thought-provoking impact, while at the same time providing us with a too-rare combination of pragmatism and vision. The eminent author's fear of the Court being marginalized in the future because of its structural impediments to facing the challenges ahead has prompted his urgent and convincing appeal for a decisive step to remedy the Court's

structural incapabilities. This appeal, launched by the President of the principal judicial organ of the United Nations, should be met with joint efforts by governments, international organizations, learned societies, and individual scholars alike. President Bedjaoui's outstanding monograph is an invaluable contribution to the ongoing in-depth process of rethinking the very fundamentals of the international legal order at the turn of this century.

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The GATT/WTO Dispute Settlement System - International Law, International Organization and Dispute Settlement by E.U. Petersmann. Kluwer Law International, The Hague, London, Boston, 1996, ISBN 9041109331.

The GATT/WTO integration process has recently been attracting a lot of attention beyond its traditional *aficionados*, that is trade diplomats. This renewed interest is essentially explained by GATT's success in managing its portfolio.

The GATT/WTO dispute settlement system has played a pivotal role in this evolution. The book discussed is an explanation - and at the same time an evaluation - of the GATT/WTO dispute settlement system.

The author, through his writings but also through his work as legal advisor to the WTO, has consistently made the case for a rules-oriented approach. It comes as no surprise that this book is written along these lines. It is divided in six chapters. Chapter 1 is dedicated to the need for a constitutional theory for international organizations, a subject that has occupied the author's attention for some time now. A rights-based approach is advocated in this book as opposed to the existing governments-only rule. The increased participation, in one form or another, of the private sector in the multilateral trade organizations (as is recently evidenced in the negotiations on the liberalization of the telecoms market) provides clear support for this thesis.

Chapter 2 provides an excellent overview of the changes that the multilateral dispute settlement underwent since its inception in 1947 and up to the entry into force of the Urugay Round Agreements on 1 January 1995. In this chapter, the author persuasively demonstrates that the legalization of the process (still an ongoing process and by no means a *depassé* topic) came out of necessity. It is precisely this prevailing functionalism that, to a large extent, explains the successful evolution of the GATT/WTO system.

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Chapters 3 and 4 analyze the various forms of complaints at the disposal of the users of the GATT/WTO dispute settlement procedures and the GATT/WTO dispute settlement practice on the basis of more than twenty case studies. The author concludes that there is no need for situation complaints, a provision that, as he argued in the past, had most likely fallen into *desuetudo*.

Chapter 5 deals with the WTO dispute settlement system and provides a concise explanation of the agreed modifications. The author analyzes in detail the dispute settlement provisions not only of the Agreement on Goods (the traditional GATT), but also of the Agreement on Services (GATS), as well as of the Agreement on Intellectual Property Rights (TRIPs). A comparative analysis of those provisions provides additional arguments to this position with respect to situation complaints.

Chapter 6 takes a look at the future. The new system has been in force for less than two years, and it is certainly premature to reach any conclusions. It is striking though, as the author correctly notes, that the number of users of the system has expanded. Especially developing countries have become active complainants under the WTO dispute settlement system.

The book contains a series of very useful annexes on all panel reports and on the relevant WTO Agreements including the Appellate Body Working Procedures (a very useful document that, unfortunately, has not been published widely enough).

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