

CHAPTER THIRTEEN: INTERNATIONAL JUDICIAL INSTITUTIONS

Pages 303-318

A. The World Court

Introduction. The first truly international court was set up under the League of Nations and called the Permanent Court of International Justice, situated at The Hague. The P.C.I.J. was the court that decided the Lotus Case that we have studied. The League of Nations came to a formal end in 1946; a year earlier, the United Nations Charter entered into force. The Charter included among its provisions a successor court to the P.C.I.J. called the International Court of Justice. All members of the United Nations automatically became members of the I.C.J. The I.C.J. adopted the same Statute that had governed the P.C.I.J. (reproduced directly below). For most purposes, it is convenient to refer to the P.C.I.J. and/or the I.C.J. as the "world court."

Unlike the P.C.I.J. which was separate from the League of Nations, the I.C.J. is an actual organ of the United Nations. Its decisions can be enforced by the Security Council. As we will see in Chapter 14, the Security Council may take military action to maintain or restore international peace and security (Article 42). This action is predicated upon the existence of a threat to the peace, breach of the peace, or act of aggression (Article 39). Many hasty readers of the UN Charter assume that these are the only three conditions that can trigger military response by the Security Council. They overlook Article 94, which gives power to the Security Council "to decide upon measures to be taken" to give effect to any judgment of the I.C.J. that the losing party fails to satisfy. In short, in a case before the I.C.J. that *falls short* of a threat to the peace, breach of the peace, or act of aggression, the Security Council nevertheless may enforce the judgment by military measures. As of the date of publication of this Coursebook, the Security Council has not yet had occasion to enforce a judgment of the world court. But the potential here is enormous, and should not be overlooked.

Reading Assignment: *International Law Anthology*, p. 325 ("Adjudication").

Statute of the International Court of Justice

Article 1

The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.

Article 2

The Court shall be composed of a body of independent judges elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Article 3

(1) The Court shall consist of fifteen members, no two of whom may be nationals of the same state.

(2) A person who for the purposes of membership in the Court is regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

Article 4

(1) The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.

(2) In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

(3) The conditions under which a state which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly upon recommendation of the Security Council.

Article 5

(1) At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a

member of the Court.

(2) No group may nominate more than four persons, not more than two of whom shall be of their own nationality, In no case may the number of candidates nominated by a group be more than double the number of seats to be filled.

Article 6

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

Article 7

(1) The Secretary-General shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible.

(2) The Secretary-General shall submit this list to the General Assembly and to the Security Council.

Article 8

The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.

Article 9

At every election, the electors shall bear in mind not only that the person to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 10

(1) Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.

(2) Any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference envisaged in Article 12, shall be taken without any distinction between permanent and non-permanent members of the Security Council.

(3) In the event of more than one national of the same state obtaining an absolute majority of the votes both of the General Assembly and of the Security Council, the eldest of these only shall be considered as elected.

Article 11

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Article 12

(1) If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.

(2) If the joint conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Article 7.

(3) If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or in the Security Council.

(4) In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

Article 13

(1) The members of the Court shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years.

(2) The judges whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General immediately after the first election has been completed.

(3) The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

(4) In the case of the resignation of a member of the Court, the resignation shall be addressed to the President of the Court for transmission to the Secretary-General. This last notification makes the place vacant.

Article 14

Vacancies shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council.

Article 15

A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

Article 16

(1) No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.

(2) Any doubt on this point shall be settled by the decision of the Court.

Article 17

(1) No member of the Court may act as agent, counsel, or advocate in any case.

(2) No member may participate in the decision of any case in which he has previously taken part as agent, counsel or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

(3) Any doubt on this point shall be settled by the decision of the Court.

Article 18

(1) No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

(2) Formal notification thereof shall be made to the Secretary-General by the Registrar.

(3) This notification makes the place vacant.

Article 19

The members of the Court, when engaged in the business of the Court, shall enjoy diplomatic privileges and immunities.

Article 20

Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

Article 21

(1) The Court shall elect its President and Vice-President for three years; they may be re-elected.

(2) The Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

Article 22

(1) The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable.

(2) The President and the Registrar shall reside at the seat of the Court.

Article 23

(1) The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

(2) Members of the Court are entitled to periodic leave, the dates and duration of which shall be fixed by the Court, having in mind the distance between The Hague and the home of each judge.

(3) Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court.

Article 24

(1) If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

(2) If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.

(3) If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

Article 25

(1) The full Court shall sit except when it is expressly provided otherwise in the present Statute.

(2) Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of the Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

(3) A quorum of nine judges shall suffice to constitute the Court.

Article 26

(1) The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labor cases and cases relating to transit and communications.

(2) The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

(3) Cases shall be heard and determined by the chambers provided for in this Article if the parties so request.

Article 27

A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court.

Article 28

The chambers provided for in Articles 26 and 29 may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague.

Article 29

With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit.

Article 30

(1) The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.

(2) The Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote.

Article 31

(1) Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.

(2) If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

(3) If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

(4) The provisions of this Article shall apply to the case of Article 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the member of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.

(5) Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.

(6) Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfil the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.

Article 32

(1) Each member of the court shall receive an annual salary.

(2) The President shall receive a special annual allowance.

(3) The Vice-President shall receive a special allowance for every day on which he acts as President.

(4) The judges chosen under Article 31, other than members of the Court, shall receive compensation for each day on which they exercise their functions.

(5) These salaries, allowances, and compensation shall be fixed by the General Assembly. They may not be decreased during the term of office.

(6) The salary of the Registrar shall be fixed by the General Assembly on the proposal of the Court.

(7) Regulations made by the General Assembly shall fix the conditions under which retirement pensions may be given to members of the Court and to the Registrar and the conditions under which members of the Court and the Registrar shall have their travelling expenses refunded.

(8) The above salaries, allowances, and compensation shall be free of all taxation.

Article 33

The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly.

Article 34

(1) Only states may be parties in cases before the Court.

(2) The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

(3) Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

Article 35

(1) The Court shall be open to the states parties to the present Statute.

(2) The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in position of inequality before the Court.

(3) When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which the party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court.

Article 36

(1) The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

(2) The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

(3) The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

(4) Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

(5) Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

(6) In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 37

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

Article 38

(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Article 39

(1) The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.

(2) In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court shall be given in French and English. In this case the

Court shall at the same time determine which of the two texts shall be considered as authoritative.

(3) The Court shall, at the request of any party authorize a language other than French or English to be used by that party.

Article 40

(1) Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

(2) The Registrar shall forthwith communicate the application to all concerned.

(3) He shall also notify the Members of the United Nations through the Secretary-General, and also any other states entitled to appear before the Court.

Article 41

(1) The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

(2) Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Article 42

(1) The parties shall be represented by agents.

(2) They may have the assistance of counsel or advocates before the Court.

(3) The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

Article 43

(1) The procedure shall consist of two parts: written and oral.

(2) The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.

(3) These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

(4) A certified copy of every document produced by one party shall be communicated to the other party.

(5) The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.

Article 44

(1) For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the state upon whose territory the notice has to be served.

(2) The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Article 45

The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.

Article 46

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

Article 47

(1) Minutes shall be made at each hearing and signed by the Registrar and the President.

(2) These minutes alone shall be authentic.

Article 48

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Article 49

The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

Article 50

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

Article 51

During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

Article 52

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Article 53

(1) Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

(2) The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Article 36 and 37, but also that the claim is well founded in fact and law.

Article 54

(1) When, subject to the control of the Court, the agents, counsel, and advocates have completed their presentation of the case, the President shall declare the hearing closed.

(2) The Court shall withdraw to consider the judgment.

(3) The deliberations of the Court shall take place in private and remain secret.

Article 55

(1) All questions shall be decided by a majority of the judges present.

(2) In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.

Article 56

(1) The judgment shall state the reasons on which it is based.

(2) It shall contain the names of the judges who have taken part in the decision.

Article 57

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 58

The Judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 61

(1) An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

(2) The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

(3) The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

(4) The application for revision must be made at latest within six months of the discovery of the new fact.

(5) No application for revision may be made after the lapse of ten years from the date of the judgment.

Article 62

(1) Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

(2) It shall be for the Court to decide upon this request.

Article 63

(1) Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

(2) Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

Article 64

Unless otherwise decided by the Court, each party shall bear its own costs.

Article 65

(1) The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

(2) Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article 66

(1) The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

(2) The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

(3) Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.

(4) States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

Article 67

The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.

Article 68

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

Article 69

Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.

Article 70

The Court shall have power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the provisions of Article 69.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. Obviously the World Court does not enjoy universal compulsory jurisdiction. It is therefore unlike domestic courts of general jurisdiction (such as the US Supreme Court). Perhaps some day the nations of the world will grant to a central court a universal jurisdictional competence, but we are a long way from that day. In fact, in recent years, there has been a tendency for states to cut back on the scope of compulsory jurisdiction that they had previously given to the World Court. The retrenchment parade was led by the United States after its dissatisfaction with the World Court's decision in 1984 in the case of *Nicaragua v. United States*.

A fascinating strategic problem presents itself to any state that wishes to place limitations upon its acceptance of the World Court's compulsory jurisdiction, due to the general operation of "reciprocity" under international law. Under the rule of reciprocity, any limitation a state places on its acceptance of jurisdiction can be used against that state. For example, if State M were to accept the Court's compulsory jurisdiction in all cases providing that the damages shall not exceed \$100,000,¹ that certainly would limit the amount of damages that could be collected in a lawsuit against State M. But it would also limit the amount of damages that State M could collect from any other state. In other words, if State M sues State N, then State N can invoke State M's own financial cap to limit the amount of damages that State M can collect against State N, *even if State N had unconditionally accepted the Court's jurisdiction*.

States have, over the years, come up with some ingenious--and some not so very ingenious--reservations to the Optional Clause. As you read the following article in the Anthology, consider what strategy or strategies would be

best for your own country. And note especially the important possibility, suggested in a dissent by Judge Lauterpacht, that a reservation that reaches too far can be treated by the Court as a nullity. Judge Lauterpacht's significant observation is found in footnote 66 on page 142 of the Anthology.

Assigned Reading: *International Law Anthology*, pp. 139-45 ("World Court Jurisdiction").

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. Is there any lower court whose judgments can be appealed to the World Court?
2. Is there any jury set up to find facts? How are the facts of cases determined?
3. What happens if there is a tie vote among the judges? See Article 55.
4. Does the world court have the power to issue injunctions? See Article 41.
5. Does the world court have the power to issue a default judgment? See Article 53.
6. Note Article 59. Some hasty readers of the Statute have concluded that it means that the world court does not follow precedent because it cannot set precedent. Both of these points are incorrect. Re-read Article 59 carefully.
7. Can the "Connally Trap" mentioned on p. 141 of the *Anthology* extend to totally international incidents? What is to prevent the United States (or any country sued by the United States) from invoking the "domestic jurisdiction" exclusion of the Connally Amendment even if the matter at issue is not by any stretch of the imagination within its domestic jurisdiction?
8. Does the United States' Connally Reservation defeat the purpose of World Court Jurisdiction? What should the Court have done about it? Do you agree with Judge Lauterpacht's "solution"? How much of a "solution" is it?
9. To the surprise of many observers, the World Court's docket has recently been getting more crowded. The development is surprising because there has been a falling-off of accessions to the Court's compulsory jurisdiction. Nations are increasingly asking for decision by Chambers under Article 26(3). Following are excerpts from the Rules of the Court pertaining to the Chambers procedure:

Rules of Court Adopted on 14 April 1978

Article 16

1. When the Court decides to form one or more of the Chambers provided for in Article 26, paragraph 1, of the Statute, it shall determine the particular category of cases for which each Chamber is formed, the number of its members, the period for which they will serve, and the date at which they will enter upon their duties.
2. The members of the Chamber shall be elected in accordance with Article 18, paragraph 1, of these Rules from among the Members of the Court, having regard to any special knowledge, expertise or previous experience which any of the Members of the Court may have in relation to the category of case the Chamber is being formed to deal with.
3. The Court may decide upon the dissolution of a Chamber but without prejudice to the duty of the Chamber concerned to finish any cases pending before it.

Article 17

1. A request for the formation of a Chamber to deal with a particular case, as provided for in Article 26, paragraph 2, of the Statute, may be filed at any time until the closure of the written proceedings. Upon receipt of a request made by one party, the President shall ascertain whether the other party assents.
2. When the parties have agreed, the President shall ascertain their views regarding the composition of the Chamber, and shall report to the Court accordingly. He shall also take such steps as may be necessary to give effect to the provisions of Article 31, paragraph 4, of the Statute.
3. When the Court has determined, with the approval of the parties, the number of its Members who are to constitute the Chamber, it shall proceed to their election, in accordance with the provisions of Article 18, paragraph 1, of these Rules. The same procedure shall be followed as regards the filling of any vacancy that may occur on the Chamber.
4. Members of a Chamber formed under this Article who have been replaced, in accordance with Article 13 of the Statute following the expiration of their terms of office, shall continue to sit in all phases of the case, whatever the stage it has then reached.

Article 18

1. Elections to all Chambers shall take place by secret ballot. The Members of the Court obtaining the largest number of votes constituting a majority of the Members of the Court composing it at the time of the election shall be declared elected. If necessary to fill vacancies, more than one ballot shall take place, such ballot being limited to the number of vacancies that remain to be filled.

2. If a Chamber when formed includes the President or Vice-President of the Court, or both of them, the President or Vice-President, as the case may be, shall preside over that Chamber. In any other event, the Chamber shall elect its own president by secret ballot and by a majority of votes of its members. The Member of the Court who, under this paragraph, presides over the Chamber at the time of its formation shall continue to preside so long as he remains a member of that Chamber.

3. The president of a Chamber shall exercise, in relation to cases being dealt with by that Chamber, all the functions of the President of the Court in relation to cases before the Court.

4. If the president of a Chamber is prevented from sitting or from acting as president, the functions of the presidency shall be assumed by the member of the Chamber who is the senior in precedence and able to act.

B. The European Court of Human Rights

Introduction. In the World Court, as we have seen, only states can be parties to cases. In the European Court of Human Rights that sits at Strasbourg, France, individuals can sue states.

The European Court of Human Rights came into being in 1953, as a result of the entering into force of a European Convention on Human Rights. The first set of Articles of the Convention list the human rights that can be enforced in the Court. The second set of Articles specify the Court's procedures.

Under the United States Constitution, individuals have standing to sue the government of the United States with respect to many of the rights contained in the Bill of Rights (the first ten amendments to the Constitution). Individuals may also claim these rights in defense to civil lawsuits and criminal proceedings brought by the government. Did Europe only catch up in 1953 to what the United States has been doing since 1781?

In one important respect, European nations gave their citizens a human-rights benefit that is denied to citizens of the United States. In Europe, if (for example) a French citizen sues her government in the European Court of Human Rights, the judges sitting on the Court will, except for one, be citizens of countries other than France, and their salaries will be paid by the Court's general funds. In contrast, judges on United States courts will be made up exclusively of American citizens, and their salaries will be paid by the government of the United States (or the state government if it is a state court). Does this make a difference? Americans can usually expect judges to be impartial and not to favor the government in a case of *Citizen vs. Government*. But this is not always true. At times of national emergency, or when a wave of excess patriotism crosses the land (as it did during the Joe McCarthy era), the litigant in a U.S. court faces a judge or panel of judges all of whom were hired by the government, are paid by the government, and are in fact government officials. American citizens of Japanese ancestry who were herded into concentration camps during the Second World War got nowhere in the U.S. courts; the Supreme Court of the United States validated their forced incarceration. Of course, Supreme Court justices today will say that the *Korematsu* decision of World War II, as well as the *Dred Scott* decision prior to the Civil War, were the blackest days in Supreme Court history. No jurist today defends the concentration camps of World War II. Yet, at the time, the concentration camps had the support of Congress, of the President, of the Secretary of the Army, of the Justice Department, and of the Supreme Court. Other waves of national patriotism that apparently had their effect upon the Supreme Court of the United States occurred during World War I (where freedom of speech was curtailed), during the Vietnam War (where courts would not listen to arguments that the war was unconstitutional or in violation of international law), during the McCarthy era (where people were convicted of treason just for teaching Marxist ideology, and the Supreme Court upheld the convictions), and to a lesser extent during other periods of perceived national emergency. At times like those, individual rights seem to have little value in the minds of many judges. (See also the decision and the two dissents in the *Yamashita Case* in Chapter 6 of this Coursebook!)

The French citizen who sues her own government—even if the lawsuit occurs during a period of intense nationalistic fervor in France comparable to the waves of patriotism described in the preceding paragraph in the United States—will benefit from having her case heard by judges all except one of whom are not French. They will necessarily have a perspective that French judges might lack during a stressful time of national emergency. They will not be beholden to the French government for their appointments to the Court or for their salaries.

Apart from this difference between U.S. courts and the European Court of Human Rights, what differences do you notice with respect to the human rights listed in the first eighteen articles of the Convention? Do you feel they are more protective of the person, or less protective, than the rights enjoyed by American citizens under the United States Constitution? Does Article 15 suggest that the European provisions may be *less* protective of human rights? If we add in the factor of the Court's composition, discussed above, does Article 15 seem diminished in its potential

obstruction to human rights?

Consider also the procedure of the European Court of Human Rights. What is the role of the Commission? There is nothing like the Commission in the standard state or federal court in the United States. Is the Commission a desirable or undesirable addition to the procedure of a court dealing with human rights?

European Convention for the Protection of Human Rights and Fundamental Freedoms.
Done at Rome, Nov. 4, 1950. Entered into force, Sept. 3, 1953.
213 U.N.T.S. 221

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in [Articles 2-18] of this Convention.

Article 2

(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is not more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4

(1) No one shall be held in slavery or servitude.

(2) No one shall be required to perform forced or compulsory labor.

(3) For the purpose of this Article the term "forced or compulsory labor" shall not include:

- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.

Article 5

(1) Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence of fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of Justice.

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

Article 8

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of

disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16

Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Article 19

To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:

(1) A European Commission of Human Rights hereinafter referred to as "the Commission";

(2) A European Court of Human Rights, hereinafter referred to as "the Court".

Article 20

The Commission shall consist of a number of members equal to that of the High Contracting Parties. No two members of the Commission may be nationals of the same State.

Article 21

(1) The members of the Commission shall be elected by the Committee of Ministers by an absolute majority of votes, from a list of names drawn up by the Bureau of the Consultative Assembly; each group of the Representatives of the High Contracting Parties in the Consultative Assembly shall put forward three candidates, of whom two at least shall be its nationals.

Article 22

(1) The members of the Commission shall be elected for a period of six years. They may be re-elected.

Article 24

Any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party.

Article 25

(1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the

High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

(2) Such declarations may be made for a specific period.

(3) The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

Article 26

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.

Article 27

(1) The Commission shall not deal with any petition submitted under Article 25 which:

(a) is anonymous, or

(b) is substantially the same as a matter which has already been examined by the Commission or has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

(2) The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly illfounded, or an abuse of the right of petition.

(3) The Commission shall reject any petition referred to it which it considers inadmissible under Article 26.

Article 28

In the event of the Commission accepting a petition referred to it:

(a) it shall, with a view to ascertaining the facts undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;

(b) it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.

Article 33

The Commission shall meet *in camera*.

Article 38

The European Court of Human Rights shall consist of a number of judges equal to that of the Members of the Council of Europe. No two judges may be nationals of the same State.

Article 39

(1) The members of the Court shall be elected by the Consultative Assembly by a majority of the votes cast from a list of persons nominated by the Members of the Council of Europe; each Member shall nominate three candidates, of whom two at least shall be its nationals.

(3) The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.

Article 40

(1) The members of the Court shall be elected for a period of nine years. They may be re-elected.

Article 42

The members of the Court shall receive for each day of duty a compensation to be determined by the Committee of Ministers.

Article 44

Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court.²

Article 45

The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48.

Article 46

(1) Any of the High Contracting Parties may at any time declare that it recognizes as compulsory ipso facto and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.

(2) The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period.

Article 47

The Court may deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement.

Article 48

The following may bring a case before the Court, provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or of the High Contracting Parties concerned if there is more than one:

- (a) the Commission;
- (b) a High Contracting Party whose national is alleged to be a victim;
- (c) a High Contracting Party which referred the case to the Commission;
- (d) a High Contracting Party against which the complaint has been lodged.

Article 50

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

Article 53

The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.

C. Other Forms of Dispute Resolution

Reading Assignment: *International Law Anthology*, pp. 320-25.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. What is a yesable proposition? What are some of the costs of devising a yesable proposition? What are the advantages?
2. Does Roger Fisher's use of the Vietnam example convincingly show the difference between statement of a policy and production of an operational decision? Is the difference important?
3. What factors have contributed to the decline in use of traditional interstate arbitration?
4. How can third parties assist in negotiations between states? What is the symbolic significance in third party assistance?
5. What are "confidence building measures"? How can they be used to expand the jurisdiction of the World Court?

FOOTNOTES Chapter 13

1 Interestingly, no state so far has placed a financial "cap" on its acceptance of the Optional Clause.

2 [Editor's Note: Of course, the Commission may bring a case before the Court of an individual petitioner.]