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## IS THE INTERNATIONAL COURT OF JUSTICE WORTH THE EFFORT?

by

JOSEPH L. DALY\*

When Julius Caesar crossed the Rubicon and advanced toward Rome his opponents sent emissaries to “talk.” They hoped that words and not short swords would be the only weapons necessary to stop Caesar. The negotiations failed — as they have so often throughout human history — but the fact that they took place at all demonstrates a persistent hope that disputes can be resolved peacefully. And, in a further bow to the principle that words can make peace, Caesar allowed the emissaries to return to Rome unharmed.

From Genghis Khan to Pearl Harbor negotiations between belligerents have taken place. “Parlementaires” are persons bearing white flags who go behind enemy lines to negotiate directly with the enemy commander.

Not to kill or capture the emissary has been customary international law from Biblical days. Both belligerents and nonbelligerents have found it necessary to send ambassadors, diplomatic agents, and emissaries across walls of hate in order to talk with one another. “Customary” international law has required that such emissaries and diplomats receive safe conduct in and out of the countries they visit. So on December 8, 1941, the day after the “Day of Infamy,” the United States government permitted Japanese diplomats to leave the United States even though half the United States Naval Fleet lay wrecked in Pearl Harbor.

Throughout history most peacemaking has been a response to a particular crisis — efforts of two countries to solve a dispute by treaty or to negotiate the end of a war. But as the instruments of war have become more and more horrible, as wars have come to take an ever increasing toll on civilian populations, world leaders have tried to establish a structure for peace, a permanent way of avoiding conflict by appealing to reason, not to weapons. Our century has hoped that some sort of international tribunal — a world court — would decide disputes on enduring principles of justice, not on the size of battalions.

Skeptics look at the meager results of these efforts — the modern International Court of Justice issued less than one contentious case judgment a year in its first 35 years of existence<sup>1</sup> — and wonder whether the world is ready for international justice. Defenders point out that war is unthinkable in a nuclear age and that international justice offers the best hope for peace.

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<sup>1</sup>1945-80, *I.C.J. Y.B.* (1945-80).

## A QUICK HISTORY

The idea of international "talk" rather than "war" as the instrument for the resolution of disputes between governments originated in modern times with the Czar of Russia, Nicholas II. George Elian, in his book *The International Court of Justice*,<sup>2</sup> reports that in August of 1898 news of great significance traveled around the world. Nicholas II had proposed to all the countries of the world a great conference for the purpose of discussing arms limitation and the prevention of war.<sup>3</sup> Nicholas himself was concerned about an article written in the Siberian village of Susenskoe by a man named Lenin. Entitled "The Development of Capitalism in Russia," it gave a theoretical basis to the mission of the ordinary person in the approaching revolution.<sup>4</sup> The Czar was frightened and hoped that an international conference on arms limitation and peace would prevent an uprising in Russia.

Countries such as Germany and Russia praised the idea of an international meeting.<sup>5</sup> The Hague, in the Netherlands, was chosen as the place for such a lofty conference, thus avoiding the capitals of the great powers. Although the great objective of disarmament failed to gain the support of the 26 participating countries at the conference held from May 18 to July 29, 1899, a commission was set up to study the problems.<sup>6</sup>

In 1907, the Second Hague Conference was called. Forty-four states eventually signed "The Convention for Pacific [Peaceful] Settlement of International Disputes" on October 18, 1907, at the Hague.<sup>7</sup> The two Hague conferences are often considered the first attempts to codify the vast domain of international law and justice.<sup>8</sup>

The Second Hague Conference organized the Permanent Court of Arbitration (PCA)<sup>9</sup> to permit countries to place their disputes voluntarily before an impartial court for resolution. Obviously, the PCA was unsuccessful in resolving a major international dispute, World War I. In fact, said Kaiser Wilhelm, "The Convention for Pacific Settlement of International Disputes," to which Germany was a signatory, "was simply a scrap of paper."

After World War I, "the war to end all wars," the League of Nations was created.<sup>10</sup> World leaders hoped that through the League, war would no longer

<sup>2</sup>G. ELIAN, *THE INTERNATIONAL COURT OF JUSTICE* (1971).

<sup>3</sup>*Id.* at 15.

<sup>4</sup>*Id.*

<sup>5</sup>Although there were mixed reactions to the proposed international meeting, overall the feeling was a positive one. *Id.* at 16.

<sup>6</sup>*Id.* at 17.

<sup>7</sup>*Id.* at 18.

<sup>8</sup>*Id.* at 19, n.5.

<sup>9</sup>*Id.* at 19.

<sup>10</sup>The League of Nations was established "in order to promote international cooperation among nations and to achieve peace and security." *Id.* at 29. <http://www.vol20/iss3/2>

be used to resolve disputes. The League recognized that a totally *voluntary* court of arbitration was not sufficient to resolve disputes. Consequently, the League established the Permanent Court of International Justice (PCIJ). The PCIJ, during its existence from 1922 to 1939, settled 83 cases involving different countries through decisions, advisory opinions and injunctions.<sup>11</sup> But just as the Permanent Court of Arbitration was not able to resolve disputes leading to World War I, neither the League of Nations nor the Permanent Court of International Justice were able to prevent the outbreak of World War II.

After World War II, nations looking at the horror of world war recognized that the League of Nations had to be strengthened. They felt that a new international organization should be established. Such an organization would base its activity on the principle of the sovereign equality of all peaceful states and would be open to all states, big or small.<sup>12</sup> A major conference at San Francisco (April 25-June 26, 1945), with 50 participating nations, approved the Charter of the United Nations and the Statute of the International Court of Justice.<sup>13</sup>

The Permanent Court of Arbitration continued to exist for the voluntary resolution of disputes through the arbitration process. But now a new International Court of Justice with expanded powers was established by participating nations. While part of the United Nations, both were headquartered at the tree-lined, peaceful atmosphere of The Hague in order to allow for judicial and reasoned settlement of disputes and to avoid the political nature of the United Nations in New York. The International Court of Justice (ICJ) was conceived as a powerful instrument for everlasting universal peace.<sup>14</sup>

### HOW THE COURT WORKS

According to its Charter, the U.N. attempts to maintain peace by settling disputes "in conformity with the principles of justice and international law."<sup>15</sup> The document goes on to speak of "negotiation, enquiry, mediation, conciliation, arbitration, [and] judicial settlement"<sup>16</sup> as means of maintaining peace.

The members of the United Nations are automatically parties to the "Statute" establishing the International Court of Justice<sup>17</sup> and each "undertakes to comply with the decision of the [court]."<sup>18</sup> If one party to a suit fails to

<sup>11</sup>*Id.* at 35.

<sup>12</sup>*Id.* at 40. See also U.N. CHARTER art. 2, para. 1.

<sup>13</sup>G. ELIAN, *supra* note 2, at 40.

<sup>14</sup>For the history of the International Court of Justice, see L. DELBEZ, LES PRINCIPES GENERAUX DU DROIT INTERNATIONAL, Pichon-Durand, 456-459 (1964).

<sup>15</sup>U.N. CHARTER, art. 1, para. 1.

<sup>16</sup>*Id.* at art. 33, para. 1.

<sup>17</sup>*Id.* at art. 93, para. 1.

<sup>18</sup>*Id.* at art. 94, para. 1.

comply, the other may ask the Security Council to "make recommendations or decide upon measures to be taken to give effect to the judgment."<sup>19</sup>

Either the U.N. General Assembly or other agencies of the U.N. may request "advisory opinions" of the International Court.<sup>20</sup> This is one of the major differences between the United States court system and the International Court. Contrary to popular opinion, the United States Supreme Court does not go charging off on its own to give opinions on all manner of cases. It has to be presented with a genuine legal case or controversy requiring adjudication.<sup>21</sup> The International Court, however, can give a legal opinion, even if there is no formal case before it.

The ICJ consists of 15 judges elected by the General Assembly and the Security Council of the United Nations from countries which are members of the United Nations.<sup>22</sup> The judges possess qualifications required in their respective countries for the appointment to the highest judicial offices.<sup>23</sup> The ICJ judges represent the main forms of civilization and the principal legal systems of the world. There are judges from developed and Third World countries and judges from capitalist and socialist systems. The judges serve full-time for nine years.<sup>24</sup> The judges have diplomatic privileges and immunity when engaged in court business.<sup>25</sup> They meet at the Peace Palace in The Hague,<sup>26</sup> continuing the tradition of the First Hague Conference of 1899. The ICJ is permanently in session except during vacations.<sup>27</sup> Judges with the same nationality as one of the parties do not have to disqualify themselves, but the opposing party can

<sup>19</sup>*Id.* at para. 2.

<sup>20</sup>*Id.* at art. 96, para. 1.

<sup>21</sup>U.S. CONST. art. III, § 2, cl. 1.

<sup>22</sup>STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 3, para. 1. The following is a list of the members of the Court and the years in which their terms expire:

President: Taslim Olawale Elias, Nigeria (1994)

Vice President: Jose Sette Camara, Brazil (1988)

Platon Dmitrievich Morozov, U.S.S.R. (1988)

Roberto Ago, Italy (1988)

Stephen Schwebel, U.S. (1988)

Mohammed Bedjaoul, Algeria (1988)

Nagendra Singh, India (1991)

Jose Maria Ruda, Argentina (1991)

Robert Y. Jennings, United Kingdom (1991)

Guy Ladreit de Lacharriere, France (1991)

Keba Mbaye, Senegal (1991)

Jens Evensen, Norway (1994)

Ni Zhengyu, China (1994)

Manfred Lachs, Poland (1994)

Shigeru Oda, Japan (1994)

THE 1986 ALMANAC 320 (O. Johnson ed. 1986)

<sup>23</sup>*Id.* at art. 2.

<sup>24</sup>*Id.* at art. 13.

<sup>25</sup>*Id.* at art. 19.

<sup>26</sup>*Id.* at art. 22, para. 1.

<sup>27</sup>*Id.* at art. 23, para. 1.

then choose a judge of the same nationality from a list of qualified candidates.<sup>28</sup> The salaries, allowances and compensation are all free of the taxing system of any nation. The salary for ICJ judges as of October, 1985, was \$85,000 a year with an annual cost of living increase of \$12,000.<sup>29</sup>

### PROBLEMS

Jurisdiction has been one of the major disputes since the establishment of the court in 1945. Only countries may be parties in cases before the court.<sup>30</sup> An individual who has a dispute with a nation cannot go before the ICJ for a resolution of the dispute. And a corporation which has a dispute with a nation may not go before the International Court of Justice unless the company persuades its own government to represent its interests.

Forty-seven states have agreed to compulsory jurisdiction of the court in all legal disputes concerning:

1. the interpretation of a treaty;
2. any question of international law;
3. the existence of any fact which, if established, would constitute a breach of an international obligation; and
4. the nature or extent of the reparation to be made for the breach of an international obligation.<sup>31</sup>

<sup>28</sup>*Id.* at art. 31, para. 1-2.

<sup>29</sup>U.N. GAORI (Agenda Item 116) at 5, U.N. Doc A/C.5/40/32 (1985). The President of the ICJ was receiving \$94,200 annually in salary as of Oct. 1985. *Id.* at 6.

<sup>30</sup>STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34, para. 1.

<sup>31</sup>*Id.* at art. 36, para. 2. As of January 1, 1983, the forty-seven states that have agreed to compulsory jurisdiction of the court include:

|                      |  |
|----------------------|--|
| Australia            | Malay  |
| Austria              | Malta  |
| Barbados             | Mauritius  |
| Belgium              | Mexico   |
| Botswana             | Netherlands  |
| Canada               | New Zealand  |
| Columbia             | Nicaragua  |
| Costa Rica           | Nigeria  |
| Democratic Kampuchea | Norway   |
| Denmark              | Pakistan   |
| Dominican Republic   | Panama   |
| Egypt                | Philippines  |
| El Salvador          | Portugal   |
| Finland              | Somalia  |
| Gambia               | Sudan  |
| Haiti                | Swaziland  |
| Honduras             | Sweden   |
| India                | Switzerland  |
| Israel               | Togo   |
| Japan                | Uganda   |
| Kenya                | United Kingdom of<br>Great Britain and<br>Northern Ireland |
| Liberia              | United States of America                                   |
| Liechtenstein        | Uruguay  |
| Luxembourg           |  |

However, the vast majority of countries — including the United States and the Soviet Union — have not agreed to the absolute compulsory jurisdiction of the International Court of Justice. In fact, the United States, by the Connally Amendment of 1946,<sup>32</sup> which was inspired by John Foster Dulles and passed by the U.S. Senate, maintains certain reservations as to the International Court of Justice's jurisdiction. The U.S. refuses to subject itself to the jurisdiction of the court when the U.S. deems that the dispute is essentially domestic or where the U.S. deems that the dispute arises under a multilateral treaty.<sup>33</sup>

The Connally Amendment doesn't mean, however, that the court can't assert jurisdiction in a case involving the United States. In fact, the court has the power to decide questions of its own jurisdiction.<sup>34</sup> In this, it is like American courts, which can hear and decide a case even if one of the parties doesn't agree.

Unlike American courts, however, the International Court can't be sure of *enforcing* its decrees. Lacking the normal apparatus of a nation-state, such as police forces and other agencies of government, it is forced to go into the political arena — the Security Council — to compel obedience to its decisions. The rules of the Security Council (the vote of any one of the permanent members can veto action)<sup>35</sup> and the realities of world politics make it unlikely that vigorous action will take place in any truly controversial case.

Here is where self-limiting provisions like the Connally Amendment come into play. The United States is on record as being committed to world peace through justice, and in the absence of a shield like the Connally Amendment, our country might find it difficult to ignore a decision of the International Court or to veto its implementation in the Security Council. With the amendment, however, we feel justified in asserting our independence of the court.<sup>36</sup>

A good recent example involves the United States and Nicaragua. Nicaragua contends that a fishing trawler sank in the Pacific port of Corinto, Nicaragua, after striking a mine that was laid by CIA-directed operatives. Nicaragua contends this was part of a program sponsored by the Reagan administration to harass Nicaraguan shipping.

The government of Nicaragua requested the International Court of Justice to declare that such activities are in violation of international law, since

E. OSMANCZYK, *ENCYCLOPEDIA OF THE UNITED STATES, AND INTERNATIONAL AGREEMENTS* 404 (1985).

<sup>32</sup>1 Stat. 1218, T.I.A.S. No. 1598, 4 Bevens 140, 1 U.N.T.S. 9.

<sup>33</sup>*Id.* See also Humphrey, *The United States, the World Court and the Connally Amendment*, 11 VA. J. INT'L L. 310 (1971).

<sup>34</sup>STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, para. 6.

<sup>35</sup>U.N. CHARTER, *supra* note 15, at art. 38. See also THE 1986 ALMANAC 319 (O. Johnson ed. 1986).

<sup>36</sup>Humphrey, *supra* note 33.

war has not been declared by the United States against Nicaragua, and requested an assessment of damages and an injunction ordering the United States government to stop supporting such activities.<sup>37</sup>

The Reagan administration attempted to nullify the Nicaraguan action by announcing that it was amending its declaration to suspend the jurisdiction of the World Court regarding any matter brought against the U.S. concerning Central America.<sup>38</sup> The administration took this step on April 9, 1984, the day *before* Nicaragua filed proceedings against the United States.<sup>39</sup> The time of suspension was two years. Nicaraguan representatives in Washington, D.C. claimed that the U.S. action was of no effect, because by the terms of the original U.S. declaration any termination or revocation had to be given with at least six months notice to be effective.<sup>40</sup> One effect of the Reagan administration's attempt to thwart the jurisdiction of the World Court was condemnation by the American Society of International Law, which for the first time in its history issued a statement condemning the actions of the United States. The statement requested the administration to "rescind its efforts to turn aside the ICJ's jurisdiction."<sup>41</sup>

The proceedings instituted by Nicaragua against the United States were brought before the International Court of Justice in early May, 1984.<sup>42</sup> Since World War II this was the first time that the United States appeared as a defendant to contest provisional measures. In its defense the United States raised two arguments. The first step taken by the United States was to invoke "its suspension of consent to compulsory jurisdiction with respect to any disputes concerning Central America."<sup>43</sup> The second step taken was its argument that Nicaragua had "no right" to plead before the World Court because it never filed instruments of ratification to officially accept the court's jurisdiction.<sup>44</sup>

The World Court ruled, by a fifteen to zero margin, that the United States was to "immediately cease and refrain from any action restricting, blocking, or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines."<sup>45</sup> By a fourteen to one vote the World Court also held that the right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region of the world,

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<sup>37</sup>Hassan, *A Legal Analysis of the United States' Attempted Withdrawal From the Jurisdiction Of The World Court In The Proceedings Initiated By Nicaragua*, 10 U. DAYTON L. REV. 295, 297 (1984).

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

<sup>40</sup>N.Y. Times, April 10, 1984, at A1, col. 6, A8, col. 1.

<sup>41</sup>Hassan, *supra* note 37, at 298, *citing Id.*, April 13, 1984, at A3, col. 1.

<sup>42</sup>Hassan, *supra* note 37, at 299.

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*, quoting Military and Parliamentary Activities in and against Nicaragua (Nicar. v. U.S.) 1984 I.C.J. 4, 22, reprinted in 23 INT'L LEGAL MATTERS 468, 477 (1984).



should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain from the threat or use of force against the territorial integrity or the political independence of any state, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States.<sup>46</sup>

The United States told the World Court that it had already stopped mining the Nicaraguan harbors and the ICJ decided that written proceedings should first be addressed to the issue of the court's jurisdiction.<sup>47</sup> The result then, was interim relief without reaching the merits of the dispute. However, the ICJ has since then ruled to accept jurisdiction of the case.<sup>48</sup>

The proceedings instituted by Nicaragua against the United States were finally decided "on the merits" on June 27, 1986.<sup>49</sup> The World Court held that "the Reagan Administration had broken international law and violated Nicaraguan sovereignty by aiding the anti-Government rebels."<sup>50</sup> The court ruled that the United States must pay reparation to Nicaragua but it deferred a Nicaraguan petition which sought \$370 million in damages from the United States.<sup>51</sup> Although the World Court lacks enforcement powers, it stated that if no settlement was reached between the two nations, it would step back into the matter.

In ruling against the United States, the court rejected the defense that the United States was "acting in the 'collective self-defense' of El Salvador, Costa Rica, and Honduras because Nicaragua was supporting rebel movements in

<sup>46</sup>Hassan, *supra* note 37, at 299. The sole dissenter was United States Judge Stephen M. Schwebel.

<sup>47</sup>*Id.* at 300.

<sup>48</sup>*Id.* at n.28.

<sup>49</sup>N.Y. Times, June 28, 1986, at A1, col. 2. The article which reported the I.C.J.'s decision included a synopsis at A.4, col. 6, on the I.C.J. It read:

The International Court of Justice, commonly known as the World Court, is an agency of the United Nations. The court, with headquarters in the Hague, was established for nations, and individuals may not sue or be sued. The court has jurisdiction in all cases that the parties agree to refer to it and in other matters provided for in the United Nations Charter or other treaties.

If there is a dispute about whether the court has jurisdiction, the court settles the issue.

Countries are not required to submit disputes to the court. Countries may say they recognize the court's jurisdiction as compulsory in cases involving the interpretation of a treaty or of international law; a decision on whether there has been a breach of an international obligation, or a settlement of any reparations for a breach of an international obligation. Such declarations are binding only if both parties have made a similar declaration.

Countries have often qualified such declarations. The United States, accepting the court's compulsory jurisdiction in 1946, excluded matters of domestic jurisdiction "as determined by the United States of America." The United States has also withdrawn from court jurisdiction in dispute involving Central America. The court, which has no enforcement powers, has 15 judges elected for renewable nine-year terms by votes of the General Assembly and Security Council. Five judges are elected every three years. No judge may be dismissed except by a unanimous finding by the other judges that he no longer fulfills conditions for service. *Id.* at A4, col. 6.

<sup>50</sup>*Id.* at A1, col. 2.

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<sup>51</sup>*Id.* at A4, col. 4.

these countries."<sup>52</sup>

The United States was found liable on a variety of grounds including breach of its duties "not to use force against another state, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce."<sup>53</sup> The production and dissemination of a manual to contra forces was judged to be "contrary to general principles of humanitarian law" but did not support a basis for concluding that acts committed pursuant to the manual's content could be imputed to the United States.<sup>54</sup>

The nature of United States' response mirrored the response it had to the court's decision to exercise jurisdiction over the case. A State Department spokesman stated that although a decision had been rendered, "[t]he court is simply not equipped to deal with a case of this nature involving complex facts and intelligence information."<sup>55</sup> The court was also criticized for premising its decision solely on the Nicaraguan version of the facts.<sup>56</sup> However the United States refused to present its case to the court claiming that due to the confidential nature of the information necessary to put on its case, the United States could not make said information available. Although the State Department spokesman did not state what the exact United States response would be, at least one observer noted that "it seemed apparent that the Administration would not comply."<sup>57</sup> Should that happen, the Nicaraguans would appear to be left without a remedy although diplomats say that Nicaragua can use the decision it received to cause the United States "diplomatic embarrassment" in certain areas including those involving the United Nations.<sup>58</sup>

#### ON THE OTHER FOOT

In the Iranian hostage case, the tables were turned and it was the U.S. seeking the court's jurisdiction and its opponent denying it. In *The United States Diplomatic and Counselor Staff in Tehran*<sup>59</sup> case the United States government voluntarily requested the ICJ to rule on the occupation of its embassy in Tehran.

Judge Taslim O. Elias, President of the ICJ, reports in his 1983 book *The International Court of Justice and Some Contemporary Problems*,<sup>60</sup> that on

<sup>52</sup>*Id.* at A4, col. 5.

<sup>53</sup>*Id.* at A4, col. 3.

<sup>54</sup>*Id.* at A4, col. 3-4.

<sup>55</sup>*Id.* at A4, col. 2.

<sup>56</sup>*Id.* at A4, col. 3.

<sup>57</sup>*Id.*

<sup>58</sup>*Id.* at A4, col. 5.

<sup>59</sup>United States of America v. Iran, Order of Dec. 24, 1979, I.C.J. Report 1979, 23; *see also* idem Judgment, I.C.J. Report of Judgments 1980, 3.

<sup>60</sup>T. ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS* (1983).  
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November 4, 1979, in the course of the demonstration outside the United States Embassy compound in Tehran, the Embassy premises were attacked and there was no effective intervention on the part of the Iranian security forces to relieve the situation, despite repeated calls for help from the Embassy. The United States filed a memorial (a legal written document more commonly referred to as a complaint in U.S. courts) before the International Court of Justice, asking that the government of Tehran immediately release all hostages, clear the premises of the United States Embassy, ensure that all persons attached to the U.S. Embassy be accorded full diplomatic and counselor functions, not place on trial any person attached to the Embassy, and ensure that no action be taken which might prejudice the rights of the United States.<sup>61</sup>

The hearing was set for December 10, 1979, before the International Court of Justice. The Iranian government refused to recognize the jurisdiction of the International Court of Justice, but on December 9, 1979, the Iranian government sent a long telegram stating that Iran wished to express its respect for the International Court of Justice and its distinguished members and requested that "the Court cannot and should not take cognizance of the case which the Government of the United States of America has submitted to it."<sup>62</sup>

Iran asserted that the question of the "hostages of the American Embassy in Tehran" . . . represented a marginal and secondary aspect of an overall problem, one which could not be studied separately and which involved, *inter alia*, more than twenty-five years of continual interference by the United States in the internal affairs of Iran, a shameless exploitation of Iran and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms."<sup>63</sup>

Iran emphasized that the problem involved in the conflict was not one of interpretation and application of treaties, but one which resulted from an overall situation containing much more fundamental and much more complex elements. Therefore Iran failed to appear before the International Court to argue its case.

Nevertheless, the International Court took jurisdiction of the matter and delivered a judgment on May 24, 1980, that Iran had violated and was still violating the obligations owed by it to the United States under long-established rules of general international law.<sup>64</sup> The court also ruled that no member of the U.S. diplomatic or counselor staff should be kept in Iran and that Iran should make reparations to the U.S. government for injury caused to or at or by seizure of the Embassy, consulates, and the diplomatic and other personnel.

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<sup>61</sup>*Id.* at 287.

<sup>62</sup>*Id.*

<sup>63</sup>*Id.* at 287-88.

<sup>64</sup>*Id.* at 293.

The court, in one of its concluding remarks said:

Wrongfully to deprive human beings of their freedom and to subject them to physical constraints of hardship is in itself manifestly incompatible with the principles of the United Nations, as well as the fundamental principles enunciated in the Universal Declaration of Human Rights. But what has above all to be emphasized is the extent and seriousness of the conflict of the Iranian state and its obligations to the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the court must here again strongly affirm

. . . .<sup>65</sup>

Thus the United States obtained a pronouncement from the International Court of Justice that Iran had broken international law, even though the Iranian government refused to accept the jurisdiction of the court. As Judge Elias admits, "it is a sad fact to note that the Order of the Court in this case was flouted and remained unheeded." Elias goes on to note that the United States itself violated an earlier order of the court to refrain from action which might further aggravate tensions between the two countries. According to Elias, the American incursion into Iran to rescue the hostages, however understandable in view of the immense frustrations inherent in the situation, was an action "calculated to undermine respect for the judicial process in international relations."<sup>66</sup>

Ultimately, the hostages were released, though as a result of negotiations, not of the court decision.

### INTERNATIONAL LAW

The ICJ function is to decide cases in accordance with international law. How does the International Court of Justice determine what is international law? Article 38 of the Statute of the International Court of Justice refers to the bodies of law which the court uses in the resolution of disputes between and among countries.<sup>67</sup> First are international conventions. These are treaties entered into between and among countries. Second is international custom as evidence of the general practice which has been accepted as law. For example, diplomatic immunity has been accepted as international custom. Third are general principles of law recognized by civilized nations. For example, the concept of individual freedom, the denial of which is forbidden without due process of law, has become a human rights principle of law recognized by all civilized nations and by the International Court of Justice. Deprivation of freedom without a fair trial should not be permitted by civilized nations.

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<sup>65</sup>*Id.* at 294.

<sup>66</sup>*Id.* at 295.

<sup>67</sup>STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38.

Finally, the court looks to judicial decisions and the teachings of other jurists of the various nations as a subsidiary means of determining rules of law. Consequently cases of a similar nature which have been heard in the highest court of other countries will be studied by the International Court of Justice for whatever precedential value such cases may have. Of course the International Court of Justice is not bound by such decisions. In fact the court is not even bound by its own previous decisions in such matters.

### PROCEDURE IN THE ICJ

The official languages of the court are French and English.<sup>68</sup> The actual proceedings at the International Court of Justice have similarities both to trial courts and to appellate courts. The procedure is in two parts, written and oral.<sup>69</sup> The parties file memorials, counter-memorials and, if necessary, replies. The oral proceedings consist of a hearing in which there are first witnesses and then arguments to the court by the advocates.<sup>70</sup> As noted in the discussion of the Iranian case, even if one of the parties does not appear before the court, the court can take jurisdiction of the matter if the court itself determines it has jurisdiction. If a third country feels that its interests are involved it can submit a request to intervene in the case. All questions are decided by a majority of the judges present, and written decisions are rendered by the judges.<sup>71</sup> The decision has no binding force (even precedential force) except between the parties in respect to the particular case.<sup>72</sup> Once a decision is rendered by the International Court of Justice there is no appeal.<sup>73</sup>

The International Court of Justice from 1945 up to the Iranian hostage case in 1980 issued only 30 judgments in cases in which two parties in dispute argued the case before the ICJ. In its first twenty-four years of existence, the ICJ "received about fifty cases, rendered judgments in twenty-one, and . . . issued thirteen advisory opinions."<sup>74</sup>

### STRENGTHS AND WEAKNESSES

A listing of some of the strengths and weaknesses of the International Court of Justice may help you formulate your own ideas as to whether the International Court of Justice is worth the effort.

<sup>68</sup>*Id.* at art. 39, para. 1.

<sup>69</sup>*Id.* at art. 43, para. 1.

<sup>70</sup>*Id.* at art. 43, para. 5.

<sup>71</sup>*Id.* at art. 55, para. 1.

<sup>72</sup>*Id.* at art. 59.

<sup>73</sup>*Id.* at art. 60.

<sup>74</sup>G. ELIAN, *supra* note 2, at 96. For a further breakdown of the number and types of cases decided by the I.C.J., see J. SWEENEY, C. OLIVER, & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 67-68 (1981).  
<http://ideaexchange.uakron.edu/akronlawreview/vol20/iss3/2>

### *Strengths*

1. "Although 'peace under the law' has been an unattainable ideal, peace without the law is unimaginable," writes R.P. Anand, Professor of International Law at Jawaharlal Nehru University, New Delhi, India. "In the present dangerous thermonuclear age, mankind needs peace and needs it desperately. It is generally acknowledged that law in some form is an indispensable means. One of the necessary conditions for a more effective law is to strengthen and improve the institutions and processes for law's administration."<sup>75</sup>

2. There is a universal need for peaceful settlement of disputes. The International Court of Justice provides an opportunity to intervene in disputes and to resolve them short of armed warfare.

3. The International Court of Justice enhances the role of an international legal order.

4. The International Court of Justice provides an opportunity to lessen the role of national interest and create a more global consideration. Each of us who has looked at pictures of earth from satellites recognize we are all in this together.

5. The court can act in an advisory capacity as a teacher, pointing out the ideals of mankind to be achieved through the rule of law.<sup>76</sup>

6. The court can be a source of law.

7. The court provides a hope for a world built on law and justice.

8. Law provides the opportunity for stability and security.

9. The ICJ offers an opportunity to depoliticize decisions.<sup>77</sup>

### *Weaknesses*

1. The political and ideological divisions of world society cause a crisis of confidence in the court.<sup>78</sup>

2. Only a small minority of the member states have accepted compulsory jurisdiction.<sup>79</sup>

3. Countries are reluctant to make use of the court. There seems to be a preference for nonjudicial means to resolve disputes rather than by the court applying positive international law.<sup>80</sup> For example, negotiation, mediation,

<sup>75</sup>Anand, *Role of International Adjudication*, in 1 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 1 (L. Gross ed. 1976).

<sup>76</sup>STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 65.

<sup>77</sup>Anand, *supra* note 75, at 1.

<sup>78</sup>*Id.* at 2.

<sup>79</sup>STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, para. 2.

<sup>80</sup>Anand, *supra* note 75, at 4.

conciliation, and even warfare seem to be the preferred methods of dispute resolution. Unlike the Islamic and the Christian West, Asian countries — Confucian China, Hindu India and Buddhist nations of Southeast Asia — because of their intuitive philosophies and religions have great reluctance to settling disputes by recourse to law and the processes of litigation.

4. Independent states are jealous of their sovereignty and skeptical about leaving control over their affairs to third parties.

5. With the growth of new nations arising out of the decay and destruction of colonial rule, different sets of cultural and legal values operate globally. There is concern that the International Court of Justice reflects a Western tradition of dispute resolution.<sup>81</sup>

6. It is argued that there are structural deficiencies of the International Court of Justice.<sup>82</sup> Although the impartiality of its decisions and the integrity of its judges are unquestionable, many newly independent countries of Asia and Africa argue that traditional international law is Euro-centric and is biased in favor of European and American states.

7. What is customary international law? Some states feel that customary international law is law which came into custom because it was imposed by eight or nine of the most powerful countries.<sup>83</sup> (Article 38 of the Statute of the International Court of Justice calls for the general principles of international law “accepted by civilized nations.”)

8. Is there really a common law for all mankind?

9. Although the International Court of Justice seems to be a good idea, is the fact that it is used so little recognition of its impotence? Nations seem not to have given whole-hearted support to resolving disputes by the International Court of Justice.

10. The International Court of Justice itself has no enforcement authority. Enforcement power lies only through the United Nations. Of the United Nations, Professor Leo Gross of the Fletcher School of Law and Diplomacy of Tufts University, has said, “In my view the performance of the United Nations in dispute settlement as distinguished from stopping hostilities is very unsatisfactory.”<sup>84</sup>

11. “Only countries may be parties in cases before the court.” (Article 34 of the Statute of the International Court of Justice.) This then precludes private parties involved in international disputes, companies and businesses,

<sup>81</sup>*Id.* at 5-7.

<sup>82</sup>*Id.* at 9.

<sup>83</sup>*Id.* at 10.

<sup>84</sup>L. Gross, *The International Court of Justice: Consideration of Requirements For Enhancing Its Role In The International Legal Order*, in 1 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 31 (L. Gross ed. 1976).

from using the ICJ. It also prevents guerilla groups and insurgents alleging violations of human rights by their own governments from using the ICJ to settle grievances.

### UNIQUE PROCEDURES

How does the International Court of Justice compare with an American trial court and with the U.S. Supreme Court? Article 43 of the Statute of the ICJ describes the procedure and proceedings. This chart provides a simple comparison.

| <i>American Trial Court</i>                  | <i>U.S. Supreme Court</i>                    | <i>ICJ</i>                           |
|--|--|--------------------------------------|
| Complaint/<br>Answer                         | Appellant's Brief/<br>Respondent's Brief     | Memorial/<br>Counter-memorial        |
| testimony of witnesses                       | no testimony                                 | testimony of<br>witnesses            |
| jury   | no jury                                      | no jury                              |
| closing argument by<br>lawyer to jury        | argument to the<br>court                     | argument to the<br>court             |
| judge  | 9 justices appointed<br>by president         | 15 judges<br>by United<br>Nations    |
| verdict or judgment                          | Written opinion;<br>no advisory<br>opinions  | Written opinion;<br>advisory opinion |
| individuals and<br>governments as<br>parties | individuals and<br>governments as<br>parties | only nations as<br>parties           |

### CONCLUSIONS

A number of the strengths and weaknesses have been discussed in this article. Ultimately, there seem to be three schools of thought concerning the International Court of Justice. The first accepts the compulsory jurisdiction of the International Court concerning the resolution of disputes with other state members. This school trusts the ability, integrity, and rationality of the justices to peacefully resolve disputes among global neighbors. Such states necessarily yield some sovereign decisionmaking power. However, few states have accepted compulsory jurisdiction,<sup>85</sup> and many maintain some reservation limiting the scope of the jurisdiction accepted.<sup>86</sup>

Countries following the second school of thought, including the United

<sup>85</sup>See note 31.

<sup>86</sup>See note 32.



States, have declared acceptance of jurisdiction by the International Court but include "self-judging reservations."<sup>87</sup> The United States has declared in the Connally Amendment that it will not accept the jurisdiction of the International Court of Justice when "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*" (emphasis added).<sup>88</sup> Six other nations, including France,<sup>89</sup> have such "self-judging" reservations.

The third school involves countries like the Soviet Union which are totally opposed to the normative character of international law itself. Consequently no matter what improvements could be made in the composition of the court and in the application of international law, such member states would not be induced to change their conduct. Although the Soviet Union has had judges sitting on the International Court of Justice, it has never subjected itself to the jurisdiction of the court.

Judge Taslim O. Elias of the International Court of Justice has noted a number of contemporary questions needing resolution. He says the International Court of Justice could serve a valuable role by elucidating human rights, diplomatic law, the law of the sea, wars of national liberation and humanitarian law, and the legal aspects of the new international economic order.<sup>90</sup>

It is certainly valid to ask whether the International Court of Justice can be a force for peace. International justice is an ideal obviously not yet achieved. Nevertheless, justice is as dear to mankind as is the idea of peace among peoples.

Although neither the United Nations nor the International Court of Justice have achieved their ultimate purposes "to save succeeding generations from the scourge of war"<sup>91</sup> (first sentence of the Charter of the United Nations), it is easy to agree with George Elian, former Vice President of the Supreme Court of the Socialist Republic of Romania and Ambassador to the United Nations, when he says: "We nourish the hope that the problems regarding the improvement of the activity in this domain should find their solution in the not too distant future."<sup>92</sup>

The reality of thermonuclear war leads us to recognize "that we live in a jungle world imperfectly ameliorated by humanity's continuous struggle against unreason,"<sup>93</sup> according to Professor Anand. With this reality in mind,

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 370 (Shabtai Rosenne ed. 1979).

<sup>90</sup> ELIAS, *supra* note 60, at 149.

<sup>91</sup> U.N. CHARTER, first sentence.

<sup>92</sup> ELIAN, *supra* note 2, at 12.

it is certainly worth our effort to continue attempts to resolve disputes in a reasoned and legal manner. The International Court of Justice may still be one of the world's best hopes to resolve conflicts between and among nations in this imperfect jungle world.

