

FORUM:

American Acceptance of the Jurisdiction of the International Court of Justice: Experiences and Prospects

*Louis B. Sohn**

The International Court of Justice ("ICJ" or "Court") is the successor to both the Permanent Court of Arbitration and the Permanent Court of International Justice. Before the first court was established in 1899, only *ad hoc* tribunals existed. This was due to a basic fact of international law that international tribunals possessed jurisdiction only if the parties to the case conferred it on the tribunal either for that case or previously by an international agreement. Therefore, the great problem of international law today is how to confer as much jurisdiction on the international court as possible. Now that the use of force is generally prohibited, the only way one can solve a dispute is by a decision of some impartial international body. Despite the doubts of some people, the International Court of Justice is the closest thing we have to such an impartial international body.

Jurisdiction conferred on the ICJ ordinarily is via a bilateral agreement. Most of the cases before 1900 were submitted on this basis. Only around 1890 did nations begin to include an arbitration clause in agreements relating to other subjects such as treaties of commerce. In 1881, Italy's Foreign Minister, Mr. Mancini, began this trend. When concluding treaties with other nations, he would insert a clause calling for any dispute under the agreement to be submitted by the parties to arbitration. He succeeded in concluding 20 such agreements.

* Woodruff Professor of International Law, School of Law, University of Georgia, Athens, Georgia.

Over the years, this form of agreement became one of the most important bases for jurisdiction. In fact, the latest case between the United States and Iran has been submitted to the ICJ on the basis of two such agreements. So we have three types of bilateral agreements which confer jurisdiction: bilateral agreements *ad hoc*, bilateral agreements containing an interpretation clause, and bilateral agreements to submit disputes between two states to various means of settlement: conciliation, arbitration and judicial settlement.

One of my first jobs at the United Nations, around 1950, was to collect all agreements of the third type concluded between 1928 and 1948. I discovered that there were several hundred of them. Depending on the type of dispute involved, conflicts were usually submitted for settlement to the ICJ for legal disputes; to arbitration for legal or non-legal disputes; and to conciliation for non-legal disputes.

The United States did not participate in this movement. It failed to sign bilateral agreements conferring jurisdiction on the Court, nor did it sign treaties containing "interpretation clauses." Whenever the United States did sign an agreement, the Senate always appended a reservation stating that "any case under this agreement may be submitted to the Court *only* with the special consent of the Senate."

After the ICJ was established in 1945, the same jurisdictional problems arose. In a stroke of genius, it was decided that the Court shall inherit all the jurisdiction held by the old PCIJ. Approximately thirty declarations accepting the jurisdiction of the Court continued to be binding, but most of them were subject to serious reservations, and they could be invoked only by a state accepting the same obligation. In addition, jurisdiction under more than a hundred bilateral dispute settlement treaties, and several hundred special treaties that contained interpretational clauses, was transferred to the ICJ.

The question then arose, what would happen next? Senator Morse of Oregon presented a resolution calling for the United States to accept the jurisdiction of the ICJ. This was a revolutionary step. A big debate then ensued in the Senate Committee on Foreign Relations. The Committee, after some hesitation, approved the resolution. However, reservations were added at the last minute on the floor of the Senate.

One stated that the United States could decide in each case whether the case related to the domestic jurisdiction of the United States and, therefore, should not be submitted to the ICJ. Fascinating examples of domestic matters were given by the reservation's proponents. These included immigration, traffic in women and children, and disputes concerning the Panama Canal. It was a broad formula that covered

everything. This first reservation was suggested by John Foster Dulles to Senator Connally, and it became the Connally Amendment.

A second reservation, by Senator Vandenberg, provided for exempting from the Court any jurisdiction concerning disputes under multilateral treaties unless all parties to the dispute were before the Court, an almost impossible condition. As a result, it was quite difficult for the United States to sue anybody because the other nation could immediately hide behind the reciprocal character of those reservations and say, "sorry, we consider this a domestic case."

A good example of this was when an Israeli airliner was shot down over Bulgaria. Bulgaria had accepted, supposedly, the jurisdiction of the ICJ, but the Court later found that this declaration was no longer valid. In the meantime, when the United States, United Kingdom and Israel brought cases against Bulgaria before the Court, Bulgaria immediately said shooting of an airplane over its own territory was a matter of domestic jurisdiction. The Legal Adviser to the United States Department of State, Mr. Hager, replied that this was nonsense. He was immediately called to appear before the Senate Committee on Foreign Relations and told: "But don't you know, this is at the complete discretion of the United States and the other parties." Mr. Hager then had to write a second letter to the ICJ apologizing for his mistake. From that point on, everyone said that the American clarification meant that the United States declaration stood for nothing.

Nevertheless, since 1945, the United States has accepted jurisdiction of the Court through various bilateral and multilateral treaties. To date, about 70 such treaties have been accepted by the United States. In several of the cases before the Court in which the United States participated, jurisdiction was based on this kind of special treaty. The case involving United States diplomats in Iran was one of them.¹ As you know, we won. We have also submitted other cases by way of bilateral agreements, one with Canada² and one with Italy.³

In a recent meeting between the Soviet Union and the United States, the two countries agreed to *search* for a case they could submit to the Court. For the moment, the Legal Advisers of the two gov-

¹ United States Diplomatic and Consular Staff in Tehran Case (U.S. v. Iran), 1980 I.C.J. 3 (May 24, 1980).

² Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12, 1984).

³ Concerning Elettronica Sicula (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (July 20, 1989).

ernments have not been able to find such a case. Someone suggested the Czarist bond case might be submitted. There exist some old bonds issued by the Czar of Russia and other authorities prior to 1917. Of course, the Soviet Union refused to pay for them as they were someone else's bonds. Most people have thrown away these bonds, but there have been some speculators buying them for pennies just in case something can be collected. Now they are pressing the State Department to pursue their claims. There is legislation which prevents the United States from giving loans to, or making special arrangements with, countries unless they have paid their debts. As a result, the Soviet Union recently has come to the United States and said, "how about doing something about the Czarist bonds?"

At the same time, there has been some disenchantment with the Court. By 1989, only 50 nations have accepted the jurisdiction of the Court by declarations under the optional clause. Most states have accepted some compulsory jurisdiction of the Court by bilateral treaties, multilateral treaties and by interpretation clauses in various treaties. Once jurisdiction has been accepted, it is obligatory and compulsory. One cannot wiggle out of it because consent has been given. This is a crucial point. However, for some reason, international lawyers have always emphasized the particular kind of declarations of compulsory jurisdiction under Article 36 of the United Nations Charter. Namely, that a state should accept the jurisdiction of the Court reciprocally with respect to other nations accepting the same jurisdiction. Even if the other state accepted a very broad jurisdiction, it is entitled to invoke against the United States the narrow acceptance of the United States and vice versa.

A case between France and Norway held to that effect.⁴ Norway had a very generous declaration accepting the jurisdiction of the Court very broadly. France had a number of reservations to its declaration. France brought a case against Norway. Norway said "Sorry, under your reservations, you cannot bring that case." The ICJ agreed, stating Norway was entitled to invoke France's reservations.

In the 1970's and 1980's, cases began arising in which states refused to even go to the Court when they were brought under one of the compulsory jurisdictional clauses. Examples include France⁵ and the

⁴ Certain Norwegian Loans Case (Fr. v. Nor.), 1957 I.C.J. 9 (July 6, 1957).

⁵ Nuclear Tests Cases (Austl. v. Fr., N.Z. v. Fr.), 1974 I.C.J. 253, 457 (Dec. 20, 1974).

United States.⁶ Usually, the refusing state followed the Court's decision holding that it had jurisdiction, by denouncing the jurisdiction of the Court. The United States did exactly that, and in April of 1987 the U.S.' 1946 declaration expired. However, the United States still is bound by approximately 70 treaties that accept the Court's jurisdiction.

Over the past few years, the American Bar Association has discussed the issue whether it can do something about the problem. It concluded that at this time, the only thing that could work would be to accept the jurisdiction of the Court in a different way. Instead of accepting jurisdiction under a very broad clause with reservations, we should accept jurisdiction by "opting-in." Namely, we might be willing to accept jurisdiction with respect to certain specified subjects.

It was suggested by Mr. Gorbachev a few years ago that the Soviet Union would be willing to accept, with respect to other members of the Security Council, the jurisdiction of the Court over certain subjects. The United States took this opportunity to discuss the matter further with the Soviet Union and agreed to locate some treaties as to which both nations would be willing to accept the compulsory jurisdiction of the ICJ with respect to their interpretation and application. They found a few such treaties; one of them related to terrorist activities. The two Legal Advisers drafted an agreement accepting jurisdiction under seven treaties; it is expected that the two Foreign Ministers will initial it and send it to their governments for ratification.⁷

However, a suggestion was then made that there should be one condition attached to this agreement. Namely, that this treaty would come into effect only if accepted by the other three permanent members of the Security Council: the United Kingdom, France and China. However, China has not accepted the compulsory jurisdiction of the ICJ in any of its treaties. If a treaty contained a clause concerning jurisdiction, China always made a reservation to it. Nationalist China accepted, in some cases, binding jurisdiction. However, when People's Republic of China decided to accept some of these treaties, it did it with a reservation as to the jurisdiction of the ICJ.

That is the present situation. The Section of International Law of the American Bar Association made three proposals at its last Annual Meeting which were accepted by the House of Delegates of the

⁶ Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (Merits) (June 27, 1986).

⁷ N.Y. Times, Aug. 7, 1989, at A5, col. 1.

Association. First, that the U.S. should accept jurisdiction of the Court by a bilateral treaty with the Soviet Union. Second, if it is good for the Soviet Union, it might also be good for some allies of the United States (e.g. members of NATO and the OECD). These countries might decide that there are some subjects or series of treaties with respect to which they might be willing to accept the jurisdiction of the ICJ. It is difficult to imagine, but nevertheless true, that we have no general peaceful settlement treaty with the United Kingdom, France or Canada accepting the jurisdiction of the Court. We have some agreements with these nations where we accept jurisdiction for a particular problem and a few agreements that contain special interpretation clauses, but we are not a party to an agreement with a general clause conferring jurisdiction. So perhaps, if we can't have a general clause with our allies, maybe we can have a little broader clause with them than the one we will have with the Soviet Union. Third, if we can succeed with the second proposal, maybe we can find other groups of states with which we might be able to do the same. An example would be Latin America. In all three cases, we might be able to conclude an agreement in which we would be willing to accept the Court's jurisdiction without the Senate's special consent in each case.

Today, there are approximately 40 nations which have accepted jurisdiction of the ICJ. Interestingly, in the last 15 years, the Western European countries and the United States have been withdrawing their acceptance of jurisdiction. On the other hand, the countries of Africa, Asia and the Caribbean have been accepting the jurisdiction of the Court. Ironically a country which we have often accused of being the great violator of international law, Libya, has accepted the jurisdiction of the Court in two cases, both by special agreement. It may possibly bring a third case before the Court very soon. While the United States is supposed to be the great protector of law and order in the world, we seem to have trouble in deciding whether to accept the jurisdiction of the ICJ. We claim the Court may be biased. You have probably heard the famous statement by one of our Senators who said, "How can you trust an international court if there is only one American and fourteen foreigners?"

Although there is strong feeling in our country that the decision in the *Nicaragua* case was a wrong one, I agree only partially. I am probably considered to be biased, as I assisted the United States concerning one important aspect of the case. But I really believe that the Court did not have jurisdiction over the case in the first place. Once the Court decided it had jurisdiction, however, I considered

that we should defend our case on the merits, and that if we should do it, we might have a good chance to win on the merits. But we did not defend ourselves. On the basis of a unilateral presentation by Nicaragua, the Court decided both that the United States violated various rules of international law and that some compensation was due. What was interesting about the second part of the case was that, on the one hand, in a number of paragraphs the Court held that the United States has violated international law, but there were also quite a few paragraphs stating that the United States did not violate international law and that Nicaragua's allegations were not justified. This the Court did even though the holding has to be based on a unilateral presentation of the facts. In the third part of the case, determining the amount of compensation, we again are staying away from the Court. If we were there, perhaps the compensation would be smaller; otherwise, it may remain in the millions.

As it often does, the Court was able to use this occasion to clarify some important rules of international law, such as those relating to the use of force and to intervention. Therefore, for the future, it is not important what the Court decided about the United States, but that the Court decided some basic issues of international law; and clarified the restrictions on the use of force in situations involving internal strife. These restrictions can be now utilized against Cuba, Nicaragua and others.

*Dean Rusk***

I'm very honored to be with my two distinguished colleagues for this discussion today. My comments will be relatively short, but I would start with the proposition that compliance with international law and our treaties is a fundamental policy objective of the United States. There have been some exceptions. We have more than 7000 treaties and agreements with other nations. We send out on every working day about 3000 cables from the State Department to our posts and to governments throughout the world. I once did some spot checks on these and discovered that about 25% of those cables dealt with the administration of treaties and with problems of international law. A junior officer on the third floor of the State Department does not have to go running up to the seventh floor to ask the Secretary of State whether we should comply with our treaties.

** Former Secretary of State (1961-1969), Samuel H. Sibley Professor of International Law, School of Law, University of Georgia, Athens, Georgia.

He can take it for granted that it is our stated intention to do so. Now, we don't always do so, but I point out, that in the main, only the President and the Congress can violate treaties or international law. No President will want anyone junior to him to bring upon himself and the United States a charge of violating international law. So you will find in those instances where we clearly did violate international law that those were decisions made by the President or Congress.

Now as far as the Congress is concerned, you must be aware that treaties and statutes are on a par with each other. Therefore, Congress can easily pass a statute which is valid as a matter of domestic law but which puts us in a position of violating international law. That sometimes occurs and is embarrassing. When we were working on the creation of the United Nations in 1945, some of us were very anxious to give full scope to the International Court of Justice. We wanted to accept the compulsory jurisdiction of the Court without reservation. But as Professor Sohn has pointed out, that ran into a snag in the Senate. We finally approved the treaty, but it included the Connally Reservation. By reserving to ourselves the right to decide whether we would accept the jurisdiction of the Court, rather than leaving the question of jurisdiction to the Court, we surrendered our right as Plaintiffs before the Court. This is because that form of compulsory jurisdiction operates reciprocally.

I once was speaking with Paul Martin, the Canadian Foreign Minister, about some of our disputes concerning the waters of the far north. At one point I said "We'll take you before the ICJ." He said, "Oh no you won't because we will simply cite the Connally Reservation and you are dead." Unfortunately, he was quite right. We voluntarily surrendered our right to use compulsory jurisdiction to bring anyone before the Court because we did not completely accept the Court's jurisdiction ourselves.

Those of us who were interested in strengthening international law and the institutions which supported it were disappointed in 1945 with the Connally Reservation. I'm not sure in broad prospectus whether we were particularly evil in that situation because relatively few countries had accepted the compulsory jurisdiction of the Court without reservation. As Professor Sohn pointed out, for practical purposes, the way to get into the ICJ is by the agreement of the parties. Despite the Connally Reservation, we have accepted approximately 70 treaties which say that if a dispute arises under that treaty, then disputes will be settled by the ICJ. That is one way to get

around the Connally Reservation to a degree, and I think those clauses are quite important and useful.

There still is a great deal of unfinished business for international law. The law of war and the use of force are in good shape. But the governments of the world have not been willing or able to apply these laws to the point of preventing wars. I am relatively encouraged by the progress which seems to have been made in recent years on this subject. There is still a lot of unfinished business in fields which require organization and cooperation. One such field is with regard to the environment, where law is waiting to be created. I think we'll get to it, but I don't know.

I've had some problems with Star Wars in that we've heard nothing about the basic treaty on outer space that we adopted in 1967.⁸ Within ten years of the launching of Sputnik, and ten years is a short time as these matters go, under the auspices of the United Nations there evolved a major treaty on outer space. This was based on a unanimous resolution of the General Assembly just a few years before. Under that treaty outer space was to be a sphere of scientific exploration and peaceful cooperation. Astronauts and cosmonauts were considered to be the envoys of all mankind. The Moon and other celestial bodies were not subject to national appropriation. In other words, the human race was able to dream a little and to set aside a special regime for outer space which would seem to leave no room for actual stationing of weapons in outer space. I myself would greatly regret the actual placing of weapons in outer space, although certain passive activities in space which have military use are acceptable—for example, the use of outer space for communications and satellite photography. We and the Soviets have agreed that satellite photography is a useful national means of detection for monitoring disarmament treaties.

We have a considerable way to go in making use of an international court. One has to accept the proposition that some of the judges on the ICJ vote the policies of their own governments and probably are under instruction. On the other hand, some of the judges refrain from doing so, and it is my belief that if the United States Government tried to instruct the American judge on the ICJ, that judge could resign and blow the State Department or the Secretary of State out

⁸ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

of the water for impropriety. I suspect the same thing is true for the judge from the United Kingdom and some other nations. Nevertheless, one must still bear in mind that there are some members of the Court who probably act on a political basis.

When two governments have reached the point where they are willing to submit a case to the ICJ, they usually are in a mood to settle the case by negotiation. This is because it is usually quicker, easier, simpler and leaves room for each party to get something out of the result. You do not, therefore, expect to find a large docket for the ICJ.

We ourselves have been occasionally negligent about international law, despite the general policy that we support treaties and international law. When you think of those situations where we seem to be in violation, it is most certainly the President or Congress or both who are involved. When we made the terrible mistake of the Bay of Pigs, President Kennedy dismissed problems of international law which I, myself, raised on the grounds that was the way Castro came to power. He felt that a successful coup d'etat of the sort Castro had achieved was self-legitimizing in that if it succeeded, it would gradually receive the recognition of other nations of the world. International law played a major role in the Cuban missile crisis. See Abe Chayes' short book on the role of international law in that crisis.

I think we were very shortsighted in the way the Reagan Administration handled the Law of the Sea Treaty. After seven years of hard negotiations, some of it brilliant negotiations, we decided that we would have no part of it. However, we now claim that those parts of the treaty we like are part of customary international law. I think that was rather badly handled.

The mining of the harbors of Nicaragua hit me wrong. I thought to mine those harbors without a general notification to international shipping that we had placed mines there was at the very least a violation of international law. By and large, the policy of the United States has been in support of our treaty obligations and international law; and I think we have played a generous role of which we need not be ashamed.

*Gabriel M. Wilner****

It is obviously a great honor for me to be sitting at the same table with two great experts in this field. My contribution will be to discuss

*** Thomas M. Kirbo Professor of Law, School of Law, University of Georgia, Athens, Georgia.

the positive development with respect to the acceptance by states of the opportunity to litigate before the International Court of Justice. The use of chambers of the Court has opened options for states free of some of the criticisms which the use of the full Court has raised.

One of the major criticisms of the Court levelled by some, and referred to by Professor Rusk, is that countries are often apprehensive of including in the full Court judges who are either unwilling or unable to decide in an unbiased manner the issues presented in a particular case. According to this view, many judges are obliged by their own governments, or led by their own view of international law, to act or to decide in a way which is incompatible with Western views. However, the Statute of the International Court of Justice and its Rules do allow the states involved in a dispute to agree to request that the Court create a chamber to decide a controversy which has arisen. Article 26 of the Court's Statute provides for the formation of chambers composed of three or more judges; chambers have generally been composed of five judges.

The chamber alternative has been used by the United States in at least two cases, namely, the *Gulf of Maine* case⁹ and more recently, the *Elettronica Sicula (ELSI)* case.¹⁰ I believe that the United States' participation in the *Gulf of Maine* case was contemporaneous with its refusal to participate in the case involving the mining of Nicaraguan harbors.¹¹ On the one hand, the United States was quite unhappy with the process of adjudication before the full Court, and it steadfastly refused to participate in the process even after the Court found jurisdiction in the *Nicaragua Case*. On the other hand, the United States did agree to the use of a chamber for the purpose of settling the maritime boundary dispute with Canada. The use of a chamber means that, essentially, the Court acts as a type of arbitral tribunal where the interested states, in fact, select the judges who will hear the case from among the members of the full Court.

The judges selected in the *ELSI* case were Judges Ruda (who took over after the death of Judge Singh), Oda, Ago, Schwebel, and Jennings. The case came before the Court on the basis of one of the bilateral treaties Professor Sohn spoke of earlier. The 1948 Friendship, Commerce, and Navigation (FCN) Treaty between the United States and Italy called for the submission to the ICJ of any dispute

⁹ 1984 I.C.J. 246 (Oct. 12, 1984).

¹⁰ 1989 I.C.J. 15 (July 20, 1989).

¹¹ *Nicaragua Case*, 1986 I.C.J. 14 (Merits) (June 27, 1986).

between the parties as to the interpretation or application of the treaty. The Italians maintained that there had been no breach of the bilateral treaty while the United States insisted that the subsidiary of the American company had been taken or "requisitioned", as the local authorities in Italy termed it. In the view of the United States, this action was tantamount to taking without compensation. The facts revealed that bankruptcy had subsequently been declared, and the property rights of the shareholders had disappeared. The chamber of the Court in the *ELSI* case was composed of "respectable" Westerners. No communists, socialists, nor judges from developing countries who might be hostile to the protection of the private property of transnational corporations were involved. Nevertheless, the Chamber found that the FCN treaty had not been breached and decided in favor of Italy. The United States, even though it lost the case, apparently had found the use of chambers an acceptable means for the settlement of at least some international disputes.

Clearly, the method of using chambers is practical when parties mutually wish to settle quickly and quietly a specific dispute; such is generally the case when their relationship is a friendly one. This was true in the *Gulf of Maine* case as well as the *ELSI* case. Moreover, a chamber may be used when states are anxious to restore a friendly relationship, but cannot do so on the political level until the dispute is settled. The boundary dispute between Burkina Faso and Mali¹² is an example of the latter type of circumstance.

However, it is also true that in other instances the developing countries have used the full Court to settle disputes with each other. The use of the full Court, which appears to be growing among developing countries, is often based on specific agreements entered into at the time of the dispute. A country which finds itself in a dispute with another state is able to avoid unending political confrontation by using the Court. Thus, whatever the outcome, the countries involved can tell their peoples that they adhered to international law and to its process of dispute settlement. This technique can be helpful to states in dealing with the unpopularity of a particular solution where such a solution, which would result from negotiations, might bring about the collapse of one or both governments. The use of chambers or of the full Court for purposes of resolving cases, where an undesirable political impasse is the alternative and where

¹² Concerning the Frontier Dispute (Burkina Faso v. Mali), 1986 I.C.J. 554 (Dec. 22, 1986).

there is a good chance that the parties' will accept the Court's judgment, is good news for those who would like the Court in the Hague to be active.

Experts who have predicted the demise of the International Court of Justice as an effective organ of the international community are now astonished to see that it is increasing its caseload. In fact, it appears today that some of the judges are complaining of the extensive number of cases now before the Court. The use of chambers should be helpful to aid the Court in dealing with its future caseload.

The increasing use of the Court by both developing and developed countries is certainly a positive sign of the general attitude toward international law in the international community. It is important, however, to encourage the use of the ICJ and its chambers not only among these groups of states but also between them. This general trend could encourage the United States to be more forthcoming in finding approaches which will enable it to agree to the Court's jurisdiction.

*Thomas J. Schoenbaum*****

I have a two-part question for Professor Rusk. First, can you confirm the story that Professor Sohn told us that the actual source of the Connally Reservation was John Foster Dulles? Second, did you have any discussion with Mr. Dulles about the Connally Reservation?

Dean Rusk

I suspect that the Connally Reservation arose out of consultations, behind the scenes, between John Foster Dulles and some of the Senators. My firm impression was that whatever they said publicly about the reasons for the Connally Reservation, the operating reason was the view of a considerable number of Senators that they did not want American racial questions to be brought before the Court. My guess is, knowing John Foster Dulles pretty well, that if he came to that conclusion, it was not on his own initiative, but that it came out of private talks between him and Senators Connally, Vandenberg and others.

Professor Wilner made a most important point about one of the functions of the Court. Governments may get themselves in a situation

**** Rusk Professor of Law, School of Law, University of Georgia, Athens, Georgia.

where they would like to see a problem settled, but are not able to take the political heat at home for giving into the other nation. Therefore, the use of the ICJ acts as a political weapon to take the heat off whichever government loses the case. I'm sure that is an operating factor in the case of many governments, including ourselves and Canada.