The American Lawyer and the International Court of Justice

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The average American lawyer has only a vague idea about the International Court of Justice. He knows the courts of his own state and probably the federal courts of his district, but relatively few attorneys will ever have occasion to bring a case before the International Court of Justice located at The Hague. A surprisingly large number of American lawyers are also somewhat skeptical of the existence of international law. As a result the practicing attorney has not taken the interest in the Court that it deserves.

Lawyers should be the leaders of their communities. With the increasing public awareness of international affairs, the attorney who can speak with knowledge of the International Court of Justice will find his stature in the community enhanced. Furthermore, the organized American bar has been taking a vital interest in the terms of the acceptance by the United States of the compulsory jurisdiction of this Court—the so-called Connally Amendment problem. No attorney should remain ignorant of the facts and issues involved in this area.

Every lawyer, as a matter of principle, wants to see controversies settled in accordance with legal rights and obligations. International controversies are no exception. It is this basic philosophy that led to the establishment by the American Bar Association of a Special Committee on World Peace through Law with Charles S. Rhyne, one of its former Presidents, as Chairman. Through the efforts of this committee regional conferences of lawyers and leaders of the countries of the world are being held to discuss the problem, with a view to having later a world conference to develop and finalize a concrete program of action. Other efforts to attack the problem of establishing a rule of law in the world are also being undertaken, notably by the World Rule of Law Center at Duke University. While some of the proposals may be over-optimistic and perhaps seem impractical at the present time, they evidence a desire to see international differences settled by judicial or arbitral means. The most important single mechanism today that is contributing to this end is the International Court of Justice, and this article proposes to give a brief picture of the Court for the enlightenment of the practicing American lawyer.

INTERNATIONAL LAW

One basic premise must be accepted: there is an international law. Almost at the commencement of our life as a nation, the United States Supreme Court
declared that the United States is "amenable to the law of nations." As Mr. Justice Gray said in *The Paquete Habana*: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." In point of fact this has been the practice of our courts, both federal and state, throughout our history.\(^2\) The American Law Institute has just finished and approved a Restatement of the Foreign Relations Law of the United States, a volume of over 700 pages, dealing with certain phases of international law and its domestic impact in the United States. For those who may doubt the reality of this branch of the law this extremely valuable compendium will supply convincing proof of the existence of an international law dealing with such subjects as international agreements (analogous to an international law of contracts), responsibilities of states (analogous to an international law of torts), as well as with the jurisdiction of states and recognition of states and governments,\(^4\) which are subjects without close analogy in domestic law.

The fact that no international legislature exists, though sometimes cited as tending to discredit the concept of international law, should not cause an American lawyer concern as to the existence of international law, for he well knows that the fundamental principles of many branches of our domestic law have their origin not in legislative action but in the common law; and international law is, in a very real sense, the common law of mankind. Neither the inability to get a certain state into court as defendant in a particular case nor the lack of an international executive to enforce the law and the judgments of the Court should belie the existence of that law or the utility of that Court to a lawyer who is familiar with the concept of the existence of a right without a remedy or who has tried to serve process on a defendant who remains without the jurisdiction, or collect a judgment against an absent defendant with no visible assets within the jurisdiction.

\(^1\) Chief Justice Jay in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).
\(^2\) *The Paquete Habana*, 175 U.S. 677 (1900).
\(^4\) Throughout this article, unless the context clearly indicates otherwise, the term "state" is used in the international sense rather than as referring to one of the states of the United States.
International law is observed very much in the same manner as is our domestic law. Every foreign office in civilized, law-abiding countries governs its daily actions and decisions by international law. It respects rights of aliens, it recognizes the jurisdiction of other states over their territory and their nationals, and it observes its treaty obligations. Furthermore, when in the past there has been such international disagreement as to result in litigation in the Permanent Court of International Justice or the International Court of Justice, the state against whom judgment has been rendered has, save in one case, complied with it in spite of the lack of an international executive to enforce the judgment.

Thus we see that there is an international law with real vitality and effect, governing the daily conduct of nations, interpreted and applied by courts, both international and national, and indeed having sufficient importance to the American lawyer to call for employment of the familiar and valuable technique of a Restatement.

Jurisdiction of Court Over States

Now let us turn to the International Court of Justice. Its predecessor, the Permanent Court of International Justice, functioned from 1922 to 1946 under the League of Nations. Although we were not members of the League or parties to the Court, the United States supplied it with such illustrious judges as Charles Evans Hughes, Frank B. Kellogg, John Bassett Moore and Manley O. Hudson. When the United Nations was formed, the International Court of Justice took the place of the Permanent Court of International Justice, and was very nearly a "Chinese copy" of it.

The Statute of the present Court is annexed to and forms a part of the Charter of the United Nations, and all members of the United Nations are ipso facto parties to the Statute of the Court (i.e., entitled to use it). States not members
of the United Nations may be permitted to become parties to the Statute of the Court on conditions laid down by the General Assembly on recommendation of the Security Council, and Switzerland, Liechtenstein and San Marino have done so. Since international law deals only with rights and obligations of states (and more recently of international organizations) only states may be parties in cases before the Court, although the United Nations and certain of its organs and specialized agencies may request advisory opinions, and any public international organization may furnish the Court information relevant to a case before it.

Every state is sovereign, and there is no way of bringing it before any court, international or national, except by its own consent. This is basic to the concept of sovereignty. The Statute of the Court provides that one way of consenting to the jurisdiction of the Court is by a special agreement of the parties referring the particular dispute to the Court for decision, or a treaty provision authorizing any party to the treaty to refer a dispute arising under it to the Court. The United States is party to a substantial number of bilateral and multilateral agreements providing that disputes arising thereunder may be referred to the International Court of Justice.

Paragraph (2) of Article 36 of the Statute of the Court provides a second method of consenting to jurisdiction—a document filed with the United Nations which recognizes as compulsory, 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.

The United States has followed this procedure as well as some thirty-seven other countries.

**Connally Amendment**

When the matter of general acceptance of compulsory jurisdiction was before the United States Senate, the Committee on Foreign Relations considered a resolution which contained the language of paragraph (2) of Article 36 of the

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10 U.N. Charter art. 93, para. 2.
12 U.N. Charter art. 96.
Statute of the Court quoted above, but with the following provisos added:

Provided, That such declaration should not 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

b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States.

Provided further, that such declaration should remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate the declaration.17

The proviso in paragraph a was merely including in the declaration what is expressly set forth in Article 95 of the Charter of the United Nations; and the proviso in paragraph b likewise was only a reaffirmation of the domestic jurisdiction exception found in Article 2 (7) of the Charter. The Court, being an organ of the United Nations,18 is under the limitations on that organization included in its Charter. The final proviso placing a potential time limit on the declaration was expressly permitted by Article 36 (3) of the Statute of the Court.

In reporting out the resolution in the form indicated above the Committee pointed out that:

The question of what is properly a matter of international law is, in case of dispute, appropriate for decision by the Court itself, since, if it were left to the decision of each individual state, it would be possible to withhold any case from adjudication on the plea that it is a matter of domestic jurisdiction. It is plainly the intention of the statute that such questions should be decided by the court, since Article 36, paragraph 6, provides: '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 committee therefore decided that a reservation of the right of decision as to what are matters essentially within the domestic jurisdiction would tend to defeat the purposes which it is hoped to achieve by means of the proposed declaration as well as the purpose of Article 36, paragraphs 2 and 6, of the Statute of the Court.19

Nevertheless, on the floor of the Senate the question was raised whether the Court should be permitted to decide this issue.20 Immigration and the tariff were cited as matters which the Court might say were not domestic; but Senator Thomas pointed out that the Court could not act on either (in the absence of a treaty on the subject to which the United States was a party) since "there is no international law dealing with the subject(s)."21 Senator Connally, however, thought the Court might decide they were international questions, and he

18 U.N. CHARTER art. 7, para. 1; art. 92; STAT. INT'L CT. JUST. art. 1.
20 92 CONG. REC. 10557 (1946).
21 Id., 10615.
also raised the question of navigation through, and tolls for use of, the Panama Canal. He proposed to amend proviso b by adding eight words at the end so that it would read:

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.22

The amendment was adopted and the resolution passed as amended.23

It must be emphasized that the Connally Amendment consisted only of the last eight words, and the issues that have been so much under discussion by a number of American bar associations involve only those words, not the rest of proviso b. There has been much misunderstanding on this point. The Charter categorically states:

Nothing contained in the present Charter [of which the Statute of the Court is "an integral part"—Art. 92] shall authorize the United Nations [or the Court as one of its principal organs—Art. 7] 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.24

The question therefore is not whether the Court should be allowed to have jurisdiction of matters which are within the domestic jurisdiction of the United States. It is expressly forbidden to act in such matters. The proviso of our declaration of acceptance of jurisdiction but without the Connally Amendment would, of course, re-emphasize this limitation, but it would not create it. The question is whether it is either appropriate or realistic for the United States to try to reserve the right to determine for itself whether a matter is essentially within the domestic jurisdiction of the United States and hence not within the jurisdiction of the Court, or whether, as provided in Article 36 (6) of the Statute of the Court (to which the United States had previously unqualifiedly adhered),25 "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Has anything of substance been accomplished by purporting to accept general compulsory jurisdiction of the Court if we reserve to ourselves the right in any case not only to tell the Court that we consider the matter is essentially within our domestic jurisdiction but thereby to deprive the Court of the jurisdiction we purported to give it? Is not our acceptance illusory and hence of no legal effect?

The issue of the repeal of the Connally Amendment will not be discussed at length. Nevertheless it should be pointed out that if it were considered vital to guard against the possibility that the Court would deal with our tariff, our immigration and our Panama Canal, however improbable that might be, the

22 Id., 10624. Words added by the Connally Amendment emphasized.
24 U.N. CHARTER art. 2(7).
problem could have been handled in another manner. These matters could have been specifically excepted from our acceptance of compulsory jurisdiction. This technique, however, was not followed; instead we not only placed ourselves in an equivocal status vis-à-vis the Court but provided an example, of dubious validity, which was followed by others. Mexico, Liberia, South Africa, Pakistan, the Sudan, the United Kingdom, France and India all incorporated similar language in their declarations of acceptance of jurisdiction. Recently, however, the last three, recognizing it was unwise to maintain it, have dropped their “Connally Amendment.”

LEGAL EFFECT OF THE CONNALLY AMENDMENT

Before leaving the point it should be noted that during the period France still had its “Connally Amendment” it sued Norway on bonds issued by Norway. Norway (as is true of practically all states) had a reciprocity provision in its acceptance of jurisdiction. It therefore contended that its obligation to submit to the Court’s jurisdiction in the particular case brought by France was no greater than the obligation assumed by France; that France had the right to determine for itself whether the issue was one of domestic jurisdiction and therefore Norway had such a right in the instant case; and that Norway did determine the issue was one of domestic jurisdiction, and hence by virtue of this unilateral determination the Court had no jurisdiction. This contention was upheld by the Court, and France, to employ a colloquialism, was hoist by its own petard. Judge Lauterpacht of the United Kingdom went so far as to say the acceptance of jurisdiction not only was contrary to Article 36 (6) of the Statute of the Court but it gave rise to no legal obligation, as the matter of jurisdiction is left for unilateral determination; and since the provision is an essential part of the acceptance the entire acceptance is invalid.

In the Interhandel Case, subsequently decided by the Court, the United States, relying upon its Connally Amendment language, took the position that one of the issues raised was a matter of domestic jurisdiction as determined by the United States. Although the opinion of the Court expressed no view upon this point since the decision went on another ground, Judge Lauterpacht, in a separate opinion, again stated his position on the invalidity of our acceptance of jurisdiction, and was joined in this view by Judge Spender of Australia in his own separate opinion. The Swiss, Norwegian and Uruguayan judges in their separate opinions also thought the Connally Amendment language invalid, but thought it was severable, and that the rest of the declaration of

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acceptance of jurisdiction might stand—in short, that the Senate had accomplished nothing by the amendment.

Thus we see that not only has the Court itself shed doubt on the validity of the Connally Amendment, but it has virtually held that if the United States sues another state which may have accepted the compulsory jurisdiction of the Court, that state, if it has the usual provision putting its acceptance of jurisdiction on a reciprocal basis, may use our declaration to claim the matter is essentially one of its domestic jurisdiction as determined by itself, and we are thereby thrown out of court by the unilateral statement of the defendant.

In our own self interest should we not follow the example of the United Kingdom, France and India and withdraw our Connally Amendment? Its repeal was advocated by the American Bar Association as early as 1947, and this position was re-affirmed after much serious debate in 1960. This also is the position taken by the Federal Bar Association in 1961 and by the American Society of International Law on repeated occasions. President Eisenhower urged the repeal of the Amendment in his State of the Union Message in 1960, and the present administration did likewise in a letter dated March 15, 1961, to the Chairman of the Senate Committee on Foreign Relations.

THE JUDGES

There are fifteen judges on the International Court of Justice, serving nine year terms. Five are elected every three years by the General Assembly and by the Security Council of the United Nations, each voting independently. They are nominated by the national groups, each of four persons, who are members of the Permanent Court of Arbitration. Not more than four nominations may be submitted by any national group, nor more than two of their own nationality. The judges are to be chosen “regardless of nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or

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31 The Federal Bar News for June, 1961, states: “This past month, after giving a full opportunity to all chapters to consider and vote on the question of the repeal of the Connally Reservation, the [Federal Bar Association National] Council debated and voted overwhelmingly in support of the repeal of the Reservation.”
33 Report, op. cit. supra note 26, at 7-8.
34 STAT. INT’L CT. JUST. art. 3, para. 1, art. 4, para. 1, art. 8, art. 13, para. 1. The vote is not subject to veto in the Security Council. STAT. INT’L CT. JUST. art. 10, para. 2.
35 STAT. INT’L CT. JUST. art. 4, para. 1. The Statute in Art. 6 states: “Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.” For the procedure followed by the U.S. group in carrying out this recommendation in connection with the 1960 elections see 55 AM. J. INT’L L. 445.
36 STAT. INT’L CT. JUST. art. 5, para. 2.
are jurists of recognized competence in international law."\textsuperscript{87} No two judges may be nationals of the same state.\textsuperscript{88} For a particular case a state which is a party and which has no representation on the Court may appoint a judge \textit{ad hoc}.\textsuperscript{39}

The caliber of people who have thus been chosen is truly imposing. Of the present Court, two were former presidents of their states, one a prime minister, and another a cabinet member. One was chief justice of his country's highest court. Five had served as their country's delegate in the United Nations or League of Nations, and five had been on the International Law Commission. Five were former legal advisers to their respective foreign offices or embassies. Five had served their countries as ambassadors. The great majority also have reputations as professors or scholars in the field of international law.\textsuperscript{40}

The listing will undoubtedly raise this question in the minds of many lawyers: Why is there only one member of the Court who had previously held a high judicial office? It of course is desirable to have men on the Court with such experience; but it should be noted that three members of the present Court have been sitting since it was organized in 1945, thus qualifying them with greater judicial experience on a high court in the international field than any other living person. Two others have had seven years experience on the Court, and three more have had five years. Thus nine of the fifteen members should qualify today as having had high judicial experience. It should also be remembered that the field of law with which the Court deals is a bit unique, and it could well be said that service on the International Law Commission (which is engaged in codifying international law in convention form) or as legal adviser to a foreign office should qualify a person at least as much as service on a court which had few if any cases in the international law field. Four more members qualify under this assumption, making a total of thirteen whom we may say are well qualified. There remain only two, one member who had risen from law professor to become President of Peru, and Dr. Philip C. Jessup, member from the United States, who was an outstanding professor of international law at Columbia, had been special adviser to the Secretary of State with the rank of Ambassador, and had served as our representative in the United Nations. They, too, seem to have qualifying backgrounds to make them very valuable additions to the Court.

The Statute of the Court notes that in electing the judges it should be borne in mind "that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."\textsuperscript{41} The five permanent members of the Security Council (United States, United

\textsuperscript{87} Stat. Int'l Ct. Just. art. 2. 
\textsuperscript{89} Stat. Int'l Ct. Just. art. 31, paras. 2, 3. 
\textsuperscript{39} See Appendix. 
\textsuperscript{40} Stat. Int'l Ct. Just. art. 9.
Kingdom, France, China and the Soviet Union) have always been represented. Latin America has had four (at present Argentina, Mexico, Panama and Peru). The British Commonwealth, Western Europe, the Middle East, and the satellites as a group have had one each (now Australia, Italy, Egypt and Poland). The other two are at present from Greece and Japan.\(^4\) Thus there are three judges from common-law countries, two from Communist law countries, seven from Roman law countries, two from Asian law countries, and one from an Islamic law area. Yet with all these diverse cultures and legal systems the opinions of the Court reflect the type of clear exposition of the facts, careful delineation of the issues, and logical development of the decision that we find in the best appellate courts of this country. The judges show the same independence and penchant for concurring and dissenting opinions that our own Supreme Court has displayed. Although the cases all have strong political overtones and the judges have their natural predilections, the product of the Court is not political but legal,\(^4\), though reflecting the wisdom gained by so many of its members from years of practical experience in the arena of international politics.

The question at once comes to mind, in reviewing the geographical distribution of the seats on the Court: What about Africa? Only the Egyptian judge, who has been on the Court from the beginning, has so far represented that continent. There are now thirty-two African states (exclusive of South Africa) that are members of the United Nations. How many of these may be able to proffer a qualified candidate for the Court is another question, but Liberia, the Sudan and undoubtedly others have able lawyers and jurists. At the next election a drive may be expected for African representation more nearly equal to that of the twenty States of Latin America which have four seats, or at least equal to that of the eighteen States of Asia which have two. One proposal is to enlarge the Court. Although this could result in its becoming unwieldy, it may be the practical solution, as it is always difficult to get a group to surrender any seats traditionally held. It seems likely that the recognition of the ability of European judges, which in the past has given that continent the preponderance of the seats not only on the present Court but on the Permanent Court of International Justice, will continue to maintain this situation for the foreseeable future. Practical international politics in any event should assure this result.

The Court elects its President and Vice-President, who serve for three

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\(^4\) A study made in 1960 points out that up to that time there had been 47 separate issues on which judges who were nationals of contesting States had voted, resulting in 96 votes by such judges. In 21 of the 96 votes the judge voted against the position advocated by his country because he thought it wrong on the law; and in only 31 of the 96 votes did he, alone or with others, support his country against the view of the majority of the Court. (Contentious Proceedings Before the International Court of Justice, World Rule of Law Center, 1960.)
years and are eligible for re-election. In practice these officers have changed every three years. The Court also appoints its Registrar and other administrative officers. There are the usual provisions restricting outside activity of the judges, prohibiting them from acting as counsel and guarding against conflicting interests, while on the other hand they are insured against dismissal except for cause. The members of the Court while on official business enjoy diplomatic privileges and immunities. Although the formation of chambers and the holding of sessions away from the seat of the Court are authorized, in practice the full court sits at The Hague on all cases. The salaries and expenses of the Court are met from the United Nations budget.

PROCEDURE

A case is commenced either by filing a special agreement of the parties submitting the matter to the decision of the Court or by filing "a written application." Notice of the filing is sent not only to the parties but to all members of the United Nations and to other States entitled to appear in the case.

One noticeable difference between proceedings in this Court and those before domestic tribunals is that the parties are represented by "agents" who, however, "may have the assistance of counsel or advocates before the Court." The agent is the government's representative with whom all communication is had, even though there be also counsel or advocates. The Court assumes he has full power to bind his government and that he acts for it in all matters. If the state's ambassador at The Hague is not the agent, that ambassador or other "competent authority" of the government must attest the appointment of the agent which is filed with the Court. In recent practice the United States has appointed the Legal Adviser of the Department of State as its agent, and he has also handled any oral proceedings rather than using any other counsel or advocate. This is one of the rare cases in which the United States is not represented in court by the Department of Justice. There is, however, close coordination between the Legal Adviser and the Attorney General on any aspects of interest to the latter.

There are no pleadings in the sense familiar to the American attorney.

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54 Rules of Court, art. 32 (3). The Rules of Court may be found in the Court's Yearbook: [1950-1951] I.C.J.Y.B. 235-262.
Rather a brief statement of "the subject of the dispute and the parties" is filed at the time of the original application or submission to the Court, followed, within time limits set by the Court in each case, by a "memorial" by the party instituting the suit, a "counter-memorial" by each other party, a "reply" by the first party and a "rejoinder" by the others. The memorial is an extremely elaborate document consisting of (1) a rather exhaustive statement of the facts, (2) affidavits and certified documentation to prove the facts, (3) a statement of the law, with argumentation, citation and quotation of authorities, and (4) submission of conclusions. It acts as pleading, proof and brief. The counter-memorial should admit or deny the facts and reply to the law stated in the memorial; and also should set out, again rather elaborately, its own facts, proof, law and submissions. The reply and rejoinder, in sequence, are much briefer and should merely answer points in the other party's documentation not already covered. The memorial, counter-memorial, reply and rejoinder must be printed in English or French.

If there are oral proceedings, as is usually the case, the Court may ask that a copy of the argument-in-chief to be made by each party be submitted to it before the hearing starts. This facilitates translation, as both English and French are official languages of the Court and unless otherwise agreed all statements are given in one of these languages and translated into the other. Since translation is not simultaneous and the speeches are formal and tend to be lengthy, the oral hearings may run many days. For example, in a recent case seven States, including the United States, argued orally. The arguments began on April 26, 1962, and continued on six subsequent days, concluding on May 4. Questions from the Court are very few, and the member wishing to ask one passes the word to the President who then announces that Judge so-and-so wishes to ask a question. In the hearing of the case just mentioned only two questions were asked. Although the rules permit the calling of witnesses and experts, the usual practice is to rely upon the memorial and counter-memorial to cover all the evidence.

The oral proceedings are conducted in a public session, and the same is true of the subsequent reading of the Court's opinion.

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64 Stat. Int'l Ct. Just. art. 43, para. 2; Rules of Court, art. 41.
57 Rules of Court, arts. 42, 43, para. 1.
56 Rules of Court, art. 43, para. 2.
58 Rules of Court, art. 58.
68 Rules of Court, art. 52.
69 Advisory Opinion, op. cit. supra note 61, at 394 and 419.
64 Rules of Court, arts. 49, 53, 54.
All the papers in the case, the orders and minutes of proceedings of the Court, a complete transcript of the oral proceedings, and the opinion of the Court are published by the Court. The orders, minutes and opinion of the Court appear in both English and French, the rest in the one of those languages in which it was written or spoken originally.

**SOURCES OF LAW**

Article 38, after observing that it is the function of the Court "to decide in accordance with international law" the disputes submitted to it, states that the Court shall apply:

a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. International custom, as evidence of a general practice accepted as law;

c. The general principles of law recognized by civilized nations;

d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The American lawyer should have no difficulty with paragraph a for in effect it states that in appropriate situations contracts govern transactions between the parties. Bearing in mind, as has been explained above, that it is the practice of foreign offices to govern their conduct by their concepts of international law, it can be seen that a general practice of nations—"international custom"—as stated in paragraph b, is a sound criterion to be invoked by the Court; and in any event a usage of long standing, of course, can establish a standard of conduct. Paragraph c has caused much academic discussion, but there definitely are certain general basic principles found running through the legal systems of practically all civilized nations, and there should be no real objection to using them when applicable in the international sphere. Paragraph d may seem a bit incongruous by putting writings of legal publicists on a par with decisions of courts in determining the law; but the Roman law and indeed most legal systems other than those with a common-law tradition rely far more on writings of those learned in the subject than on decisions of courts. In the International Court of Justice, which must function as the supreme melting pot to reduce to a common base all the legal systems of the world, the common-law countries can hardly complain if our traditional source of authority is rated at least on a par with one traditional to the other systems.

It also should be pointed out to the American lawyer that the Article refers to these two sources of international law as "subsidiary means" for the determi-

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66 The United States Supreme Court stated in The Paquete Habana, 175 U.S. 677 (1900): "By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war . . ." (Emphasis supplied.) Id. at 686.
nation of rules of law. To have judicial decisions relegated to this category probably shocks the American attorney, but this is only a reflection of international law practice of long standing. There has never been a doctrine of *stare decisis* in international law, and this principle underlies Article 59 of the Statute which expressly provides that a decision of the Court "has no binding force except between the parties and in respect of that particular case." This again reflects the practice in other legal systems where the weight given judicial precedent in common-law countries is not recognized. However, in point of fact, the International Court of Justice has almost invariably followed its precedents and those of the Permanent Court of International Justice.

**Certain Cases Decided by the Court**

The substantive matters with which the Court deals are as broad in scope as international law itself; a summary of a few decided cases will illustrate this diversity. The facts and issues have been reduced to simplest terms for this purpose, and merely show the type of case and the tenor of the decision.

The United States first became directly involved in a case before the Court when France sought a definition of our treaty rights in Morocco, then a French Protectorate.\(^6^7\) We contended that under our treaties the import license controls which France had recently imposed in Morocco could not be applied to our nationals without our consent. The Court rejected this claim, but sustained our next contention by holding that the controls were contrary to our treaty with Morocco of 1836\(^6^8\) and the General Act of Algeciras of 1906\(^6^9\) since they discriminated against the United States in favor of France. The scope of our then-existing extra-territorial consular court jurisdiction was also involved. The Court upheld our right to try cases where all parties involved were Americans or persons protected by the United States, but rejected our contention that the consular court could try cases where only the defendant was an American.

Next consider *The Minquiers and The Ecrehos Case*.\(^7^0\) The Minquiers and the Ecrehos are two groups of islands in the English Channel off the coast of France. The Court was asked to determine whether they belonged to the United Kingdom or to France. The evidence went back to the Norman Conquest in 1066. The case was argued largely on the basis of treaties that had been entered into between the two countries in the Middle Ages, but the Court based its decision on the direct evidence of possession and actual exercise of sovereignty, and awarded them to the United Kingdom.

*The Corfu Channel Case* \(^7^1\) was one of the most serious threats to the peace

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\(^6^8\) 8 Stat. 484 (1836).

\(^6^9\) 34 Stat. 2905 (1906).

\(^7^0\) [1953] I. C. J. Rep. 47.

\(^7^1\) [1949] I.C.J. Rep. 4. See note 7 supra.
dealt with by the Court. Mines were sown in the Corfu Channel along the Albanian coast. British naval vessels passing through the Channel hit them and were badly damaged. Forty-four members of the crews were killed and forty-two injured. The Court held Albania responsible. Its holding that there was a right of innocent passage in territorial waters which constitute international straits connecting two bodies of the high seas is now reflected in the text of the Geneva Convention of 1958 on the Territorial Sea.\(^7\)

Another case also affected the drafting of that Convention, and that was the *Fisheries Case*.\(^7\) The United Kingdom protested a method prescribed in a Norwegian decree for drawing baselines along its coast from which the width of its territorial sea was to be measured to the seaward. The decree provided that Norway had exclusive fishing rights in that territorial sea. It established baselines measured from outer point to outer point on islands off the coast, thus extending the territorial sea much further seaward than if the normal method of drawing baselines along the coast were followed. The Court, however, found that the Norwegian coast did not constitute, as in most countries, a clear dividing line between land and sea because of some 120,000 islands, rocks and reefs offshore. It held that for the purpose of a baseline these really constituted the coast, and upheld the method adopted as not contrary to international law. This principle is now stated in Article 4 of the Convention on the Territorial Sea.\(^4\)

Turning now to an Advisory Opinion requested by the General Assembly of the United Nations,\(^7\) the Court was asked to deal with questions raised by the assassination in Palestine of Count Bernadotte, a Swedish national, who was at the time functioning as United Nations Palestine Mediator. The most significant point decided was that the United Nations had the capacity to bring an international claim against the state responsible for the death of its mediator with a view to obtaining reparation for damage caused to the United Nations and to the victim. Though there was no express language on the point in the Charter, the Court said that the Organization must have the international personality and capacity to carry out its functions and protect its rights. It recognized that usually the claim on behalf of the victim or persons entitled through him would be advanced by the state of his nationality, but the United Nations was deemed also to have this capacity in the case of one in its service who suffered injury or death while acting for it, since it was essential to the discharge of the Organization's functions that it give suitable support and protection to its agents entrusted with important missions in disturbed parts of the world.

Latin American Nations have also been before the Court. Perhaps the most

\(^7\) Not yet in force. For text see 52 Am. J. Int'l L. 834 (1958), particularly art. 16, para. 4.
interesting case being the one involving the boundary dispute between Nicaragua and Honduras, a source of friction for over 50 years. Under an 1894 Treaty the countries had agreed to have a Mixed Boundary Commission settle and demarcate their common boundary. The Commission completed a substantial part of their work, but they could not agree upon one section of the boundary. The Treaty, however, had provided for arbitration in the event of this contingency, the arbitrator (under certain conditions) to be the King of Spain. The King was appointed. He handed down a decision on December 23, 1906, which was generally favorable to Honduras. Nicaragua before the Court claimed the award invalid on two grounds: (1) that the designation of the King was not in conformity with the conditions for such selection laid down in the Treaty, and (2) that the Treaty in any event had lapsed before the King agreed to act as arbitrator. The Court held that those representatives of the two countries who had met and decided the King should be requested to act and who, according to the minutes of their meeting, felt the requirements of the Treaty had been complied with, were authorized to make that decision with binding effect. Furthermore, the point was never raised by Nicaragua until March 12, 1912, long after the date of the decision. As to the second point, the Treaty by its terms was to run for ten years. The King agreed to act as arbitrator on a date more than ten years from the date of signature of the Treaty but less than ten years from the date of exchange of ratifications. The Treaty was silent as to when it came into force. The Court held it was the intention of the parties that it should not come into force until exchange of ratifications, and therefore ruled against Nicaragua. Other points raised by Nicaragua were overruled, and the award of the King was held valid.

Finally we might look at a case from Asia. Portugal sued India claiming interference with her claimed right of passage over Indian territory from the coast to two Portuguese enclaves within India, Dadra and Nagar-Aveli. The evidence went back to certain decrees and alleged agreements of the eighteenth century. The practice over the intervening years was shown. The Court found that, at least since the British came into control in India, Portugal had been allowed free passage for goods and civilians, and this having been a practice for over a century and a quarter was accepted as the law. But as to armed forces, armed police, and arms and ammunition the Court found that passage had been by special agreement or on the basis of reciprocity, not of right, and therefore held there was no right of passage for them. Finally it found no interference by India with Portugal's rights as thus determined.

The range of cases that may come before the Court is only barely touched by such summaries. Some of the other decided cases, for instance, go into such

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76 Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906, [1960] I.C.J. Rep. 192.
matters as the grant of nationality by a state.\textsuperscript{78} the assessment of Members of the United Nations for their share of the cost of the Congo operation,\textsuperscript{79} the granting of asylum in a friendly embassy to a leader of a rebellion in the country where the embassy was located,\textsuperscript{80} and the interpretation of the peace treaties with Bulgaria, Hungary and Romania.\textsuperscript{81} It is obvious that the Court has a field within which it can resolve, according to law, international differences of a great many patterns.

Perhaps some will raise the question whether there can be an appeal from the United States Supreme Court, or the Supreme Court of one of the States of the Union, to the International Court of Justice. Cases never go to that Court by appeal from a national court, but the same (or substantially the same) issue that is presented to the national court may, in certain circumstances, come before the International Court of Justice. A potential case of this character has already arisen. The Alien Property Custodian during World War II blocked, and after the war vested, the stock of General Aniline and Film Corporation, which had been owned by a Swiss corporation known as Interhandel. The contention was that Interhandel was, in turn, owned and controlled by I. G. Farbenindustrie, a German company, and hence an alien enemy. This was disputed by Interhandel and also by Switzerland. While Interhandel was pursuing its statutory remedy in our federal courts, the Swiss were pressing the claim through diplomatic channels. In the suit Interhandel was ordered to produce certain records from Switzerland, but it claimed this was forbidden by, and was a criminal offense under, Swiss law. For its failure to do so, after repeated extensions of time, the federal court, acting under Rule 37 of the Federal Rules of Civil Procedure,\textsuperscript{82} ordered the case dismissed. The case went to the United States Supreme Court, but meanwhile Switzerland had brought suit against the United States in the International Court of Justice. The Supreme Court held that Rule 37 did not authorize a dismissal where the failure to produce was due to inability, not wilfulness, bad faith, or any fault of the petitioner. It remanded the case for further proceedings.\textsuperscript{83} The case in the International Court of Justice was thereupon disposed of by the Court upholding the preliminary objection of the United States that Interhandel, whose cause Switzerland was espousing, had not yet exhausted the local remedies available to it in United States courts.\textsuperscript{84} However, if the matter is not satis-

\textsuperscript{78} Nottebohm Case, [1955] I.C.J. Rep. 4.
\textsuperscript{80} Asylum Case, [1950] I.C.J. Rep. 266.
\textsuperscript{81} Interpretation of Peace Treaties, [1950] I.C.J. Rep. 65, 221.
\textsuperscript{82} Rule 37, in material part, provided: "... If any party ... refuses to obey ... an order made under Rule 34 to produce any document or other thing for inspection ..., the court may make such orders in regard to the refusal as are just, and among others the following: ... (iii) An order ... dismissing the action or proceeding or any part thereof ... ."
\textsuperscript{83} Societe Internationale etc. v. Rogers, 357 U.S. 197 (1958).
factorily adjusted in our courts or by a mutual settlement, Switzerland may again raise the issue in the International Court after local remedies have been exhausted. While technically the issues are different in the two forums, since in our courts the question is whether the property was properly vested under our statutes while in the International Court the issue is whether the United States is under an international obligation to restore the property to Interhandel, the substantial question in both cases is the same—are we entitled to the property or is Interhandel?

USE OF THE COURT

Before closing let a word of caution be injected. There seems to be a feeling in certain quarters that the Court can be used as an alternative to armed conflict. Most issues that are headed for serious armed conflict are basically political and cannot be taken to court. There is nothing in the Congo, or in Algeria, or in Vietnam that is susceptible of juridical solution. Situations like Berlin and Cuba have legal issues which could go to the Court, but one side or the other usually feels the political situation is such, or the prestige or national honor at stake is so great, that it cannot afford to take the chance—inhherent in any litigation—of a possible adverse decision.

Nevertheless the International Court of Justice has its place in the settlement of disputes around the world. It should play a much greater role than it does. The repeal of the Connally Amendment would be a step toward this end, for it would change the posture of the United States from one of an illusory acceptance of jurisdiction of the Court to one of firm acceptance under the limits on that jurisdiction established by the Charter and the Statute; from one of distrust of the Court to one of confidence in it. Furthermore, as the United States example in adopting the Amendment was followed by others, so there is reason to hope that its example in enlightened repeal of the Amendment might be followed by the five other states still having this self-judging reservation.

There certainly should be greater use of the Court to settle differences with other states where the issue can be the subject of adjudication and where prestige, national honor or political objectives are not too heavily involved. It is recognized that diplomats are trained to negotiate, not to litigate; yet the threat of possible litigation (where there has been acceptance of compulsory jurisdiction or where a public offer to litigate would bring the weight of public opinion to bear) may expedite successful conclusion of negotiations. Certainly when negotiations reach an impasse, and the case falls within the suggested limitations, resort to the International Court of Justice seems not only possible but indeed the wise and sensible course to pursue in a nation's own self-interest in order to secure resolution of the difficulty and prevent its becoming a continuing source of international friction.
Admittedly this is not an easy goal to achieve. The United States is following a commendable policy of including in its international agreements clauses referring disputes arising from the interpretation or application of substantive treaty rights and obligations to the International Court of Justice for adjudication. A few litigated cases arising under such provisions might serve as useful precedents in demonstrating to other nations the advantages of this technique to dispose of what otherwise might be troublesome causes of international friction. In point of fact that Court has never had before it a case involving the United States which went there by virtue of such a Treaty clause.\textsuperscript{85}

How to bring about in other ways further use of the Court is a problem that deserves careful study, but is a subject far beyond the scope of this paper. In this field the United States should take the lead. At the very least it should develop and utilize means of giving to the International Court of Justice greater opportunity to advance the rule of law in controversies between states—a task which it is well equipped to accomplish.

As the Court discharges its increased responsibilities with the impartial legal judgment and wisdom it has already displayed, and as it continues to respect the independence, the sovereignty, and the equality of all states, which it surely will, confidence in resort to its decision will grow among the nations of the world. With such confidence established, the Court's stature will increase, and the full measure of its role in the peaceful settlement of adjudicable international disputes will be assured.

**APPENDIX**

The present Members of the International Court of Justice are the following:

Dr. Bohdan Winiarski (Poland): President. On Court since 1946. Dean of law school and professor of international law.

Dr. Ricardo J. Alfaro (Panama): Vice President. On Court since 1960. President of Panama, Minister of Justice, legal author, Chairman of International Law Commission.

Dr. Abdel Hamid Badawi (United Arab Republic). On Court since 1946. Roman and Islamic law professor and scholar, author of books on international law.

Dr. Jules Basdevant (France). On Court since 1946. Professor of international law, author of legal works, Legal Advisor to Ministry of Foreign Affairs.

Dr. Jose Luis Bustamente y Rivero (Peru). On Court since 1961. President of Peru, professor of law, author of legal works.

Roberto Cordova (Mexico). On Court since 1955. Member of International Law Commission, Ambassador, legal counsellor of Embassy at Washington.

Sir Gerald Fitzmaurice (United Kingdom). On Court since 1961. Member of International Law Commission, Legal Adviser to Foreign Office, author of legal works, including The Law and Procedure of the International Court of Justice.

Dr. Philip C. Jessup (United States). On Court since 1961. United States Ambas-

\textsuperscript{85} 56 Am. J. Int'l L. 794 (1962).
sador-at-Large, Delegate to the General Assembly of the United Nations, professor of international law at Columbia, lawyer, author of legal works.

Dr. Wellington V. Koo (China). On Court since 1957. Prime Minister, President of League of Nations Council.

Dr. Vladmir M. Koretsky (Union of Soviet Socialist Republics). On Court since 1961. Member of International Law Commission, professor of international law and legal history, author of legal works.

Dr. L. M. Moreno Quintana (Argentina). On Court since 1955. Judge in Civil and Commercial Courts, professor of international law, author of legal works.

Dr. M. Gaetano Morelli (Italy). On Court since 1961. Professor of international law, co-editor of Italian international law review and of treatise on international law, author of legal works, legal adviser to Ministry of Foreign Affairs.

Sir Percy C. Spender (Australia). On Court since 1957. Member of Cabinet, Ambassador to United States, lawyer and legal author.

Dr. Jean Spiropoulos (Greece). On Court since 1957. Member of International Law Commission, Legal Adviser to Ministry of Foreign Affairs, professor of international law.

Dr. Paul Kotaro Tanaka (Japan). On Court since 1961. Chief Justice of Supreme Court, dean and professor of law at Tokyo University, author of legal works.