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INTERNATIONAL COURT OF JUSTICE: MODEL CLAUSES FOR ACCEPTING THE COMPULSORY JURISDICTION

Document submitted by the Chair and Vice-Chair of the CAHDI

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Introduction

1. In the 2005 World Summit Outcome Document, the Heads of State and Government called upon States that had not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute (UN General Assembly resolution 60/1 of 16 September 2005, paragraph 134(f)). This call was repeated in General Assembly resolution 61/39 entitled "The rule of law at the national and international level", adopted without a vote on 4 December 2006).

2. The CAHDI has had an item on the International Court of Justice on its agenda over a number of meetings. Of the 46 member States of the Council of Europe, 21 have declarations in force under the Optional Clause (Article 36.2 of the Statute of the Court).

3. The present paper suggests that consideration be given to the adoption, by the Committee of Ministers of the Council of Europe, of "Model Clauses for Accepting the Jurisdiction of the International Court of Justice". This is intended to assist States which may be considering accepting the Court's compulsory jurisdiction, or changing an existing acceptance, to decide upon the terms of their declarations of acceptance. It could be of interest both to member States of the Council of Europe and others.

4. The Model Clauses would only include a very small number of the most common clauses and would not be in any way exclusive. They could be accompanied by a brief commentary. The exercise is in no sense intended to be prescriptive. It is, of course, for each State accepting the jurisdiction to draw up the terms of its acceptance in the light of its own particular circumstances.

Background

5. The Optional Clause system was created some 86 years ago and confirmed 60 years ago. An extensive practice and case-law have developed under the clause. See S Rosenne, *The Law and Practice of the International Court, 1920-2005* (2006), Chapter 12 (pages 701-802); Ch Tomuschat, "Article 36", in: Zimmermann, Tomuschat, Oellers-Frahm (eds.), *The Statute of the International Court of Justice: A Commentary* (2006), pages 589-657; and the bibliographies contained in these works.

6. There is no longer talk of the decline of the Optional Clause. But it remains the case that only just over one-third of the Members of the United Nations have declarations in force. The breakdown of countries accepting the optional clause by regional group is interesting. Africa has the largest number of declarations in force, with 20; Asia the lowest with only six.

7. The present drafting of declarations has grown up very much *ad hoc*. One State makes a declaration, others copy it in whole or on part; sometimes the language reflects a particular problem faced by one State but is nevertheless copied by others. Sometimes declarations are obscure, not deliberately so but nevertheless obscure, perhaps because they were drafted in haste. If States could have more confidence in the effect of their declarations they might more readily accept the compulsory jurisdiction of the Court under the Optional Clause.

Model Clauses

8. The Model Clauses might include, in addition to the basic language accepting the Court's jurisdiction, the following four possible reservations:

- *First*, a reservation that excludes stale or historical disputes (disputes arising after a certain date , with regard to situations or facts subsequent to the same date – sometimes referred to as the Belgian clause). Whether a cut-off date is needed, and if so what is a reasonable date, will vary according to the circumstances of particular States. There would be no need to specify any particular cut-off point in the Model Clauses.

- *Second*, a clause excluding disputes where a party accepted the Court's compulsory jurisdiction less than a certain period (of, say, six, nine, or twelve months) prior to commencing the proceedings. Such a clause has become common following the *Right of Passage* case, in which Portugal accepted the Court's jurisdiction only a few days before bringing the proceedings against India. Again, the Model Clauses would not need to specify any particular period.

- *Third*, a right to terminate or vary upon reasonable notice or with no notice.

- *Fourth*, an exception for disputes which the parties have agreed to settle by some other method. This maintains the priority of specific arrangements, which are becoming more common in these days when international courts and tribunals are, in the language of the President of the Court, "burgeoning".

9. The instrument would also make it clear that the inclusion of certain reservations in no way called into question (either legally or politically) other reservations that States may decide to include in their declarations accepting the compulsory jurisdiction of the International Court.