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INTERNATIONAL LAW: THROUGH NATIONAL OR INTERNATIONAL COURTS?

THOMAS M. FRANCK†

INTERNATIONAL LAW is, of course, what international courts do. Third-party law in the international community is made by judges of international tribunals: the International Court of Justice, the regional courts of Europe,¹ as well as the various tribunals functionally designed to resolve specific problems² or problems arising out of anticipated circumstances.³

Third-party law in the international community is, however, also made by national courts. Indeed, American judges, in common with those of other countries, are actually the principal progenitors of third-party international law. They are profoundly involved in the process of international law-making, for international law is *part* of

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1. There are two of these: The Court of Justice of the European Communities, which incorporates the former Court of the Coal and Steel Community (*Convention Relating to Certain Institutions Common to the European Communities*, 298 U.N.T.S. 14, 1958. See also, Treaty Institution the European Coal and Steel Community, 261 U.N.T.S. 142, 1951.) and the Human Rights Court (*Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, 1950). For a discussion of the Court of Justice's jurisprudence see: Buerghenthal, *Appeals for Annulment by Enterprises in the European Coal and Steel Community*, 10 AM. J. COMP. L. 227.

2. There have been numerous such tribunals, beginning, in modern times, with the Jay Treaty between Britain and the United States, 8 Stat. 116, T.S. 105, 1794, which set the pattern for mixed claims commissions composed of nationals of the two disputing parties and a third state. See: STUYT, *SURVEY OF INTERNATIONAL ARBITRATIONS 1794-1938* (1939). For a criticism of the operation of these commissions in the field of claims see: LILICH, *INTERNATIONAL CLAIMS* (1962).

3. Many treaties contain provision for settling disputes arising out of ambiguities in their text. Those between non-Communist states frequently provide for the referral of such disputes to the International Court. Treaties with the Soviet Union involve special problems, an example of which is the State Treaty for the Re-establishment of an Independent and Democratic Austria, 217 U.N.T.S. 225, 1955,

the law of all civilized states, and, reciprocally, the jurisprudence of national courts is a major source of international law.⁴

This role of the national courts in the making of world law has been given scant credit by the writers who have been attracted by the more recent and more dramatic growth of international courts.⁵ Yet the International Court itself pays deference to the "general principles of law recognized by civilized states";⁶ and what better source is there of such general principles than the jurisprudence of national judiciaries?⁷

The role of the national judge in processing the law of nations was recognized by the United States courts early in American judicial history. Faced with the confiscation of a French-owned slave-ship by a United States naval unit off the coast of Africa, Mr. Justice Story in 1822 — at a time when slavery was still lawful in the United States — wrote of the slave-traffic: "Now there is scarcely a single maritime nation of Europe, that has not in most significant terms, in the most deliberate and solemn conferences, acts, or treaties, acknowledged the injustice and inhumanity of this trade; and pledged itself to promote its abolition."⁸ Therefore, "I am bound to consider the trade an offence against the universal law of society."⁹ Three years later, the United States Supreme Court rejected this position, but only after satisfying itself that the international law of 1825 did not sustain the prematurely enlightened view of it taken by Mr. Justice Story.¹⁰ Both decisions turned on international law, for, in the words of Chancellor Kent,

which contains three arbitration clauses, arts. 10, 30 and 35. The first makes provision for an Arbitration Commission consisting of one representative of the Soviet Union, one representative of Austria, and one, "a national of a third country, selected by mutual agreement between the two Governments," to decide disputes arising out of the disposition of German assets in Austria. Under Article 35, the interpretation of any article of the treaty which is not subject to other special procedures is referred to a Commission composed of one representative of each party to the dispute "and a third member selected by mutual agreement of the two parties from nationals of a third country. *Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary General of the United Nations may be requested by either party to make the appointment*" (emphasis added). The Commission is authorized to take its decision by majority vote: art. 35(2).

4. For an example of how the behavior of national courts constitutes evidence of international law, see the decision of the World Court in the *Minquiers and Ecrehos Case*, I.C.J. Rep. 47, 62, 67-68 (1953).

5. See, however, LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES IN INTERNATIONAL LAW* (1927).

6. Statute of the I.C.J., art. 38. For instances of the application of art. 38, see *Schlesinger, Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 734, 736 n.10 (1957).

7. See: *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 734 (1957).

8. *United States v. The Schooner La Jeune Eugenie*, 26 Fed. Cas. 833, 846 (1822).

9. *Id.* at 847.

10. *The Antelope*, 10 Wheat. 30, 23 U.S. 66 (1825).

"When the United States ceased to be a part of the British Empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality and custom had established among the civilized nations of Europe, as their public law. . . . The faithful observance of this law is essential to national character. . . ." ¹¹

In the years since "national character" descended upon these United States, some 164 decisions of the federal Supreme Court have called forth the judges' vision of international law.¹² Many times that number of international law cases were resolved at lower judicial levels.

The American experience is by no means unusual in this respect. The United States Constitution, of course, specifically assimilates treaties to the supreme law of the land;¹³ but more recently-conceived constitutions have gone even further. West Germany specifies that "general rules of international law shall take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory."¹⁴ The Italian constitution provides that "The Italian judicial system conforms to the generally recognized principles of international law."¹⁵ Some of the newest fundamental laws of former colonial states have gratefully (if selectively) incorporated significant portions of the United Nations Declaration of Human Rights.¹⁶ Accordingly, national courts will, in the future, continue to be frequently occupied with international law-making.¹⁷

Why, then, must we have international courts at all? National courts are generally cheaper and faster in serving the client.¹⁸ More-

11. KENT, COMMENTARIES 1-2 (12th ed. 1873).

12. This count extends to the end of 1961.

13. Art. II, Sec. 2, cl. 2.

14. Constitution of the German Federal Republic, art. 25, 2 PEASLEE, CONSTITUTIONS OF NATIONS 30, 34.

15. Constitution of Italy, art. 10, PEASLEE, *id.* p. 482 at 483.

16. The Constitution of Lybia, 1951, ch. 2 ("Rights of the People") is an example in that it draws heavily on the International Declaration of Human Rights (U.N. Doc. A/810), PEASLEE, *id.* p. 599 at 600-602, while yet avoiding the reference to rights of women. See also: the Special Statute for Trieste (1954), U.N. Docs. S/3301, S/3305. For a discussion of the Universal Declaration as part of the preamble to the Japanese Peace Treaty see: Schwelb, *The Influence of the Universal Declaration of Human Right on International and National Law*, A.S.I.L. PROCEEDINGS 217, 221-22 (1959). See also the discussion, therein, of the influence of the Declaration on constitution-making in the French Cameroons, Togoland and Eritrea.

17. Is, for example, the United Nations Charter part of the law of the United States; and, if so, what impact does it have on domestic legislation? For a view that it affects even the congressional war-making powers under the constitution, see: *Miele v. McGuire*, 53 N.J. Super. 506, 612; 147 A. 2d 827, 830 (1959), "under our present membership in the United Nations, a declaration of war by the Congress is no longer necessary in order to commit our armed forces to combat."

18. It should be added, however, that the procedure of the International Court is regarded by some practitioners as extraordinarily well suited to the difficult realities of international pleading that involves counsel of many nations before a bench of jurists trained in different systems of law. See: ROSENNE, *THE INTERNATIONAL COURT OF JUSTICE* 415 (1957).

over, they venture on the uncharted seas of international law in streamlined vessels equipped with the latest administrative, political and executory conveniences while the international courts are cast adrift in the rather leaky tub of international organization. So long as there is no recognizable international political community generating a world "public policy," no international police force to execute judicial decrees, and no international legislature to initiate universal legislative reform — why not simply leave international law exclusively in the tried and true hands of national courts?¹⁹

The answer is, in part, that national courts are tried and true to a particular national concept of international law. Just as federal law cannot be exclusively the province of state courts, so international law cannot be the sole prerogative of national courts.

Which "international" causes ought to be subject to international jurisdiction? Here, again, international law can learn from the experience of national, and particularly from federal legal systems. "To judge with accuracy the proper extent of the federal judiciary," said Alexander Hamilton in *The Federalist No. 80*,²⁰ "it will be necessary to consider in the first place what are its proper objects."

"It seems scarcely to admit of controversy that the judiciary authority of the union ought to extend to these several descriptions of causes, . . . To all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; . . . to all those which . . . relate to the intercourse between the United States and foreign nations, or that between the States themselves . . . and lastly, to all those in which the state tribunals cannot be supposed to be impartial or unbiased."

In words borrowed from Professor Paul Freund in the other context, international courts are necessary to "umpire the international system."²¹

This is not to say that national courts should play no role in the international field. There are, however, three areas of litigation, closely parallel to those conceived by Hamilton, in which the decisions of national courts ought not to be final:

1. Where the issue directly affects the interest of two or more states, their citizens or property, and these states are not in agreement as to the applicable international legal doctrine.
2. Where the issue directly affects the interests of two or more states, their citizens or property, and the national courts are

19. For a further discussion of this point see: LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* ch. XI (1933).

20. "The Federalist" no. 80, in J. E. Cooke, ed., 534 (1961).

21. Freund, *Umpiring the Federal System*, 54 COLUM. L. REV. 561 (1954).

in law precluded from making an impartial determination by the political arm of Government.

3. Where the issue directly affects the interests of two or more states, their citizens or property, and the issue concerns the interpretation of a treaty, convention or agreement between those states.

The first area, that of conflicting international legal doctrine, is illustrated by the problems of Francisco Mendoza-Martinez. Born of Mexican parents in the United States, Mendoza-Martinez was a Mexican citizen under Mexican law (which follows the principle of the *jus sanguinis*) and an American citizen under the laws of the United States (according to the *jus soli* doctrine). In 1942 Mendoza-Martinez left the United States for Mexico in order to avoid the draft. At the end of the war he returned, was arrested and sentenced to prison for a year.²²

Was the United States law regarding evasion of military service applicable to a person who, under Mexican law, was a citizen of Mexico and who, apparently, acted in a manner fully in accord with Mexican law? Could the United States make it a crime for a Mexican citizen to return to Mexico in preference to serving in the United States armed forces? Each sovereign state may, of course, legislate as it chooses in matters of nationality and citizenship.²³ This method of gaining jurisdiction over the individual is not, however, unlimited — it must not conflict with the rights of other states in international law.²⁴ It must not, for example, disregard the requirement of international law that there be a nexus, a real relationship between the state and the individual on whom it seeks to confer its citizenship.²⁵ Is the arrest and imprisonment of Mendoza-Martinez an exercise of ordinary national discipline by the United States over one of its own, or is it a gratuitous attack on the right of Mexico to “ingather” someone who, under Mexican law, is a Mexican citizen? In answer, the United States asserts its refusal to recognize the concept of dual nationality²⁶ — but,

22. Reported in the later proceedings for deprivation of citizenship: Mackey v. Mendoza-Martinez, 362 U.S. 384, 386 n.2 (1960).

23. Tunis-Morocco Nationality Decrees Case, 1923 P.C.I.J. Series B, No. 4.

24. *Ibid.*

25. Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. REF. 4. A similar rule was approved by a United States court which held that German citizenship could not, by act of annexation, be imposed on Austrian citizens who were not in Austria at the time — because international law restricted the right of imposition to inhabitants over whom the annexing state had actual control. United States ex rel. Schwarzkopf v. Uhl, 137 F. 2d 898 (2d Cir. 1943).

26. Yet recognition is sometimes forced upon it. See, for example, Trop v. Dulles, 356 U.S. 86 (1958), in which the United States Supreme Court, and especially Brennan, J., distinguished between expatriation of United States citizens who are dual nationals and those who, having but one nationality, are thereby rendered “stateless.”

while this may be conclusive for an American citizen and an American court, ought it to be conclusive for the government and citizens of Mexico?

A similar dilemma was faced by a Chilean court, which, however, arrived at quite a different answer. Hector Garcia was born of Spanish parents in Chile. Chilean law made him a Chilean; under Spanish law he was also a Spaniard. When Garcia refused to serve in the Chilean army he was given a thirty day sentence. This the Chilean Court of Appeal reversed because it felt that the applicable Chilean law must be read in accordance with the law of nations so as to grant Garcia a choice between Chilean and Spanish nationality and jurisdiction.²⁷

Which concept is correct? Only an international court has the posture of impartiality necessary to lay the conflict of doctrines to rest.

The role of the international court in "umpiring" direct "diversity" conflicts of this sort is illustrated by the case of the *S.S. Lotus* which was decided in 1927 by the Permanent Court of International Justice.²⁸ The *Lotus* was a French mail steamer which, while on the high seas en route to Constantinople, collided with the Turkish freighter *Boz-Kourt*. The *Boz-Kourt* was cut in twain and sank immediately, taking eight Turkish nationals with her. The *Lotus*, after doing what she could for the *Boz-Kourt*, proceeded to Constantinople, where Turkish authorities arrested the first officer, a French national named Demons.

After a trial, Demons was sentenced to eighty days in jail and a fine of £22.

The Turkish prosecution had been brought under Article 6 of the Turkish Penal Code which stated:

Any foreigner who . . . commits an offense abroad to the prejudice of Turkey or of a Turkish subject, for which offense Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey.²⁹

This statute incorporates the "passive personality" doctrine of international law which many states, including France, vehemently reject.

The French lawyers argued, according to international law a state is not entitled, apart from express or implicit special

27. Chile, Court of Appeals of Santiago, 5 *Revista de Derecho y Jurisprudencia*, pt. 2, sec. 2, p. 28. Abstracted in BISHOP, *CASES AND MATERIALS IN INTERNATIONAL LAW* 318 (1st ed. 1953).

28. Case of the *S.S. Lotus* (France v. Turkey), 1927 P.C.I.J., Series A, No. 10.

29. *Id.* at 15.

agreements, to extend the criminal jurisdiction of its courts to include a crime or offense committed by a foreigner abroad solely in consequence of the fact that one of its nationals has been a victim of the crime or offense.³⁰

Here, then, were two concepts of the international law of jurisdiction engaged in a tug-of-war over Captain Demons. Neither French nor Turkish courts could resolve the issue fairly, since each would follow its own doctrine. Appropriately, the two countries agreed to submit the question to the World Court, which decided in favour of Turkey, finding that "the offense produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory."³¹ International law, the majority ruled, does not preclude a state from taking jurisdiction over a crime "if one of the constituent elements of the offence, and more especially its effects, have taken place there . . ." even though the author of the offence happens at the time to be somewhere else.³²

Like the courts in this country, the World Court refused to umpire a hypothetical play. Since Turkish jurisdiction could be sustained on territorial grounds, there was no need to decide whether the "passive personality" principle is valid international law.

Nevertheless, Turkey won. Indeed, it won a double victory, since its right to try M. Demons was not only sustained by a court, but by the *World Court*. Had the same decision been made by a Turkish court, even one purporting to base its decision on international law, both M. Demons and the French government would have suspected that they had not been fairly served by the third-party process.

Such cases arise frequently. Recently, the president of a Panamanian corporation (La Belle Creole), with its principal place of business in Haiti, was served with a subpoena by the Attorney General of New York.³³ The server managed to catch the President while he was staying at a New York hotel on a visit. He was directed to produce certain books and documents necessary to determine the applicability of a New York law which states:

Whenever any person shall engage in repeated fraudulent or illegal acts . . . in the carrying on, conducting or transaction of business, the attorney-general may apply . . . for an order enjoining the continuance of such business. . . .

30. *Id.* at 7.

31. *Id.* at 23.

32. *Ibid.*

33. *La Belle Creole International S.A. v. Attorney General of N.Y.*, 10 N.Y. 2d 192, 176 N.E. 2d 705 (1961).

What constitutes "carrying on . . . of business" in New York so as to give New York jurisdiction over the allegedly illegal activity of a Panamanian corporation? Apparently, La Belle Creole was in the business of placing orders for liquor on behalf of Americans travelling abroad (who may, thereby, be entitled to a duty-free quota). A New York corporation, Interamerica, did the advertising and soliciting for Creole in New York, and supplied potential customers with "order kits" for the duty-free liquor service. All orders were mailed by the customer directly to a Creole office in Switzerland. The liquor was then sent directly to the customer, payment being made either in Switzerland or Puerto Rico. La Belle Creole had no tangible assets and "transacted" no business within the borders of New York.

The New York Court of Appeal held that New York nevertheless had jurisdiction to subpoena the president. Does it also have jurisdiction to subject him to suit?³⁴ More important, does New York have jurisdiction to compel him to divulge information about his Panamanian corporation which the laws of Panama require him not to divulge?³⁵ These issues, surely, are as appropriate for international adjudication or judicial review, and for the same reasons, as the conflict in the *Lotus* case.

As these cases indicate, conflicts of legal doctrine between various states most frequently arise in matters of jurisdiction or nationality. They can, however, arise in any international law field where states try to attain paramountcy by means of a sort of jurisprudential "enclosure movement."

A recent case arising in New York focuses this problem. In *Banco Nacional de Cuba v. Sabbatino*³⁶ the court had to deal with the international law doctrine called "act of state." The Cuban (Castro) Government, having seized certain supplies of sugar belonging to an American firm, sold them on credit to an American purchaser. This purchaser, under New York law,³⁷ was compelled to pay not the Cuban Government, but, instead, a New York receiver. The Cuban Government brought this action to recover the money paid to the receiver.

34. *Id.* at 708-9.

35. This issue is not a part of the *La Belle Creole* case, but rather an analogy from an issue broached three years earlier by *Societe Internationale Pour Participation Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). Here, the lower courts had ordered a Swiss corporation to produce records which were located in Switzerland. Compliance with the order would have put the corporation in violation of Swiss penal law. The conflict did not come to fruition, however, because the Supreme Court reversed the lower courts insofar as they had dismissed the Swiss Corporation's suit for return of property seized by the Alien Property Custodian solely on the corporation's failure to comply with their order.

36. 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962).

37. N.Y. C.P.A. s.977(b).

Judge Dimock of the U. S. District Court in New York rejected the Cuban claim that acts of a Cuban Government, operating internally, were immune under the act of state doctrine to attack in the courts of other countries. "The crucial question remains," Judge Dimock said, ". . . whether this court can examine the validity of the Cuban act (of seizing the sugar) under international law and refuse recognition to the act if it is in violation of international law. . . . Probably the basic reason for judicial refusal to examine the validity of acts of foreign states is a wise recognition of and respect for the sovereignty of each state within its own territory, the right of each state to conduct its own internal affairs as it wishes."³⁸

So far so good.

"The basis for such recognition and respect vanishes, however, when the act of a foreign state violates not what may be our provincial notions of policy but rather the standards imposed by international law."³⁹ The court then went on to analyse the reasons for Cuba's nationalization of the sugar and the rate of compensation offered the former owners. Finding that the seizure was a reaction to United States curtailment of the Cuban sugar quota, Judge Dimock said "The taking was avowedly in retaliation for acts by the Government of the United States, and was totally unconnected with the subsequent use of the property being nationalized. This fact alone is sufficient to render the taking violative of international law."⁴⁰

No authority is cited for this proposition of international law.

Judge Dimock also found the Cuban nationalization violative of international law because it discriminated against United States nationals as against all others without providing a reasonable basis for such classification and because the compensation provided (in Cuban Government bonds with a term of not less than thirty years bearing two per cent interest and subject to a resumption of sales to the United States) was inadequate.

These interpretations by Judge Dimock of international law, aside from their controversial content, raise certain procedural questions. If international law, impartially determined, were to hold the Cuban nationalizations valid, then the seizure of payments by the New York receiver would be a wrongful act for which the United States would be liable to Cuba. The United States, in other words, could only emerge from this dispute as the innocent party if Cuba were "found guilty." Such a determination of an international law issue affecting

38. 193 F. Supp. 375, 380-81 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962).

39. *Id.* at 381.

40. *Id.* at 384-85.

foreign rights should, therefore, not be left to a United States judge, for to do so raises at once a suspicion of potential partiality which is harmful to the interests of both the court and the law. There is every likelihood that, on the compensation issue at least, Judge Dimock's views are right. How much better it . . . is to have this confirmed, as Turkey did in the *Lotus* case, by an impartial international court.⁴¹ Indeed, it was perhaps this fact which was recognized in the decision of the United States Court of Appeals in the same case. Judge Waterman pointed out that "It is commonplace in many parts of the world for a country not to pay for what it takes. Since it is unnecessary for this court in the present case to decide whether a government's failure in, and of itself, to pay adequate compensation for the property it takes is a breach of international responsibility, we decline at this time to attempt a resolution of that difficult question."^{41a} If international law exists at all, it must be in response to the need for a set of neutral principles which govern international relations. Where there is a dispute as to the content of these principles it cannot be, and *appear* to be, neutrally resolved by the courts of one of the parties.

The second closely related area of litigation which ought to be subject to international adjudication is illustrated by the classic British litigation between Messrs. Luther and Sagor,⁴² the facts of which are not unlike those of the *Sabbatino* case.

The litigation took place in the Court of King's Bench in 1921. The James Sagor Company had been manufacturing plywood in Russia since 1898. After the revolution, the firm was seized by Soviet authorities who continued to operate it and to sell its products. One such sale was made to a British importer, A. M. Luther, who brought the lumber to England. Sagor Company, on hearing that some of "their" plywood had reached England, asked the British Court to rule on the question of title.

The British courts, considering the "act of state" doctrine binding on them, felt constrained to honour the laws of the Government of Russia. But *were* the Soviets really the Government of Russia in 1921? If so, the lumber belonged to the Luther Company. If not, it belonged to Sagor, for the Soviets could not validly sell what was not theirs. To help him out of this dilemma, the British judge turned to the Foreign Office. "The proper source of information as to a foreign power, its status and sovereignty," he said, "is the Sovereign of this

41. This does not exclude the possibility that the jurisdiction of the International Court might better be invoked by way of quasi-appeal after the exhaustion of available local (national) judicial remedies.

41a. *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 864 (2d Cir. 1962).

42. *Luther v. Sagor* (1921) 1 K.B. 456.

country through the Government . . . I therefore propose to deal with the case upon the information furnished by His Majesty's Secretary of State for Foreign Affairs."⁴³

He did not treat the communication of the Foreign Office as expert evidence, subject to rebuttal, but as conclusive.

Since, at the time, Britain had not yet recognized the Soviet government of Russia, the British courts were obliged to disregard its act of nationalization and the property in Mr. Luther's hands was handed over to the Sagor Company. By the time the case was heard on appeal some months later,⁴⁴ however, the British government had recognized the Soviet regime. The court, finding that this recognition operated retroactively — that the Soviets really had been the government all along — now declared the seizure valid and ordered Sagor to return the plywood to Luther. The British courts must have felt somewhat foolish playing "follow the leader" down the tortuous streets and byways of national policy with the Foreign Office.

American courts are also subject to such executive intervention, although they do at times manage to act independently even in matters intimately related to questions of foreign policy.⁴⁵ However, the number of instances in which they do *not*, raises a real doubt about the neutral quality of international law dispensed by the national courts under such circumstances.

In the litigation between the Bank of China and the American Wells Fargo Bank,⁴⁶ for example, the court had to choose between two rival sets of Chinese Bank directors — those appointed by the Communist Government and those appointed by the Nationalist — both of whom claimed the right to withdraw funds deposited with Wells Fargo. In 1952, at the time the case was determined by the Federal Court in California, all Chinese territory (which, by the State Department's own submission in a later case, does not include For-

43. *Id.* at 473-4.

44. *Luther v. Sagor* (1921) 3 K.B. 532.

45. For recent examples of such judicial independence see *Upright v. Mercury Business Machine Co.*, 213 N.Y.S. 2d 417 (1961), the New York courts were asked to enforce a contract between defendant Mercury and an East German corporation from which Mercury had ordered typewriters but withheld payment. The suit was brought by an assignee of the East German Claim. It was held that "it is insufficient for defendant merely to allege the non-recognition of the East German Government. The lack of jural status for such government or its creature corporation is not determinative of whether transactions with it will be denied enforcement, in American courts, so long as the government is not the suitor" (*Id.* at p. 421). Indeed, even the East German corporation might be permitted to sue (*Id.* at p. 421 n). See also *Amtorg Trading Corp. v. U.S.*, 71 F.2d 524 (C.C.P.A. 1934). Another recent example of judicial independence is *Stephen v. Zivnostenska Bank*, 213 N.Y.S. 2d 396 (1961).

46. *Bank of China v. Wells Fargo Bank and Union Trust Co.*, 104 F. Supp. 59 (N.D. Cal. 1952). See also earlier litigation in same case: 92 F. Supp. 920 (N.D. Cal. 1950).

mosa⁴⁷) had been occupied by the Communists including, of course, the headquarters of the bank. Nevertheless, the court ordered the funds paid out to the Nationalists. "In this situation," the judge said, "the Court should justly accept . . . that government which our executive deems best able to further the mutual interests of China and the United States."⁴⁸

"Justice," it is submitted, had nothing to do with it. The decision totally lacks that basis of "neutral" principle which respectable international law must have if it is not just to be political action by another name. No doubt a functionally valid argument can be made out for withholding funds from a government engaged in hostilities against this country, perhaps by appointing a custodian for such property. That, however, is the proper prerogative of the legislative and executive branch. It is neither "just" nor "impartial" to allow political policy to dictate the courts' legal determination of aliens' claims — and yet frequently it appears to do so, and not by any means in this country alone.⁴⁹

When the courts feel themselves obliged to defer to the executive, they no longer "truly and impartially minister justice," nor do they minister *international* law properly so-called. Suppose the application of impartial principles by a neutral court were to reveal that the Chinese Communists were, *in fact*, the Government of China. Changing this key fact would, as in *Luther v. Sagor*, totally reverse the outcome of the case. Does the determination of such a decisive fact-element by the executive violate the separation of powers inherent in the constitution? Does it deprive the Chinese Communists of property without due process? These are problems for the constitutional lawyer. But just as the constitution of the United States prohibits a taking without due process, so also does international law (as Judge Dimock pointed out in the *Sabbatino* case). No nation can discharge its obligation under this prohibition by an executive act withholding recognition from the injured government. In determining the key issue: "who rules China?" — the community of nations cannot be expected to defer to executive determinations, particularly if the determining party is also a party to the dispute.

In a controversy of this sort, where the rights of aliens protected by international law are likely to be adversely affected by the subservience of courts to the dictates of national policy, the determinations of the national courts should not be final, for they are not impartial.

47. Cheng Fu Sheng v. Rogers, 177 F. Supp. 281 (D.D.C. 1959).

48. 104 F. Supp. 59 at 66.

49. See, for example, Domke, *The Israeli-Soviet Oil Arbitration* 53 AM. J. INT'L L. 787 (1959).

The intervention of executive policy may not always injure the alien. At times, as in the recent, surprising (and legally indefensible) State Department intervention supporting the immunity of a Cuban freighter,⁵⁰ the intervention may actually favour the foreigner — but it can never fail to affect his rights. Accordingly, if such litigation merits an impartial decision, it must be provided, as in the *Lotus* case, by an international tribunal. If not, the state should frankly proceed by executive or legislative fiat. If the decision should be based on national policy, let it not be confused with international law, a confusion which edifies neither the former nor the latter.

The third area to which international courts should have entry is that of treaty interpretation. This includes disputes between two governments or between two individuals affected by the treaty who are nationals of different states party to it. Either type of dispute may now be heard in national courts, although the former, in the United States, is subject by the constitution to the original jurisdiction of the federal Supreme Court,⁵¹ while the latter may arise in any federal⁵² and even state court.⁵³

There is nothing wrong with such national jurisdiction, but it cannot be conclusive, for the rights of one party under a treaty cannot be impartially determined, or *seem* to be impartially determined by the courts of the other party. Both of the previously-discussed disabilities of national courts apply here: the susceptibility of the court to allegations of bias by reason of executive intervention or, simply, the national affiliation of the judges. In the case of treaties, however, new limitations on the efficacy of the national courts arise. The most important of these is sovereign immunity: the general immunity of the federal government and the states of the Union (the latter being set forth in the Eleventh Amendment to the Constitution) and the sovereign immunity which, in our courts, protects a foreign government from suit both by persons and other governments.⁵⁴ This immunity is so immutable that the representative of a foreign government need only establish his credentials to deprive the national court of all further jurisdiction.⁵⁵ Only an international court escapes these consequences.

50. *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961). In this case a Cuban ship was brought to United States waters by a defecting crew and was claimed by, among others, its former owner. The court ordered both the ship and its cargo of sugar (claimed by United Fruit Co.) returned to Cuba on the intervention of the State Department. "We conclude," said the court, "that the certificate and grant of immunity should be accepted by the court without further inquiry" (at 26).

51. Art. III, s.2.

52. *Ibid.*

53. For a recent example: *Banco do Brazil S.A. v. A.C. Israel Commodity Co.*, 29 Misc. 2d 229 (1961).

54. *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

55. *Regina v. Madan*, 2 W.L.R. 231, (Ct. Crim. App.) (1961).

Finally, even if all these disabilities were overcome, it is still highly doubtful that treaties, which are the "federal legislation of the world," should be subject, in cases which affect the rights of the other party, to purely national interpretation. Treaties attempt to weave a fabric of uniformity in the practice and conduct of states. Lack of uniformity in interpretation of treaties can totally frustrate that purpose; and uniformity can only be assured where there is an international court of final recourse to knot up the unravelled strands of national jurisprudence.

Fortunately, there is rather widespread recognition of this and the texts of treaties frequently make provisions for resolving clashes of national interest arising out of its terms by reference to international tribunals. One typical approach is to give compulsory jurisdiction to the International Court of Justice, as in the Japanese Peace treaty:⁵⁶

ARTICLE 22

If in the opinion of any Party to the present Treaty there has arisen a dispute concerning the interpretation or execution of the Treaty, which is not settled by reference to a special claims tribunal or by other agreed means, the dispute shall, at the request of any party thereto, be referred for decision to the International Court of Justice. Japan and those Allied Powers which are not already parties to the Statute of the International Court of Justice will deposit with the Registrar of the Court, at the time of their respective ratifications of the present Treaty, and in conformity with the resolution of the United Nations Security Council, dated October 15, 1946, a general declaration accepting the jurisdiction, without special agreement, of the Court generally in respect to all disputes of the character referred to in this Article.

A functional variation of this formula yields the provision that such disputes, if not resolved by diplomatic means "shall be submitted to arbitration or, upon agreement of the Parties, to the International Court of Justice."⁵⁷ This has the effect of making some form of inter-

56. 136 U.N.T.S. 45 (1951). For an example of special acceptance of I.C.J. compulsory jurisdiction, this by Cambodia, see: 137 U.N.T.S. 13 (1952). See, further, Wilson, *Postwar Commercial Treaties of the United States*, 43 AM. J. INT'L L. 262 (1949). Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958).

57. Treaty of Friendship, Commerce and Navigation Between the United States of America and the Federal Republic of Germany, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593; 273 U.N.T.S. 3. There are, currently, many variations on this theme all of which provide for recourse to the compulsory jurisdiction of the I.C.J. should other means of adjustment fail. See, for example: the Treaties of Friendship, Commerce and Navigation with: Ireland (1 U.S.T. 785, art. 23); Japan (4 U.S.T. 2062, art. 24); Ethiopia (4 U.S.T. 2134, art. 17 — "Treaty of Amity and Economic Relations"); Greece (5 U.S.T. 1829, art. 26); Israel (5 U.S.T. 550, art. 24); Netherlands (8 U.S.T. 2043, art. 25).

national adjudication compulsory, albeit not that of the International Court.

The more institutional the consequences of a treaty are, the more extensive must be the functions of judicial review. The Charter of the United Nations provides that "The International Court of Justice shall be the principal judicial organ of The United Nations"⁵⁸ and empowers the General Assembly and Security Council to request advisory opinions of The Court on any legal matter. It allows "other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly" to "request advisory opinions of the Court on legal questions arising within the scope of their activities."⁵⁹ Moreover, before it proceeds to the resolution of a dispute or situation,⁶⁰ "The Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice. . . ."⁶¹

Provisions of even greater moment are those setting forth the role of the Court of Justice of the European Economic Community, which establishes a tribunal⁶² of seven judges.⁶³ "Any Member State which considers that another Member State has failed to fulfill any of its obligations under this Treaty may refer the matter to the Court of Justice"⁶⁴ which, if the matter is not resolved within three months by the Commission of the European Community, may then hear and determine the issue.

The Court also has wide powers of review over the acts of the Economic Community's Treaty Organization itself (except those of the Council and the Commission) and its machinery for declaring such acts *ultra vires* may be set in motion not only by states but also by "any natural or legal person . . . against a decision addressed to him or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and specific concern to him."⁶⁵

Perhaps most dramatic of all has been the enlargement of international judicial review under the terms of the *Convention for the Protection of Human Rights and Fundamental Freedoms*⁶⁶ of the Council

58. U.N. CHARTER, art. 92.

59. *Id.*, art. 96.

60. These terms are used by way of reference to Art. 33 of the Charter.

61. *Id.*, art. 36. One instance of a dispute actually being referred by the Security Council to the International Court is afforded by the *Corfu Channel Case: United Kingdom v. Albania*, I.C.J. REP. 1949.

62. 298 U.N.T.S. 14 (1958), art. 164.

63. *Id.*, art. 165.

64. *Id.*, art. 170.

65. *Id.*, art. 173. See: Buerghenthal, *supra*, n.1.

66. *Supra* n.1.

of Europe, which, in addition to enumerating the civil rights to be protected, proceeds to establish a Human Rights Court to try cases alleging violation of the rights of individuals not only by other parties to the treaty but also by the state of which the complainant is a citizen. The jurisdiction of the court is not compulsory but may be made so by acceptance of the supplementary declaration.⁶⁷ Two cases, that of Mr. Lawless of Ireland and M. de Becker of Belgium have been heard by the court in its first year. Both suits were against the suitor's own government, illustrating a new trend in international law to concern itself with more than relations between the various governments, or between persons of various nationalities. If the trend continues, the relation of the citizen to his government or to other citizens of the same state may well be subject to certain international standards — the "law" against Genocide⁶⁸ comes most readily to mind — which will perforce open new vistas for international courts.

67. *Id.*, art. 46.

68. Resolution approving the Genocide Convention and setting out its text: U.N. Doc. A/810, RES No. 260 (III), G.A.O.R., at 174.