1960

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Recommended Citation
Alan Schechter, Towards a World Rule of Law-Customary International Law in American Courts, 29 Fordham L. Rev. 313 (1960). Available at: http://ir.lawnet.fordham.edu/flr/vol29/iss2/3

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TOWARDS A WORLD RULE OF LAW—
CUSTOMARY INTERNATIONAL LAW IN
AMERICAN COURTS

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A major factor in the development of a world rule of law is the attitude of municipal courts toward questions possibly involving international customary law. Mr. Schechter reviews the practice of American federal and state courts since the end of World War II, concentrating on the types of evidence considered to establish the existence of customary rules.

The most challenging issue facing mankind today is the survival of liberty and free institutions in a world torn between two opposing ideologies. Advances in nuclear technology have made the traditional concept of the employment of force to insure survival nearly obsolete. Further, the democratic states of the world hopefully recognize that the use of both military and nonmilitary coercion to halt the spread of totalitarian ideas leads only to derogation of the very liberties which the free world desires to preserve.

President Eisenhower presented the nation with his thoughts on the problem of survival in a bipolarized world in his annual State of the Union address before Congress midway through his second term of office. The President said:

All peoples are sorely tired of the fear, destruction, and the waste of war. As never before, the world knows the human and material cost of war and seeks to replace force with a genuine rule of law among nations.

It is my purpose to intensify efforts during the coming 2 years in seeking ways to supplement the procedures of the United Nations . . . to the end that the rule of law may replace the rule of force in the affairs of nations.¹

The President's nationwide emphasis on the need for a rule of law in international relations follows upon the increased concern of the organized bar with the possibilities for peace inherent in a world-wide rule of law. Speeches, resolutions and committee reports by members of the bar have been unanimous in their support of the rule of law in international affairs.²

¹ Fulbright Scholar, International Court of Justice at The Hague.
Professional journals have printed articles tracing the relationship of the law of nations to American municipal law, to the application of international law by municipal courts, and to the limitations on judicial recourse to international law, but no systematic attempt has been made to analyze the adoption and development of international law in the process of decision-making. This article attempts to study the approach of United States courts, both state and federal, to problems of international law in the post-World War II period.

Although a survey of all the relevant cases would be impossible within the limitations of this article, an effort has been made to include all the important cases and a representative sampling of the less valuable decisions. Only as a secondary matter has an attempt been made to report the content of the decisions as international law developments. The main concern is with the process of decision-making itself, for the purpose of increasing our knowledge of why and how municipal courts arrive at certain conclusions on issues involving the law of nations. Such knowledge may well provide a firm base for an understanding of what the future course of international law may be in state and federal courts. Further, an increase in understanding of the development of international law in municipal courts cannot help but hasten the growth of a world rule of law in international relations.

Although international conventions are a major source of law, treaties between states can serve only as the underpinnings of a world society based on law. Multilateral and bilateral treaties are not and should not be binding on nonsignatory states. At the same time, conventions are strong evidence of common agreement among nations, agreement which serves to transfer a rule of conventional law into the realm of customary law. As a result of the common usage of nations, rules of customary law are binding on all states. Since progress toward a world society based on law depends on the acceptance by states of binding legal principles, this article focuses on the problems of customary law development.

The cases fall into three broad categories: (1) decisions not based on international law, (2) decisions based on a common law approach to


4. See Stat. Int’l Ct. Just. art. 38, which provides: “(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. . . . 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.”
customary law, and (3) decisions which focus directly on customary international law questions.

In following the noninternational law approach, the courts avoid deciding cases on a customary law basis. Instead, grounds for decision-making are found in policy, equity, statutory law, State Department rulings, or the Constitution. Under the common law approach, the courts merely accept the rule of law as binding, without discussion of the rule itself or the basis for its existence. The generally accepted principle may be justified either as a rule of customary law or of American law. United States cases are occasionally cited to show that the rule is a generally accepted principle of law.

The final broad category, the international law approach, is of major importance. Here the courts attempt to find customary law rules, basing their decisions on the existence or nonexistence of such rules. Analysis of what types of evidence are persuasive and of what the courts look for in deciding upon the existence of a rule of customary law has required division of this category into numerous subgroups: (a) unratiﬁed international conventions, (b) ratiﬁed international conventions, (c) foreign court decisions as evidence of state practice, (d) international law publicists, (e) executive department statements and legislation, (f) diplomatic communications, (g) failure to protest, (h) generally accepted principles, and (i) history.

In conclusion, preliminary answers are presented to the questions raised by the analysis of the various approaches employed by courts in the decision-making process. An effort will be made to discover why the courts prefer one approach to another, in what areas of law the various approaches are favored, what evidence of the existence of a customary law rule is most persuasive to a court, whether the state and federal courts differ in their outlook toward issues of customary international law, and, ﬁnally, what the American courts can do to speed the development of a world society based on law.

I. NONCONSIDERATION OF CUSTOMARY LAW ISSUES

A. Policy and Equity

The use of considerations of policy and equity as a ground for decision-making is revealed in a series of cases involving the immunity of a foreign sovereign plaintiff from counterclaims. Mr. Justice Frankfurter, in National City Bank v. Republic of China, stated the general rule that immunity of a foreign sovereign from suit had been established solely through adjudications of the Supreme Court and was not based on an explicit command of the federal constitution. "It rests on considerations

of policy given legal sanction by this Court. Whether a foreign sovereign possesses immunity from suit because of the establishment of a binding rule of customary law by the general usage of nations, as an alternative line of reasoning to policy considerations, is not discussed in this opinion.

Equitable considerations have led to two exceptions to the immunity rule. When a foreign sovereign enters United States courts in pursuit of a claim, the court has jurisdiction to entertain a counterclaim seeking an adjudication of title to the precise property which is the subject of the action, or one in the nature of a setoff which arises from the same transaction upon which the sovereign plaintiff bases its claim.

_National City Bank v. Republic of China_ presents an example of the extension of a rule of law based on considerations of justice and morality. The Court went beyond the rule of related counterclaims and focused on the continuing business relationship between the parties, holding that a foreign sovereign which had brought suit was not immune from a counterclaim limited to reducing the sovereign's recovery, even though the counterclaim was not based on the subject matter of the suit and did not grow out of the same transaction. The Court stated that the doctrine of immunity was "one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." The key to Mr. Justice Frankfurter's thinking lies in his statement that "the ultimate thrust of the consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation." As in the

6. Id. at 359.
9. In a suit by the Republic of China to recover a deposit, defendant interposed two counterclaims seeking affirmative relief on defaulted treasury notes of plaintiff. Following a plea of sovereign immunity, the district court dismissed the counterclaims. 103 F. Supp. 766 (S.D.N.Y. 1952). The court of appeals, affirming, held the plaintiff immune from counterclaims, whether treated as requests for affirmative relief or as setoffs, since they were not based on the subject matter of the suit. 208 F.2d 627, 629 (2d Cir. 1953). On certiorari, defendant dropped its demand for affirmative relief and reduced the counterclaims to mere demands for setoff. In a four-to-three decision, the Supreme Court directed the district court to reinstate the counterclaims. 348 U.S. 356 (1955).
10. 348 U.S. at 362.
11. Id. at 365. Mr. Justice Frankfurter found it worth noting that the State Department had not been asked nor had it given the slightest indication that allowance of counterclaims involving fiscal management would embarrass friendly relations with China. Id. at
case of the basic question of sovereign immunity itself, no attempt is made to discover whether any rule or rules of customary law exist which would throw light on the further issue of exceptions to the general rule of immunity.

Considerations of both policy and equity appear dominant in several cases involving the power of a belligerent occupant to make regulations for occupied territory. In *Anglo Chinese Shipping Co. v. United States*,\(^1\) the Court of Claims ruled that the occupying powers were not liable for the cost of what Japan had done to rehabilitate herself, despite the fact that the claim arose directly from an order of the occupying authority. The extent of the belligerent occupant's right in international law to make and enforce laws was not even raised. The decisive point was that the order was issued for the benefit of the Japanese and only incidentally for the benefit of the occupation forces. As a result, the basis of the court's judgment seems to be a *sub rosa* feeling that admission of United States liability would constitute enrichment of Japan at the expense of the occupying government.

No mention is made of the right of the occupant to make currency regulations in *Eisner v. United States*.\(^2\) The Court of Claims found a satisfactory explanation for the alleged conversion of plaintiff's bank account by order of the American Military Commander of Berlin in an assessment of the difficulty of the task of occupation. In effect, the court ruled that the commander must have had the power to establish a rational money system because, "until a stable currency was established, economic recovery lagged, the population suffered, and the financial burden upon the occupying powers continued."\(^3\) The policy of the allied governments, plus the fact that "the currency reform . . . was . . . reasonably calculated to accomplish a beneficial purpose,"\(^4\) was sufficient authority for denying plaintiff's claim.

364. Further, the opinion cited the exception to the sovereign immunity rule based on related counterclaims as evidence that fair play must be taken into account. Ibid. Mr. Justice Reed, dissenting, argued that the decision violated the common usage of nations and that the change from a generous to a parsimonious application of the sovereign immunity rule should be left to the political branches of the government. 345 U.S. at 366-72.

12. 130 Ct. Cl. 361, 127 F. Supp. 553, cert. denied, 349 U.S. 933 (1955). The case arose from an order of the Supreme Commander of the occupying forces directing the Japanese to use a vessel which they had seized during the war to lay and repair marine cables. The court did not discuss the right of an occupation commander in international law to order the conquered territory to keep the vessel. Instead, it found authority for the order in the surrender terms and in a letter from President Truman to General MacArthur stating that the General's authority was supreme. Id. at 367 n.1, 127 F. Supp. 557 n.1, citing letter from President of United States to General MacArthur, Sept. 6, 1945.


14. Id. at 326, 117 F. Supp. at 199.

15. Id. at 327, 117 F. Supp. at 199. The court also was influenced by the fact that the claims
Policy decisions have been important in two other areas of law in the postwar period. Extraterritorial effect has been denied nationalization decrees of foreign governments for property located in the United States on two similar but not identical grounds. The courts have held either that no national policy existed requiring the court to give extraterritorial effect to the confiscation, or that the confiscation was contrary to public policy and therefore, the court must deny extraterritorial effect to the foreign decree.

In the leading post-World War II case on the subject of treaty suspension or abrogation in wartime, the Supreme Court premised that the outbreak of war did not necessarily suspend or abrogate the provision of a 1923 treaty with Germany granting reciprocal rights to sell inherited realty and export the proceeds. The Court stated that its function was to determine whether the treaty provision was inconsistent with the policy or safety of the nation and, hence, presumably intended to be limited to peacetime. Thus, abrogation would occur only if the Executive or Congress had formulated a policy clearly inconsistent with enforcement or if the treaty provision itself was incompatible with a state of war.

arose from a prewar deposit in a bank which was made hopelessly insolvent by the collapse of the German Government. The court considered the reform order not a conversion of 95% of plaintiff's amount, but a grant of 5% of funds which no longer existed. Ibid. 16. Zwack v. Kraus Bros., 135 F. Supp. 929 (S.D.N.Y. 1955). Authority for this view is found in United States v. Pink, 315 U.S. 203, 221-25 (1942), and Anderson v. N.V. Transandine Handelmaatschappij, 28 N.Y.S.2d 547 (Sup. Ct.), aff'd mem., 263 App. Div. 705, 31 N.Y.S.2d 194 (1st Dep't 1941), aff'd, 289 N.Y. 9, 43 N.E.2d 502 (1942).

17. Plesch v. Banque Nationale, 273 App. Div. 224, 77 N.Y.S.2d 43 (1st Dep't), aff'd per curiam, 298 N.Y. 573, 81 N.E.2d 106 (1948); Augstein v. Danska A Huty Akciiva Spolecnost, 124 N.Y.S.2d 446 (Sup. Ct. 1953); Merilaid & Co. v. Chase Nat'l Bank, 189 Misc. 285, 71 N.Y.S.2d 377 (Sup. Ct. 1947). In the Augstein case, supra, the court cited N.Y. Civ. Prac. Act § 977-b, which denies extraterritorial effect to foreign confiscatory laws affecting foreign corporate property in the state, and Vladikavkazsky Ry. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934), for the holding that arbitrary confiscation is contrary to public policy. Although both grounds for decision focus on public policy and not on the customary law issue, it is worthwhile keeping them separate. Perhaps the courts in these cases should have looked to the relevant conflict of law rules of the forum before deciding the cases on public policy grounds.


20. 331 U.S. at 508-14. The Court found that the right of inheritance of realty was not inconsistent with the provision prohibiting the removal of money or property from this country by enemy aliens in the Trading With the Enemy Act, 40 Stat. 411 (1917), as amended, 55 Stat. 839 (1941), as amended, 50 U.S.C. App. §§ 1-40 (1958), nor with the Treaty of Peace With Germany, Aug. 25, 1921, 42 Stat. 1939, T.S. No. 658, which accorded the United States all rights and advantages specified in the Joint Resolution of July 2, 1921, 42 Stat. 105, 106, vesting in the United States absolute title to property of German nationals then held by the United States. In addition, no evidence appeared that the
Recent cases which have been decided on statutory grounds involve questions of diplomatic immunities and suspension of the statute of limitations in wartime. In Carrera v. Carrera,21 registration with the Department of State in accordance with the United States Code22 and inclusion on the "List of Employees in the Embassies and Legations in Washington not Printed in the Diplomatic List" was held dispositive of the issue of immunity in a suit for separate maintenance and custody and support of a child. The court, feeling bound by the statutory grant of immunity, held that certification by the Department of State as to the inclusion of the defendant's name on the "White List" made judicial inquiry into the propriety of its listing inappropriate.

The Maryland Court of Appeals, in Hale v. State,23 indicated by way of dictum that the failure of the Swedish Ambassador to notify the Department of State of appellant's employment as personal servant to the air attaché of the embassy in accordance with the Code precluded a grant of diplomatic immunity in a criminal prosecution. A statutory grant of immunity included in a joint resolution of Congress24 authorizing the President to bring into effect the United Nations Headquarters Agreement25 was held decisive of the issue of immunity in Friedburg v. Santa Cruz.26

In Westchester County v. Ranollo,27 the City Court of New Rochelle applied the International Organizations Immunities Act,28 concluding that an issue of fact had to be tried to decide whether defendant was engaged in official business as required by the act. A federal district court applied the International Organizations Immunities Act and the United Nations Headquarters Agreement in United States v. Coplon29 and concluded that political departments of the Government considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or to the obligation of either party in respect to them.

23. 200 Md. 72, 88 A.2d 312 (1952).
the defendant was not entitled to immunity. In Emmet v. Lomakin, the court ruled that a consul was not immune from a writ of habeas corpus under United States statutory law. In none of these cases did the courts reach the question of what immunities the defendant possessed in international law.

Few cases deal with the subject of suspension of the statute of limitations on statutory grounds. De Sayre v. De La Valdene is perhaps the clearest example of this type of decision. A resident of France during the period of German occupation was held to be a nonresident enemy alien as defined by the Trading with the Enemy Act, which prohibits the commencement of actions by enemy aliens. The court was bound by a New York statute suspending the running of the statute of limitations in the event of a statutory prohibition to the commencement of the action.

In an early stage of the now famous Bernstein case, the plaintiff argued that his claim was preserved by a 1948 amendment to Section 13 of the New York Civil Practice Act, which tolled the statute in cases where the cause of action arose in a foreign country with which the United States was then or subsequently at war. The district court, applying New York law, held that the amendment applied only to claims arising in favor of nonresidents, whereas plaintiff had been a resident of the state since 1933.

C. State Department Rulings

It would be of little value to go through all the diplomatic immunity cases of the postwar period, looking for statements that municipal courts

30. 84 N.Y.S.2d 562 (Sup. Ct. 1948).
34. Compare Frabutt v. New York, C. & St. L.R.R., 84 F. Supp. 460 (W.D. Pa. 1949), where the court held it a firm rule of international law that existence of a state of war between two nations suspends the running of the statute of limitations between citizens of such countries. It was only fair and just that the operation of the statute be suspended, ruled the court, since the courts are necessarily closed to belligerent citizens during war. Here, the international law rule was stated and justified on grounds of fairness and justice, but no explanation was given for the source of the rule in international law. Compare also Osbourne v. United States, 164 F.2d 767 (2d Cir. 1947), where the statute was tolled for an American held prisoner by the Japanese from 1941-1945. The district court's dismissal, 74 F. Supp. 711 (S.D.N.Y. 1947), was overruled by the court of appeals, with the statement that the considerations for tolling the statute were present. It would be the "height of unreasonableness," said the court, to give an enemy alien a right not possessed by an American held prisoner during the war. 164 F.2d at 769.
36. Id. at 40-41.
hold a Department of State determination on the subject of immunity controlling. In nearly all of the cases cited under subdivision (B), a second major justification for the holding was a State Department communication that defendant had immunity. In Tsiang v. Tsiang,37 for example, the unqualified representation by the Department of State that defendant had immunity was held in and of itself to prevent further examination of the question. But the defendant’s immunity arose both from the representation and from a statute.

Curran v. City of New York38 followed the strict rule that a State Department determination precludes the court’s independent consideration of the immunity question. Considering the fact of diplomatic status to be a political question and a matter of state, the court concluded that raising such issues in court could only serve to embarrass the United States in the conduct of foreign relations. Thus, in contrast to English and French practice, the United States courts feel bound not only by executive determinations of diplomatic status, but also by State Department rulings as to the immunity arising from such status. As a result, the courts successfully avoid consideration of the problems of diplomatic immunity in customary international law.

State Department rulings also have been held conclusive in cases involving recognition of states,39 capacity of an enemy alien government to sue after surrender but before the declaration of peace,40 sovereignty of a foreign country following United States conquest and military control,41 and sovereign immunity from suit.42

D. United States Constitution

Consideration of international law questions has often been neglected when important constitutional issues have been raised. Arguments have been advanced repeatedly that the United Nations Charter provisions dealing with respect for human rights and fundamental freedoms43 are the supreme law of the land under the treaty clause of the Constitution and must be followed by the courts under the international law principle pacta sunt servanda. Attempts to invoke the Charter have been particu-

43. U.N. Charter arts. 1, 2, 55.
larly prevalent in cases involving discriminatory alien land laws and restrictive covenants based on racial prejudice. Of the alien land law cases, only *Sei Fujii v. State* 44 involved a court decision based on the Charter.

The concurring opinions of Mr. Justice Murphy and Mr. Justice Black, in *Oyama v. California*, 45 involving the constitutionality of the California Alien Land Law, 46 are particularly notable for their reference to the Charter provisions on human rights and fundamental freedoms. The two Justices agreed that the land law was a barrier to the United States pledge in the Charter and that the law's inconsistency with the Charter, which had been duly ratified and adopted by the United States, was but one more reason why the statute must be condemned. 47

The restrictive covenant cases follow the same general pattern as the land law cases. In holding racial restrictive covenants unenforceable on the ground that such enforcement would constitute state action contrary to the fourteenth amendment, the courts have not raised pertinent questions of customary and conventional law. 48

44. 97 Adv. Cal. App. 154, 217 P.2d 481 (2d Dist. 1950), aff'd on other grounds, 38 Cal. 2d 718, 242 P.2d 617 (1952). The district court of appeals held the discriminatory legislation unenforceable under the Charter and decided that the fact that Japan was not a member did not render its nationals ineligible for guarantees extended under the Charter. On appeal, the California Supreme Court found that the law violated the fourteenth amendment. The court relied on Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829) (Marshall, C.J.), for the view that the treaty did not supersede state law because it was not self-executing. "[The provisions] state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons." 38 Cal. 2d at 722, 242 P.2d at 620-21. Further, the provisions were held by the court to "lack . . . mandatory quality and definiteness which would indicate an intent to create justiciable rights . . . ." Id. at 724, 242 P.2d at 622.


47. See Mamba v. McCourt, 185 Ore. 579, 204 P.2d 569 (1949), in which the Oregon Land Law, Ore. Laws 1945, ch. 436, was held unconstitutional. The court relied on *Oyama v. California*, 332 U.S. 633 (1948), and *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948), a decision based on the equal protection clause of the fourteenth amendment. The court referred to the signature of the Charter to show that the United States was bound by the principles expressed therein. See State v. Oakland, 129 Mont. 347, 287 P.2d 39 (1955), where the Montana Alien Land Law, Mont. Laws 1947, ch. 44, was invalidated on the basis of *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952), and Mamba v. McCourt, supra. Again, the case was decided on fourteenth amendment grounds, but the court cited, with approval, the reasons given by Mr. Justice Murphy and Mr. Justice Black in their concurring opinions in *Oyama v. California*, supra.

Cases on the issue of the legality of seizure and confiscation of enemy alien property in wartime have focused on the Constitution and not on the international law issue. In *Silesian-American Corp. v. Clark* and *Clark v. Uebersee Finanz Korporation*, the Supreme Court did not discuss whether this exception to the doctrine of no confiscation without compensation was justified in customary law. The Court appeared satisfied with the statement that the United States had the right to vest enemy property under the war powers of Congress.

II. THE COMMON LAW APPROACH

The second major approach to decision-making by United States courts on questions involving issues of customary international law is based on what the courts consider generally accepted rules of either international or municipal law. In contrast to cases discussed in the first section of this article, decisions following this approach to law development do not obscure the international law questions presented in the cases. However, although this category of decision-making does not avoid customary law problems, neither does it clarify them. Little or no effort is made to discuss the basis of the rule, to evaluate its foundations in international law, or to analyze foreign state and court practice. The rule is merely included in the particular decision, occasionally with a qualifying remark that the rule was derived from international law. The court then concludes that the rule is decisive of the factual situation in question.

Analysis of the many cases following this approach would add little to this article. To facilitate comparisons between the three major approaches, between the development of law in state and federal courts, and between various areas of international law, however, a cursory study of some representative cases might be useful. A common law approach was particularly notable in post-World War II cases dealing with (1) the abrogation or suspension of treaties as a result of war, (2) suspension of the statute of limitations in wartime, (3) the right of a consular officer to appear in court to represent his nationals, and (4) the nonadjudication of the validity of foreign decrees affecting property within the borders of the foreign country. The principles in areas (2) and (3) are generally accepted rules of international law; the principle in area (1) is treated primarily as a rule of international law, although this is not expressly

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*Id. at 35.*

49. 332 U.S. 469 (1947).

50. 332 U.S. 480 (1947).

stated in the cases; the principle in area (4), although it states a rule of international law, is treated as an accepted rule of municipal law.

The courts have not handled cases involving treaty abrogation or suspension uniformly. Clark v. Allen seems to have been decided primarily on the fact that no national policy existed inconsistent with enforcement of the treaty provisions in question. The case is also cited as authority for the view that whether or not a treaty provision remains in force during wartime depends on the intrinsic nature of the treaty provision itself. Subsequent cases have attempted to focus on this latter doctrine in determining the effect of war on treaties between belligerents.

In re Meyer's Estate applied this standard to the provision of a treaty of 1827 with Bremen dealing with inheritance of property. The California court concluded that the provision was not abrogated, since there was nothing incompatible between its enforcement and existence of a state of war. Meier v. Schmidt presents an example of confusion between a treaty suspended or abrogated by policy and one suspended or abrogated because of internal inconsistency with a state of war.

In Brownell v. City & County of San Francisco, the issue of treaty
suspension or abrogation was decided on the common law ground, and policy was cited to reinforce the "intrinsic character" doctrine. The court held that a tax exemption was not so incompatible with a state of war as to require the inference that the contracting parties intended suspension or abrogation of such exemption during the war. Tax exemption of German consular property could not impair the war effort. After construing the intrinsic nature of the treaty provision, the court took judicial notice of a communication from the State Department to the Department of Justice, stating that the legal effect of the provision was unchanged by war. The court also spoke of the possibility of retaliation by foreign governments if the treaty were held abrogated. Unlike Clark v. Allen, in which the Supreme Court ruled that its function was to determine whether the treaty provision was inconsistent with the policy or safety of the nation, the court here did not cite policy as an independent basis for its holding, but only as evidence in applying the "intrinsic character" of the treaty provision. Consideration of the nature of the exemption itself and of the expression of State Department policy led the court to the conclusion that the tax exemption was not incompatible with the existence of a state of war.

In none of these cases involving treaty abrogation in wartime did the courts analyze the rule itself. A court infrequently may have taken the preliminary step of inquiring into what was the rule of law to be applied, but rarely has one delved into the basis for the doctrine and its foundation in international law. Never has a rule's application by foreign states been considered. In effect, the courts have merely applied the doctrine and closed their eyes to pertinent questions of customary law.

Most cases of suspension of a statute of limitations in wartime have

on real property owned by Germany from 1941-1947. The Treaty of Friendship, Commerce and Consular Rights With Germany, Dec. 8, 1923, art. XIX, 44 Stat. 2149, T.S. No. 658, had exempted such property from taxation. The district court of appeals held that the exemption was neither suspended nor abrogated by the declaration of war under the Trading With the Enemy Act, 40 Stat. 411 (1917), as amended, 50 U.S.C. App. § 1-40 (1958).

The communication provided in part: "This Government has consistently endeavored to extend to the property of other governments situated in territory under the jurisdiction of the United States of America the recognition normally accorded such property under international practice and to observe faithfully any rights guaranteed such property by treaty... In view of these considerations, the Department of State perceives no objection to the position which the Office of Alien Property is advancing that the provisions... remain in effect despite the outbreak of war between the United States and Germany." Letter from Jack B. Tate, Acting Legal Adviser, for Acting Secretary of State, to Tom C. Clark, Attorney General, Nov. 10, 1948, in 126 Cal. App. 2d 107-09, 271 P.2d at 977-78.

331 U.S. 503 (1947); see text accompanying notes 13-20 supra.
followed the same attitude toward law development.\textsuperscript{61} Peters \textit{v. McKay}\textsuperscript{62} asserts frequently the existence of a rule of international law that the statute of limitations is tolled in wartime between citizens of belligerent states. Aside from repetition to the point of monotony, its only authority for the rule appears to be three Civil War cases\textsuperscript{63} and a series of cases based on these early decisions. \textit{Frabutt v. New York, C. \& St. L.R.R.}\textsuperscript{64} also held it a firm rule of international law that existence of a state of war served to suspend the statute. Here a federal district court stated that the rule of international law was not expressly stated in the statutes, but was applied by the courts by reading the rule into the statutes. This court went so far as to say that the rule of law was fair and just, but seemed wholly oblivious to the importance of explaining its source, its foundation in international law, and its application by foreign states. In both cases, the courts satisfied themselves by stating the rule and then applying it to the facts in question.

In a series of cases involving the right of a consul in international law to represent his nationals in foreign courts, in the absence of statutory or treaty stipulations granting such a right, the courts again have merely stated the rule and held it decisive.\textsuperscript{65}

A final area of law where the courts employ a rule as an accepted principle of law without further justification is the "act of state" doctrine. \textit{Bernstein v. Van Heyghen Freres Societe Anonyme}\textsuperscript{66} is particularly descriptive of this approach. Judge Learned Hand, speaking for the Second Circuit, framed the question as whether the determination of the validity of Nazi acts in Germany in 1937 was within the jurisdiction of a New York court. Holding that United States courts will not pass on the validity of the acts of a foreign sovereign in its own territory, Judge Hand said: "We have repeatedly declared, for over a period of at least thirty years, that a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such."\textsuperscript{67}

\textsuperscript{61} For exceptions see cases cited in notes 26-35 supra.
\textsuperscript{62} 195 Ore. 412, 238 P.2d 225 (1951).
\textsuperscript{64} 84 F. Supp. 460 (W.D. Pa. 1949).
\textsuperscript{66} 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947). See also Pasos \textit{v. Pan American Airways, Inc.}, 229 F.2d 271 (2d Cir. 1956); Bloch \textit{v. Basler Lebens-Versicherungs-
\textsuperscript{67} 163 F.2d at 249. Judge Hand did not perceive in executive policy any indication that
Judge Hand completely ignored the question of customary international law, basing the generally accepted principle solely on municipal court decisions. Whether an exception existed to the general rule was held solely a question of executive policy, not of international law or foreign practice.

III. CUSTOMARY LAW DECISIONS

United States courts find evidence of customary international law in diverse ways. Courts often cite international conventions, both ratified and unratiﬁed, foreign court decisions as evidence of state practice, writers, executive department statements, legislation, diplomatic communications, failure to protest, generally accepted principles, and history. Rarely are they satisfied with reference to only one or two of these evidences of international custom. In most cases, the courts cite as many proofs of custom as are applicable to the particular factual situation. Rather than study each case separately, as an independent attempt to discover whether a rule of customary law exists, this section will investigate the various types of evidence cited. Obviously, this method of analysis must involve frequent cross references to cases and different types of evidence.

A. Unratified International Conventions

Four cases citing unratiﬁed conventions as evidence of a general consensus of thought accepted by nearly all nations have been reported in the last fifteen years. In Bergman v. De Sicys, the French Minister to Bolivia was sued in a civil action while in New York en route to his post. The district court found that the authorities were divided on the question of the immunity of a diplomat while in transit but it nevertheless granted diplomatic immunity, basing its decision on two pre-1890 New York cases, an 1840 French decision, the Harvard Research in International Law, a communication of the Secretary of State, and the Pan American Convention on Diplomatic Officers. The doctrine should not apply in the case of German hostilities. Id. at 251. However, Judge Clark, dissenting, found such a policy. Id. at 253, 255. State Department Release No. 295, April 27, 1949, cited in Bernstein v. N. V. Nederlandse-Americaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954) (per curiam), indicates Judge Clark was correct.

68. 170 F.2d 360 (2d Cir. 1949).
73. Letter From Secretary of State Root to Secretary of Commerce and Labor Straus, March 16, 1905, in 4 Hackworth, Digest of International Law 513 (1942).
74. Convention on Diplomatic Officers, Feb. 20, 1928; see text in Harvard Research in
strict court declared: "This Convention has been ratified by several of the States ... but ... not ... by the United States. So far as the United States is concerned, it, of course, lacks the force of law, but it is important as being the first formal pronouncement ... of the Law of Nations in this regard."75

Speaking for the Second Circuit, Judge Learned Hand found the Pan American Convention strong authority on the issue of immunity. For the first time in the history of the case, Judge Hand cited the statement in the preamble of the convention that the agreeing states had decided to "conclude a convention incorporating the principles generally accepted by all nations."76 Judge Hand said that the convention made no distinction between diplomats in transitu and in situ, "and it does this in a convention which professes to incorporate 'the principles accepted by all nations.' Thus it constitutes weighty authority: i.e., the consensus of opinion of the distinguished lawyers there assembled as to what 'principles' on the subject were at that time 'generally accepted' as part of international law."77 But Judge Hand evidently did not think it necessary to state that only a few Latin American countries had ratified the convention. No connection is made between the failure of most of the signatory states, including the United States, to ratify the convention and the validity of the preamble's statement that the principles included in the convention were declaratory of already existing customary law. It could have been argued that the failure of many states to ratify the convention was strong evidence that state practice did not support the words of the preamble.

A somewhat similar case, involving a convention ratified by the United States but not by the country in which defendant was incorporated, was presented in Glenn v. Compania Cubana de Aviacion.78 At issue was the defendant's claim to the benefits of exemptions from and limitations to liability of the Warsaw Convention of 1929 even though Cuba was not a high contracting party. The convention provided for its application to all international transportation by aircraft for hire.79 The convention defined international transport by the character and nature of the transport, and not by reference to the citizenship of passengers and carriers. The court concluded that the convention was designed to provide an international code declaring the rights and liabilities of

75. 71 F. Supp. at 341.
77. 170 F.2d at 362.
parties to international carriage by air and was to be applied by the courts of the countries adopting it. Therefore, the convention applied, regardless of the Cuban incorporation of the defendant carrier. The convention constituted binding customary law.80

The court did not think it necessary to inquire into the general acceptance of the convention, but it is worth noting just how many states had ratified this convention held to constitute a binding rule of law. Of thirty contracting parties in 1944, only two, Brazil and Mexico, were Latin American nations.81 By 1960, the number of ratifications had grown to fifty-one, but only Argentina and Venezuela had joined the Latin American signatories.82 Twenty-six of the fifty-one member nations are on the European continent. Certainly it would not be easy to conclude from these statistics that the convention is expressive of a generally accepted rule of law binding on all nations.83 As in Bergman v. De Sieyes,84 the court required little in the way of proof of the existence of a general consensus accepted by nearly all nations. The evidence of a rule of custom was insufficient, inadequate for the desired purpose, and imperfectly examined by the court, but the court seemed to have no difficulty in arriving at a clear-cut decision.

The Second Circuit showed equal facility for reading a consensus of thought sufficient to establish a generally accepted rule of law into an unratified convention and superseded conventions in Lambros Seaplane Base, Inc. v. The Batory.85 The case turned on the novel question of whether a seaplane was a vessel subject to salvage within general maritime law. Judge Hincks, looking first to state practice, found the only relevant case to be an English holding that a seaplane was not subject to salvage under maritime law.86 That case was severely criticized and

80. The court was certainly injudicious in speaking of the convention as constituting a binding rule of customary law and in the same breath stating that it was to be applied by the courts of the various countries adopting it. If the rule were one of generally accepted customary law, it was binding on the courts of all states, not just those which had formally bound themselves by the convention. Otherwise, states that have not ratified gain the rights included in the convention without being required to accept the duties that accompany such rights in international law.
82. U.S. Dep't of State, Pub. No. 6959, Treaties in Force 201-02 (1960).
83. In contrast to this view, Shawcross & Beaumont, Air Law 41 (2d ed. 1951), state that the general principles of the convention are “well on their way to universal acceptance” since there is no competing system and the convention has received adherence in both hemispheres. But the authors suggest that difficulties in the application of the convention may result from the creation of many new states since 1939.
84. 170 F.2d 360 (2d Cir. 1948).
85. 215 F.2d 223 (2d Cir. 1954).
promptly overruled by the Air Navigation Act of 1936,87 which expressly extended the law of salvage to aircraft at sea. In 1936, Ireland adopted similar legislation.88

Since a generally accepted rule of law could hardly be found on the basis of Irish and English practice, the court looked to municipal cases and statutes. The United States cases held only that a seaplane was not a vessel within limitation of liability statutes89 or within the purview of a criminal statute.90 The statutes offered only a weak peg on which to hang the decision. The 1951 amendment to the Air Commerce Act of 192691 was regarded as an express recognition by Congress that it was necessary to assimilate the regulation of seaplanes into the navigation laws. Although the statute did not deal at all with the question of marine salvage of airplanes, the court ruled that it constituted a cogent suggestion that the courts should similarly assimilate seaplanes into the maritime law of salvage.92

To bolster the decision, the court cited the Pan American Convention on Commercial Aviation of 1928, which stated that salvage of aircraft at sea shall be regulated by the principles of maritime law.93 Also referred to were similar provisions in the Paris Air Navigation Convention of 191994 and the 1938 Brussels Convention on Salvage of Aircraft at Sea.95 From these conventions, and the view of textwriters, the court concluded: "Although no international convention appears to control our decision here, we think it well worth noting that there is this highly reputable consensus of thought expressed by those participating in the development of international law. . . ."96 On these considerations,

87. 26 Geo. 5 & 1 Edw. 8, c. 44. The court incorrectly cited the Air Navigation Act of 1920, 10 & 11 Geo. 5, c. 80.
92. 215 F.2d at 233. A contrary argument could just as easily be made from these facts. The court might have ruled that Congress' express assimilation of regulation of seaplanes into the navigation laws, accompanied by a failure to mention the question of salvage, indicated an intention opposed to the assimilation of seaplanes into general maritime law.
96. 215 F.2d at 233.
the court ruled that a seaplane was subject to the maritime law of salvage.

What Judge Hincks failed to state in concluding that a highly reputable consensus of thought existed was that none of the conventions were in force in the United States at the time of the action. More than half of the thirty-eight states that ratified the Paris Convention were European.97 Although the United States did not ratify the Paris Convention, it was one of sixteen states to ratify the Pan American Convention. These two conventions were expressly superseded by the Chicago Convention on International Civil Aviation of 1944.98 The provision that aircraft at sea shall be regulated by principles of maritime law, however, was omitted from the superseding convention.

The only convention dealing specifically with the question before the court, the Brussels Convention on Salvage of Aircraft at Sea, was signed by sixteen states, but had not been ratified by any state as of July 1950.99 Although from the facts cited by Judge Hincks, the conclusion that a "highly reputable consensus" existed was reasonable, it would be difficult to argue that a generally accepted rule of law also existed. The facts omitted from the opinion indicate that the consensus could hardly be used to justify the existence of a rule of customary law. State practice, as shown by the failure of states to ratify the Brussels Convention and the omission of the salvage provision from the Chicago Convention, did not indicate positive international acceptance of the viewpoint adopted by the court.

The final case of an unratified convention held to constitute a binding rule of law is Murarka v. Bachrack Bros.100 On the subsidiary question of whether proof of plaintiff's citizenship in India was adequate for jurisdictional purposes, the court ruled: "It is the undoubted right of each country to determine who are its nationals, and it seems to be general international usage that such a determination will usually be accepted by other nations."101 For this view, the court cited the Convention on Conflict of Nationality Laws,102 signed at The Hague in 1930. In the ten years following the opening of the convention to accession only twelve states had deposited ratifications.103 The con-

100. 215 F.2d 547 (2d Cir. 1954).
101. Id. at 553.
vention was certainly a weak ground for finding a generally accepted rule of law.

B. Ratified International Conventions

International conventions have played an important part in several postwar cases on the rights and duties of a belligerent occupant over conquered territory. In In re Yamashita, the Supreme Court was confronted with the question of whether a commanding officer had a duty to control his subordinates in occupied territory. On the international law question, Chief Justice Stone held (1) that the charge sufficiently stated that acts directed against civilians in clear violation of the law of war as expressed in the Hague Conventions were committed by an armed force under petitioner's command, and (2) that the law of war imposed on him a duty to take appropriate measures to control the troops under his command.

The Court found the rule of law in Article 1 of the Regulations of the Fourth Hague Convention on Laws and Customs of Land Warfare, which held that an armed force must be commanded by a person responsible for his subordinates in order to be accorded the rights of lawful belligerents; article 43 of the same Regulations, declaring that a commander must attempt to restore public order and safety; Article 19 of the Tenth Hague Convention on Bombardment of Naval Vessels and Article 26 of the Geneva Red Cross Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, both of which held that a commander must see that the articles of the convention are carried out. Chief Justice Stone concluded that these provisions plainly imposed a duty on petitioner to take such measures as were within his power to protect civilians and prisoners of war.

In contrast to the majority opinion that these conventions expressed a binding rule of law, Mr. Justice Murphy argued that the charge did not state a recognized violation of the laws of war. He found effective control of his troops, which the petitioner was convicted for failing to achieve, an impossibility under the circumstances, due to the complete disorder of the Philippines at the time of the atrocities in 1944-1945. International law, he ruled, made no attempt to define the duties of an

104. 327 U.S. 1 (1946). This was a habeas corpus suit for lack of jurisdiction to try the prisoner by a military court. Mr. Chief Justice Stone ruled that a military trial was authorized by 1) the political branch of the Government, 2) military command, 3) international law and usage, and 4) the surrender terms of the Japanese Government.
106. 36 Stat. 2306.
army commander under constant and overwhelming assault, nor did it impose responsibility for the failure to meet the ordinary responsibilities of command. The dissenting Justice stated that the Court's reliance on vague and indefinite references in the Hague Conventions and the Geneva Red Cross Convention was misplaced, and he cited instead the laws of war recognized by the United States to show that a defeated commander was not responsible for the excesses of disorganized troops. The Basic Field Manual Rules of Land Warfare, for instance, showed that the United States recognized individual criminal responsibility for violations of the laws of war only as to those who commit the offenses or who order or direct their commission. He concluded that in no recorded instance had the inability to control troops under attack by superior forces been made the basis for a charge of violating the laws of war.

Mr. Justice Rutledge dissented on the ground, among others, that petitioner's trial was not in accord with Articles 60 and 63 of the Geneva Convention on Prisoners of War. Japan had not ratified the convention, but at the beginning of the war both the United States and Japan announced their intention to adhere to its provisions. Mr. Justice Rutledge found in the legislative history of the convention an intention by the drafters not to foreclose a future holding that under the terms of the convention a state was bound to apply the provision to prisoners of war of nonparticipating states. "And not to foreclose such a holding is to invite one."

Moreover, if this view is wrong and the Geneva Convention is not strictly binding upon the United States as a treaty, it is strong evidence of and should be held binding as representing what have become the civilized rules of international warfare.
shita is as much entitled to the benefit of such rules as to the benefit of a binding treaty which codifies them.113

One receives the impression from reading In re Yamashita that the majority did not consider it necessary to look far to find the existence of a rule of customary law. Mr. Justice Murphy's destruction of the majority's "plainly imposed" duty is the best existing evidence that the Court wanted to find a generally accepted international law rule as one of the reasons for denying the writ of habeas corpus. In the light of the attitude of authorities on international law toward the cited convention provisions, the majority's holding that the provisions were evidence of a rule of law is certainly questionable.

Aboitiz & Co. v. Price114 also involved the power of a belligerent occupant over conquered territory under international law. The court ruled that Article 43 and Section 3, entitled "Military Authority over the Territory of the Occupied State," of the Regulations of the Fourth Hague Convention115 were expressive of the body of rights and duties incumbent on the occupant which had been developed by international customary law.

Both the United States and Japan signed and ratified this international agreement, which declares the governing international law principle: that the commander of a force occupying enemy territory "shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."116

The court did not determine the scope of the authority permitted an occupant in international law. Rather, it addressed itself to two specific questions: (1) Should a municipal court recognize Japanese army pass money as a valid medium of exchange? (2) Should a United States court, long after the war is won, recognize as valid the Japanese army edict forbidding traffic in that money under penalty of death between internees and friends outside the camp? The court applied the general test sanctioned by customary law, i.e., were the decrees limited to the necessity of preserving the peace, order and good government of the Philippines? Tested by this principle, the fiat currency was valid. Some recognized medium of exchange was necessary

113. Ibid. The Court did not decide whether the convention was binding on the United States. Instead, the majority ruled that articles 60 and 63 were not properly invoked by the petitioner and that by their terms they were not applicable to the proceeding. Mr. Justice Rutledge disagreed with this argument. 327 U.S. at 20-24.

114. 99 F. Supp. 602 (D. Utah 1951). This was an action on a promissory note given to secure repayment of money advanced by plaintiff to defendant during the period when defendant was a prisoner of the Japanese.


to keep the economic life of the community going. However, the act
prohibiting traffic in money did not benefit and protect the inhabitants
and provide protection against derangement of economic life. The
court held it invalid because it was directed against the United States,
obnoxious to our ideas, and intended primarily to aid Japan's efforts
to defeat the United States.

Unlike *In re Yamashita*, the ruling here was clear-cut. Looking for
a rule of law, the court found an express statement of the applicable
principle in a convention to which both belligerents were parties. As a
result, the court had no difficulty in applying the general principles to
the particular factual issues.

*In the Matter of Muller*[^117^] involved the same question of the right
of an occupant to make laws in conquered territory. The United
States had prescribed certain foreign exchange laws prohibiting un-
licensed transactions involving foreign exchange in occupied Europe.
Authorities on international law were cited for the view that, while the
United States was not sovereign over occupied territory, it had supreme
authority under customary law. The court also cited an English
case decided in 1722,[^118^] stating that where the King conquered a
country he acquired a right and property in the people and could
impose any laws he pleased. Relying on these sources, the court ruled
that the United States had the right to impose the foreign exchange laws
on occupied territory.

The process of analyzing factors of customary law is totally inadequate
in this case, in contrast to *Aboitiz & Co. v. Price*.[^119^] After stating that
the occupying nation did not acquire sovereignty, but rather an undefined
"supreme authority," the court cited the eighteenth century English
case holding that the belligerent occupant did acquire sovereignty.
The customary law relied upon was substantially modified by the
Hague Conventions, but no mention was made of these international
regulations. No question was raised as to the extent and character of
the occupant's customary law right to prescribe laws. Instead, the
decision implied that the vague "supreme authority" gave the United
States the power to make any laws binding upon the inhabitants of
the occupied territory, regardless of the provisions of the Fourth Hague
Convention. Articles 42-56 of the Hague Regulations are directly op-
posed to the English case on which the court placed such great weight.

Article 43 of the Hague Regulations played an important part in a
dictum of the Second Circuit in *State of the Netherlands v. Federal
Reserve Bank*,[^120^] which involved a decree promulgated by the Nether-

[^118^]: Anonymous, 2 P. Wms. 75, 24 Eng. Rep. 646 (Ch. 1722).
[^119^]: 99 F. Supp. 602 (D. Utah 1951); see text accompanying notes 114-16 supra.
[^120^]: 201 F.2d 455 (2d Cir. 1953), reversing 99 F. Supp. 655 (S.D.N.Y. 1951). Plaintiffs
lands Government-in-exile. Judge Charles Clark, considering the question of an absent sovereign's power to make regulations for occupied territory, held that the nineteenth century American view denying effect to such regulations had been modified by the Hague Convention. The pre-occupation laws of the sovereign outside the legitimate scope of the occupant's control remained in force under article 43. The question of new legislation by the absent sovereign was not quite as certain, since the Hague Regulations did not deal explicitly with the problem. The court then cited European court decisions giving effect to the enactments of the legitimate sovereign applying to the occupied territory and the publicist McNair for the view that, "assuming the new law to fall within the category of that large portion of national law which persists during the occupation, it ought to operate in occupied territory."

Judge Clark concluded that the decree might have been hostile, but that it was not opposed to the legitimate authority of the occupant since Article 46 of the Hague Regulations prohibited confiscation of private property by the occupant. "We may add," he said, "that the conclusion to which we find ourselves impelled by current doctrines

sued to recover four bonds seized by the Germans in the Netherlands, sold on the Paris black market to a Swiss firm and resold to a United States citizen not a holder in due course. The Netherlands Government-in-exile had promulgated a decree vesting protective title in the Netherlands to all securities belonging to natural or legal persons domiciled in the Netherlands. The district court ruled that the absent sovereign had no right in customary law to legislate for the occupied territory. The court of appeals reversed, holding the decision in Anderson v. N.V. Transandine Handelmaatschappij, 28 N.Y.S.2d 547 (Sup. Ct.), aff'd mem., 263 App. Div. 705, 31 N.Y.S.2d 194 (1st Dep't 1941), aff'd, 289 N.Y. 9, 43 N.E.2d 502 (1942), controlling. In that case, the court had found that rights based upon Dutch law to intangible property having its situs in New York are recognized and enforced by the courts of this state unless such enforcement would offend the public policy of the state. In the present case, Cities Service v. McGrath, 342 U.S. 330 (1952), was cited for the view that the actual location of bonds does not determine their situs for all purposes. The court then determined that the situs of the debt was not at the locus of the certificate since in the case of looting of securities the domicile of the corporate debtor was a much more significant point of contact than the location of the certificate. Having disposed of the case on the grounds that the bonds were in the United States for the purpose of the suit, the court went on to consider the effect of the decree in international law.


122. "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Convention With Other Powers Respecting the Laws and Customs of Wars on Land, Oct. 18, 1907, Annex, art. 43, 36 Stat. 2306, T.S. No. 539.

123. 201 F.2d at 462.

124. McNair, Municipal Effects of Belligerent Occupation, 57 L.Q. Rev. 33, 73 (1941), quoted in 201 F.2d at 462.

125. 36 Stat. 2307.
of international law seems to us more necessary and appropriate to the
world to which we have come than the mid-nineteenth century view
followed below."

Here the court was not impressed by the heavy weight of contrary
evidence. The fact that the United States had consistently held as a
matter of law that decrees of absent sovereigns for territory under
occupation by American military forces were a nullity was not even
mentioned. The closing remark of the court, placing stress on the
importance of the requirements of the period, adds strength to the
argument that the court thought that a rule of customary law should
exist. As a counterpart, the remark cannot but detract from the decision
that a rule of customary law already existed. This dictum, then, is an
example of the actual development of a customary law rule by the
municipal courts.

Several cases in the postwar period have interpreted the Shipowner's
Liability Convention of 1936. The leading case on the question of
maintenance and cure for an injured seaman is Farrell v. United
States. The 1936 draft convention of the International Labor
Organization, which became effective in the United States in 1939,
required that a shipowner defray the expense of medical care and
maintenance until the sailor was cured or until the sickness or incapacity
had been declared permanent. The Supreme Court noted: "While
enactment of this general rule by Congress would seem controlling, it
is not amiss to point out that the limitation thus imposed was in
accordance with the understanding of those familiar with the laws of
the sea and sympathetic with the seaman's problems." American
admiralty courts, the Court said, adhered to the doctrine of maintenance
and cure prior to the adoption of the convention, despite occasional
ambiguity of language. The rule of customary law accepted by the majority in Farrell v. United States was contested by Justices Douglas, Black, Murphy and Rutledge, dissenting. After citing an 1832 decision to the effect that the shipowner remained liable until the cure was completed, the

126. 201 F.2d at 463.
130. 336 U.S. at 517.
131. Id. at 518, citing The Point Fermin, 70 F.2d 602 (5th Cir. 1934); Sholker v. Lehigh Valley R.R., 60 F.2d 593 (2d Cir. 1932); The Boulter No. 2, 241 Fed. 83 (3d Cir. 1917); The Wensleydale, 41 Fed. 829 (D.C.N.Y. 1899).
132. 336 U.S. at 521.
dissent, noting the provision in article 12 of the convention that nothing
in the convention shall affect any law or custom which insures more
favorable conditions than those therein provided,\textsuperscript{134} ruled that the
convention was not declarative of customary law binding the Court
since American maritime decisions provided greater benefits than
allowed by the convention. In a case of extreme hardship, the Court
could easily have gone beyond the formula expressed in the convention.
Perhaps plaintiff's negligence and absence from his ship helped lead the
Court to accept the statement in the convention as a binding rule of law.

\textit{Smith v. United States}\textsuperscript{135} presented the question of the shipowner's
liability for maintenance and cure for any injury occurring to a sailor
while on personal business ashore. The Fourth Circuit held the Ship-
owner's Liability Convention, providing that liability shall exist between
the time of reporting for duty and termination of service,\textsuperscript{136} declarative
of customary international law. The language of the convention, the
court ruled, manifestly covered shore leave not in the ship's service.

In \textit{Warren v. United States},\textsuperscript{137} the Supreme Court discussed the con-
vention's purpose—"to equalize operating costs by raising the standard
of member nations to the American level"\textsuperscript{138}—and concluded that it
provided a reasonable average for international application in a suit
for maintenance and cure. It again held that the convention constituted
customary international law binding upon the Court.

United Nations General Assembly Resolutions and the opinions
of textwriters were insufficient to create a generally accepted rule of
customary law in \textit{Karadzole v. Artukovic}.\textsuperscript{139} In an earlier part of the
case,\textsuperscript{140} the court of appeals had decided that an extradition treaty of
1902 with Serbia\textsuperscript{141} was still in effect with Yugoslavia in 1954. The
remaining question was whether the particular crime charged was
extraditable. The Yugoslav indictment charged appellee with respon-
sibility for the deaths of 250,000 persons while he was Minister of the
Interior under the Nazi occupation. The appellee argued that he was
not subject to extradition because of the treaty provision prohibiting
surrender of fugitives charged with political offenses.\textsuperscript{142} Appellant
claimed that war crimes were extraditable offenses within the meaning

\textsuperscript{134} 54 Stat. 1700.
\textsuperscript{135} 167 F.2d 550 (4th Cir. 1948).
\textsuperscript{136} Art. 2, para. 1, 54 Stat. 1695.
\textsuperscript{137} 340 U.S. 523 (1951).
\textsuperscript{138} Id. at 527.
\textsuperscript{139} 247 F.2d 198 (9th Cir. 1957).
\textsuperscript{140} Ivancevic v. Artukovic, 211 F.2d 565 (9th Cir.), cert. denied, 348 U.S. 818 (1954).
\textsuperscript{141} Treaty With Servia for the Mutual Extradition of Fugitives from Justice, Oct. 25,
\textsuperscript{142} Art. VI, 32 Stat. 1892.
of international agreements to which the United States was a party. The court was forced to examine the concept of political offense in customary law and to determine whether any applicable customary law rule existed.

It was argued that by virtue of General Assembly Resolutions of 1946 and 1947 on the surrender of alleged war criminals the court must hold the offense extraditable. The court replied: "We have examined the various United Nations Resolutions and their background and have concluded that they have not sufficient force of law to modify long standing judicial interpretations of similar treaty provisions." The court also noted an argument by Professor Quincy Wright that "codification of offenses against the law of nations should be developed to indicate those offenses with a political aspect which should be excluded from the concept of 'political offense' and made subject to extradition to the country where the offense was committed..." Other writers on international law also held the view that war crimes were beyond political acts and the extradition of the offender was the only justifiable course of action. The court, however, rejected this argument as to the existence of a rule of law allowing extradition of war criminals despite treaty provisions excluding offenses of a political character.

The court here passed over the question of whether a unanimous resolution by the General Assembly constituted general agreement among nations sufficient to establish a rule of law. The statement that the resolutions did not have sufficient force of law to modify treaty provisions indicated that the court was thinking in terms of the legal effect of agreements to which the United States was a contracting party, and not in terms of customary law.

United States v. Coplon also raises the question of just what constitutes a rule of customary law. Unmentioned by the court, but in the background of the case, is the General Convention on Privileges and Immunities of United Nations Personnel, which gives subordinate


144. 247 F.2d at 205.


146. E.g., García-Mora, International Law and Asylum as a Human Right 91-102 (1956), cited in 247 F.2d at 204.


United Nations officials diplomatic immunity. The Headquarters Agreement, on the other hand, gives representatives of member states other than those in the capacity of head representatives or ambassadors immunity only for official acts. At the time of the Coplon case, thirty-seven states had ratified the convention; the United States had not then and has not today. The court did not consider the question of whether a binding rule of customary law existed. Sixty-three states have now ratified the convention. In a future immunities suit, the argument may well be made that the convention is binding on the United States not as a treaty, but as express customary law. Certainly, accession by a majority of states is stronger evidence of generally accepted principles than the convention ratified by only a handful of states held binding in Bergman v. De Sieyes. But the courts would not be receptive to such an argument. Unlike the status of the French minister in the Bergman case, the immunities of United Nations representatives and officials are covered expressly by federal statute. The statute conflicts with the convention, but no court is likely to decide the issue on the basis of international law and thereby flout the supreme law of the land.

C. Foreign Court Decisions as Evidence of State Practice

United States courts often cite decisions of foreign courts in attempting to show the existence of a rule of law. In Bergman v. De Sieyes, the Second Circuit cited a French decision to prove that a diplomat in transit has immunity. The district court in Glenn v. Compania de Aviacion mentioned an English case which held that the Warsaw

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152. 71 F. Supp. 334 (S.D.N.Y. 1946), aff'd, 170 F.2d 360 (2d Cir. 1948); see text accompanying notes 68-76 supra.
153. 170 F.2d 360 (2d Cir. 1948).
155. 102 F. Supp. 631 (S.D. Fla. 1952); see text accompanying notes 78-83 supra.
Convention was designed to provide an international code declaring the rights and liabilities of parties to international carriage contracts by air regardless of the citizenship of the parties.

In *Aboitiz & Co. v. Price*, to support the view that fiat currency decrees were valid in international law, the court cited *Haw Pia v. China Banking Co.* and subsequent Philippine decisions approving the currency in question. In *State of the Netherlands v. Federal Reserve Bank*, the district court and the court of appeals drew opposite conclusions from their consideration of foreign cases. The district court, on the authority of a Greek decision of 1930, held that the view prior to World War II considered acts of *de jure* governments as having no force and effect in occupied territory. The court of appeals cited postwar decisions of courts in Holland, Norway and Belgium, a Polish decision of 1927 and a Belgian decision of 1919 and concluded that the Greek case was the only contrary holding. Several English cases are cited in *United States v. Coplon* to show that the English courts recognize as a general principle of law that diplomatic privileges and immunities are conferred only upon persons sent by one state to another on diplomatic missions.

The statutory grant of diplomatic immunity in *Arcaya v. Paez* dealt only with the first half of the question before the district court. The statutory immunity prohibited service of process but did not tell
the court what to do where process had been served and the court had acquired jurisdiction over the subject matter of the suit before diplomatic immunity had been acquired. To determine its duties in this situation, the court looked to an English case[^7] which had found the rule of law in Grotius' *Laws of War and Peace* that the immunity of an ambassador was not limited to service of process, but included protection from the necessity of defending a suit. The district court concluded: "No one has suggested that any court has ever held otherwise or suggested any good reason why a court should do so."[^168]

A final case citing foreign court decisions is *American Transatlantic Co. v. United States*,[^169] which held it a rule of international law that a seizing nation could show in prize court that a ship flying a neutral flag was actually owned by an enemy, while a ship flying an enemy flag could not show in court that its owner was neutral. The basis for this rule was found in several British decisions[^170], no American cases being in point. But the judicial practice of one maritime power is a relatively weak basis for a conclusion that a rule of customary law exists. It appears fairly obvious from the decision in this case and in *Arcaya v. Paez* that the courts in both cases focused their attention on foreign court practice only because they could not find stronger evidence of generally accepted rules of law.

**D. International Law Publicists**

It is common practice for courts to review the views of writers on international law questions in determining the existence of a rule of customary law. In *Bergman v. De Sieyes*,[^171] the court found the authorities divided and looked elsewhere for the rule. Mr. Justice Murphy, dissenting in *In re Yamashita*,[^172] cited the differing views of legal authorities on the meaning of several phrases in certain Hague regulations to prove that the interpretation of the majority was incorrect. Four treatise writers were named for the view that Article 43 of the Fourth Hague Convention constituted a binding rule of law in *Aboitiz & Co. v. Price*.[^173] In *In the Matter of Muller*,[^174] the Surrogate

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[^171]: 171. 10 F.2d 360 (2d Cir. 1948); see text accompanying notes 68-77 supra.
[^172]: 172. 327 U.S. 1, 36-37 (1946); see note 109 supra.
cited Oppenheim, Hall, Higgins and Moore for the theory that the United States, while not sovereign over occupied territory, had "supreme authority" and the right to enforce exchange regulations under such authority. Judge Clark referred to McNair in *State of the Netherlands v. Federal Reserve Bank*, and Briggs was mentioned as one support for the decision as to proof of nationality in *Murarka v. Bachrack Bros.* A book review by Quincy Wright was cited by the Ninth Circuit in *Karadzohe v. Artukovic*.

In *In re Territo*, an American citizen captured while fighting with the Italian army in 1943 was held to be a prisoner of war within the provisions of the Geneva Convention on the basis of the law of war and agreement of treatise writers that all persons active in opposing an army in war, regardless of citizenship, may be captured and held as prisoners of war. The court also quoted a Supreme Court statement that United States citizenship "of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." The court did not explain why fighting for Italy constituted a breach of the law of war.

Citations to legal authorities have been prominent in several postwar cases dealing with problems of treaty interpretation. For the view that treaties are binding upon a successor state which is created by a division of territory, the Supreme Court of New Hampshire, in *Hanafin v. McCarthy*, looked to the writings of Moore and Crandall. On the basis of these authorities, the court held that until the new state exercised its sovereign right to enter into new treaties, the treaties by which it was bound as part of the whole state remained binding.

The validity between the United States and Yugoslavia in 1954 of a
1902 treaty with Serbia was questioned in *Ivancevic v. Artukovic*.

The Ninth Circuit did not deal with the international law question of the binding force of treaties on new or successor states, but only with the factual controversy itself. The rule of law was assumed. Among other evidence, the court was persuaded by the views of treatise writers that this was a case of enlargement of the territory of an existing state. It noted, but did not agree with, the views of four European authorities that Yugoslavia was a new state and not an enlargement, in the territorial sense, of Serbia.

Occasionally, a court will go beyond the “intrinsic character” theory on the question of whether a particular treaty has been abrogated by war. *Argento v. Horn* declared that, while it was settled in the United States that not all treaties were abrogated by war, it was not easy to apply the “intrinsic character” theory to determine precisely what treaties fell and what survived. Authorities, as well as the practice of nations, presented a contrariety of views. The court referred to the views of Calvo and Moore, adopted by the Supreme Court in 1929.

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185. 211 F.2d 565 (9th Cir.), cert. denied, 348 U.S. 818 (1954).

186. E.g., 5 Hackworth, Digest of International Law 375 (1943); 2 Hyde, International Law, Chiefly as Interpreted and Applied by the United States 1535 (3d ed. 1945); McNair, Law of Treaties 443 (1938), cited in 211 F.2d at 571, 572 n.19.

187. 211 F.2d at 572 n.19.

188. 241 F.2d 258 (6th Cir.), cert. denied, 355 U.S. 818 (1957). The case involved an Italian who had lived for thirty years as a law-abiding resident of the United States. Italy asked extradition on the basis of hearsay evidence which would be inadmissible in a municipal criminal case, but admissible in an Italian court. The court cited various publicists and *Society for the Propagation of the Gospel v. Town of New Haven, 21 U.S. (8 Wheat.) 464 (1823)*, and *Clark v. Alien, 331 U.S. 503 (1947)*, for the view that not all treaties are abrogated by war.

It is noteworthy that in none of the cases involving treaty suspension or abrogation did the court attempt to ascertain foreign state practice. James J. Lenoir attempted to review state practice on this question in his article, *The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions, 34 Geo. L.J. 129 (1946).* Lenoir stated that Britain has held from the eighteenth century to the present day that war abrogates all treaties. The American Government held this theory, but not consistently, up to World War I. He quotes a statement made by Austria and Russia in the 1890's that "the doctrine that war annuls all pre-existing engagements between the adverse parties is a principle of international law so universally proclaimed that we are surprised that it should suddenly be denied with such vehemence." Lenoir, supra, at 145, citing a quote in *Comment on Article 35, Harvard Draft Convention on the Law of Treaties (1935), 29 Am. J. Int'l. L. Supp. 1184-85 (1935).* Lenoir cited conflicting cases decided by French, Belgian, German and Italian courts. The author's conclusion was that no clear rule of international law existed, but that the general view was that war terminated pre-existing treaties, even though the view had been abandoned on certain occasions and despite the recognition of certain exceptions.

189. *Karnuth v. United States, 279 U.S. 231, 236-37 (1929).*
that there was common agreement that at least the following types of treaties remain in force: (1) stipulations as to what shall be done in war, (2) treaties of cession, boundary, and the like, (3) provisions giving rights to citizens to hold and transmit land in the territory of the other party, and (4) provisions which represent completed acts. On the other hand, treaties of amity and alliance designed to promote harmony are generally regarded as annulled. The court felt that extradition, the subject of the treaty in question, did not conveniently fit into either category, but held that the treaty was not abrogated. The court’s method in this case is clear. Whether all treaties were abrogated by war was determined on the basis of American precedents, without reference to a rule of international law. The types of treaties abrogated were found by reference to publicists after a futile attempt to discover a generally accepted rule of customary law.

E. Executive Department Statements and Legislation

Occasionally, statements by the executive branch of the United States and foreign governments and legislation of Congress and foreign states are used by judges in attempting to prove the existence of a rule of customary law. In *Lambros Seaplane Base, Inc. v. The Batory*, the Second Circuit cited an English statute expressly overruling a British court decision as part of its effort to show a rule of customary law. The court also mentioned several American statutes on the subject of marine navigation and interpreted these statutes to mean that Congress agreed with the rule. The dissenting opinion of Mr. Justice Murphy in *In re Yamashita* mentioned the laws of war recognized by the executive branch in the Basic Field Manual Rules of Land Warfare to show that the United States recognized criminal responsibility for violation of the laws of war only as to those who commit the offenses or order their commission. The same field manual was regarded by a district court in *Aboitiz & Co. v. Price* as evidence of the attitude of the United States towards Article 43 of the Hague Regulations in the court’s ruling that international law had established a body of rights and duties incumbent on a belligerent occupant in the interests of order and the welfare of the inhabitants of the occupied territory.

190. 215 F.2d 223 (2d Cir. 1954).
191. Air Navigation Act of 1936, 26 Geo. 5 & 1 Edw. 8, c. 44.
194. 327 U.S. 1, 37 (1946).
A Department of State release and exchange of communications\textsuperscript{196} was cited in \textit{Murarka v. Bachrack Bros.}\textsuperscript{197} to show United States agreement with the rule of law that each country has the right to determine who are its nationals and that such a determination will be accepted by other nations. In \textit{Ivancevic v. Artukovic},\textsuperscript{198} statements by the executive branches of Yugoslavia and the United States were important evidence that Yugoslavia had inherited the treaty rights and obligations of Serbia. The court quoted a letter from the Secretary of State, in answer to an American citizen in 1921,\textsuperscript{199} expressing the opinion of the Department that the treaties were applicable to the new government. While discounting the weight of this opinion since it was given in the form of a private communication in a nonadversary proceeding, the court noted, nevertheless, that the communication was "an official one of the Secretary of State, as such, with respect to a matter peculiarly within his charge."\textsuperscript{200} Subsequent letters of the Department\textsuperscript{201} confirmed that the treaties were in force. The court also cited a proclamation of Prince Regent Alexander of Yugoslavia in 1918\textsuperscript{202} showing that Serbia was the nucleus to which the other nations adhered.

\textbf{F. Diplomatic Communications}

Communications from one government to another were considered important evidence in \textit{Ivancevic v. Artukovic}.\textsuperscript{203} The court referred to a 1921 communication by the Yugoslav Chargé d'Affaires to the Secretary of State,\textsuperscript{204} stating that the government of the Serbs, Croats and Slovenes considered treaties between Serbia and the United States applicable to the whole territory.

In \textit{United States v. Coplon},\textsuperscript{205} the district court quoted a 1933 letter of

\begin{itemize}
\item \textsuperscript{196} 22 Dep't State Bull. 433-41 (1950).
\item \textsuperscript{197} 215 F.2d 547, 553 (2d Cir. 1954).
\item \textsuperscript{198} 211 F.2d 565 (9th Cir.), cert. denied, 348 U.S. 818 (1954).
\item \textsuperscript{199} Letter from Secretary of State Hughes to De Frees, Buckingham and Eaton, June 4, 1921, Dep't of State file 711.60H/1, in 5 Hackworth, Digest of International Law 375 (1943).
\item \textsuperscript{200} 211 F.2d at 570-71.
\item \textsuperscript{201} Id. at 571 & n.15.
\item \textsuperscript{202} Christmas Day Proclamation from Prince Regent Alexander of Yugoslavia to His People, Dec. 24, 1918, in [1919] 2 Foreign Rel. U.S. 896 (1934).
\item \textsuperscript{203} 211 F.2d 565 (9th Cir.), cert. denied, 348 U.S. 818 (1954).
\item \textsuperscript{204} Communication from Chargé d'Affaires ad interim of the Kingdom of the Serbs, Croats, and Slovenes to Secretary of State Hughes, Sept. 29, 1921, Dep't of State file 711.60H/3, in 5 Hackworth, Digest of International Law 375 (1943).
\item \textsuperscript{205} 88 F. Supp. 915 (S.D.N.Y. 1949).
\end{itemize}
the Under-Secretary of State to the Turkish Ambassador, not as evidence, as in the Ivancevic case, but as an expression of the controlling rule of customary law regarding diplomatic immunity. A diplomatic note was used in Hanafin v. McCarthy as evidence that Eire succeeded to an 1899 treaty with Great Britain and Ireland relating to disposition of real property. The court cited a communication from the British Foreign Office to the Secretary of State in 1924, stating that the creation of the Irish Free State was not regarded by the British Government as affecting the applicability to Eire of the convention of 1899.

G. Failure to Protest

Only two clear cases in which the courts cite the failure of a state or states to protest have arisen in the postwar period. In one, the failure to protest went to the evidence only; in the other, it went to a customary law rule. In Hanafin v. McCarthy, the court thought it important that Eire had taken no action indicating repudiation of the treaty. In Aboitiz & Co. v. Price, the court declared: "Between 1918 and 1935, the validity and applicability of Articles 42-56 (of the Hague Regulations) were confirmed in a great number of decisions of international and domestic tribunals; they were never contested by any party to any dispute nor were they questioned by any government." Evidently, the court's conclusion that a rule of customary law existed was strengthened by the failure of states to protest against the Hague Regulations.

H. Generally Accepted Principles

All the cases discussed to this point look to evidence of a consensus of thought in order to find a binding rule of customary law. Several cases, however, do not come under the holdings which have been analyzed. These also are based on binding rules of customary law arising from common consent of nations, but the rules are found in the general acceptance of the principles involved. This group differs markedly from

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207. 95 N.H. 36, 39, 57 A.2d 143 (1943).


209. See T.S. No. 146 at 3-4; see also [1924] 2 Foreign Rel. U.S. 245-49 (1939).

210. 95 N.H. 36, 39, 57 A.2d 143, 150 (1943).


the decisions which merely accept the rule of law on its face and apply it to the factual controversy, without testing its authority in customary law. Here the approach focuses on finding whether a rule of customary law actually exists, with evidence of generally accepted principles used as proof of the rule's existence.

Generally accepted principles were decisive of the issue of whether the states or the federal government had rights over the land and minerals underlying the Pacific Ocean from the low water mark to three miles offshore in *United States v. California*. The Supreme Court first looked for the existence at the date of independence of an international custom that nations owned the land underlying the three-mile belt. On this point, the Court concluded that no charters, documents, or treaties with England showed a purpose to set aside a belt for colonial or state ownership. Since no custom was found, the Court decided the case on the ground that since the eighteenth century the idea of a belt had been accepted throughout the world. It therefore derived a rule of customary law that a nation has certain rights in an offshore belt from the general acceptance of the idea of a belt.

Generally accepted principles were decisive in settling whether the Jones Act applied to a Danish seaman who had signed on a Danish-owned and registered ship in New York. The Jones Act gave a right of action to any seaman, either a citizen or a foreigner, to recover for personal injuries suffered in the course of his employment. The Court ruled initially that the statute only applied to areas in which United States law would be considered operative under prevalent doctrines of international law. To find the applicable international law, the Court deferred to "an international maritime law of impressive maturity and universality . . . [which] has the force of law, not from extraterritorial reach of national laws . . . but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations." In effect, the Court held that the customary standard to be applied to the conflict of laws question was formed by the principles previously accepted by "civilized communities."

I. History

Occasionally, the courts find it necessary to do historical research in order to demonstrate that the decisive rule of customary law has been derived from long-accepted principles. In *Aboitiz & Co. v. Price*,

216. 345 U.S. at 581-82.
217. 99 F. Supp. 602 (D. Utah 1951); see text accompanying notes 114-16 supra.
the validity of Japanese currency was supported by a long history of the use of such currency in nearly all wars as far back as the American Revolution. The court even mentioned the issuance of leather money by the Doge of Venice during the siege of Tyre in 1122.218 In United States v. California,219 the Supreme Court examined history to determine whether an international custom existed at the time of American independence regarding the ownership of the tidelands. Attempting to prove that maintenance for life was a customary law rule derived from generally accepted principles, the injured seaman in Farrell v. United States220 cited the laws of the Hanseatic Towns and early rules on the liability of a shipowner to a sailor maimed in an attack by pirates. The Court chose a contrary holding also based on agreed-upon principles.

A final example of the use of history is provided by Ivancevic v. Artukovic,221 where the court did not deal with the international law question of the relationship between state continuity and treaty rights and obligations but only with the factual issue of whether Yugoslavia was a new state. The court looked to certain historical evidence, including a pronouncement of Serbia in 1914 favoring self-determination, a statement by the Yugoslav Committee in London in 1915 for the unification of the Yugoslavs into one state, and similar statements by the Committee of Yugoslavs on the Island of Corfu in 1917 and by the National Council of Slovenes, Croats and Serbs in 1918, and a proclamation by the National Council of the unification of the various groups on November 24, 1918.222

It is easy to conclude from these cases that references to history to support generally accepted principles do not seem particularly useful. In several cases, such references appear to be little more than judicial frivolity. Citations to history may prove valuable on a question of fact, but no important question of customary law has been decided primarily on the basis of historical proof of long-approved principles in the period under consideration.

CONCLUSION

What are the reasons underlying judicial preference of one of the three major approaches—noninternational law, common law and customary law—in arriving at decisions? Certain conclusions present

218. Id. at 615.
220. 336 U.S. 511, 513-14 (1949); see text accompanying notes 123-34 supra.
221. 211 F.2d 565 (9th Cir.), cert. denied, 348 U.S. 318 (1954); see text accompanying notes 184-87 supra.
222. Id. at 565-69.
themselves. If the factual controversy presents an issue on which the political branches of the government have already expressed an opinion, the judiciary is reluctant even to consider the relevant questions of international law. This is particularly true where Congress or a state legislature has passed legislation on the subject in question. Immunity statutes are held conclusive of the immunity to be granted a foreign diplomat, his family and employees, regardless of what immunity he may possess under international law.

Where the court considers an issue a political one, involving the successful prosecution of the foreign affairs of the country, a determination by the Executive or the Secretary of State forecloses further judicial inquiry. The courts have ruled executive statements conclusive not only of the status of a foreign diplomat, but of the immunity to be accorded him as well. This contrasts sharply with the English and French procedure, in which the executive determines status but the courts determine the immunity under international law arising from such status. The United States courts seem more prone to arguments of policy and equity than perhaps they should be. Legal decisions on the basis of rules of customary law are often avoided by reference to policy requirements which the courts find no difficulty in rationalizing.

Finally, decisions based on rules of customary law are avoided where the issue at bar is directly related to the internal affairs of the nation. Thus, there are few references to international obligations in decisions in potentially politically inflammatory areas such as racial discrimination. To date, the negative prohibition of state discrimination in the fourteenth amendment to the Constitution has served to partially fill the gap between standards of morality recognized in the United Nations Charter and actual practice within the nation. The "state action" doctrine of the fourteenth amendment has been tortured and twisted out of all relation to its original meaning in judicial efforts to prevent attempts to circumscribe the anti-discrimination provisions of the amendment. However, the gap remains an open and festering wound which inevitably will have to be treated by the courts or the electorate in the not too distant future.223

223. However remote, the conceptual possibility exists that the courts could find the existence of a generally accepted rule of law requiring positive anti-discrimination by the nations of the world. There is certainly sufficient evidence for such a customary rule in the international treaties to which the United States is a party. The United Nations Charter provisions on equal rights and fundamental freedoms may not be enforceable as treaty obligations in American courts because they are not self-executing, see Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952), discussed in note 44 supra, but they may be enforceable as rules of customary law.

On a much smaller scale, decisions interpreting the Shipowner's Liability Convention
Cases decided on the basis of controlling rules of customary law differ markedly from the cases decided on noninternational law grounds. In nearly all these cases, no statute has been passed on the issue in question; no national policy conflicts with the customary rule; equitable considerations may be present but are considered not decisive; no question is presented that might embarrass the Executive in the conduct of foreign relations, and no issue of importance to the internal affairs of the nation is involved.

Consider, for example, three cases decided by the Court of Appeals of the Second Circuit. In Bergman v. De Sicyes,221 Judge Learned Hand decided the question of a diplomat's immunity while in transit on customary law grounds. The immunity statute did not cover diplomats in transit, and no mention was made of any expression of opinion by the State Department. In Bernstein v. Van Heyghen Freres Societe Anonyme,223 Judge Hand ignored the question of customary law, basing his decision not to inquire into the acts of a foreign state within its own borders on United States precedents. No justification was offered for the controlling rule, but the precedents made clear that the so-called "act of state" doctrine was followed to save the Executive possible embarrassment and to insure reciprocity on the part of foreign courts. Having formulated the controlling rule, the majority next sought but failed to find an executive policy indicating that the courts should entertain actions of this particular nature. Judge Clark, dissenting,226 disagreed only with the finding that no executive policy existed. In State

follow this line of thought. See, e.g., Farrell v. United States, 336 U.S. 511 (1949); Smith v. United States, 167 F.2d 550 (4th Cir. 1948), and Warren v. United States, 330 U.S. 523 (1941), discussed in text accompanying notes 127-133 supra. In these cases, the courts, including the Supreme Court, held that the convention, plus previously agreed upon principles, constituted a rule of customary law requiring states to enforce certain minimum standards in the treatment of national and foreign seamen by shipowners. Although the situations are distinguishable, there does not seem to be any adequate reason in law why states themselves may not be held to certain minimum standards in their treatment of citizens. Such rules do exist for the treatment of aliens.

By means of the 1950 Rome Human Rights Convention, signatory states bound themselves to certain minimal rights for citizens. See text in 45 Am. J. Intl L. Supp. 24 (1951). Individuals were given internationally enforceable rights even against their own states. A Human Rights Commission and a European Court of Human Rights were set up by the convention to hear and decide claims. The court's first case, a suit by an Irish national against Ireland charging illegal arrest for alleged membership in the Irish Republican Army, began Oct. 3, 1960. N.Y. Times, Oct. 4, 1960, p. 11, col. 1.

224. 170 F.2d 360 (2d Cir. 1948); see text accompanying notes 76-77 supra.

225. 163 F.2d 246 (2d Cir.), cert. denied, 33 U.S. 772 (1947); see notes 65-67 and accompanying text.

226. Id. at 253.
of the Netherlands v. Federal Reserve Bank, 227 Judge Clark applied customary law in a dictum showing that an absent sovereign could validly legislate for occupied territory. As in Bergman v. DeSieyes, the rule of customary law was not opposed by a statute, a national policy, the conduct of foreign relations, or the internal affairs of the nation.

It may be concluded from the analysis in this article and the brief survey of these three cases that most issues decided on the basis of customary law in the United States courts are issues on which no other grounds for the decision seem controlling. Essentially, the courts treat customary international law as a subsidiary source of rules of law.

The next question that should be asked is: Do the state and federal courts differ in their outlook toward customary international law? More than seventy cases have been studied in this article. Of these, twenty-one involved more or less detailed investigation of pertinent customary law issues. Nineteen of these cases were decided by federal courts. The proportion of cases decided in the federal and state courts based either on a simple statement of an international law rule or on noncustomary law rulings is twenty-seven to twenty-three. In order not to distort the results of this tally, it should be noted that eight of the noninternational law decisions decided in state courts involved only one problem—the question of diplomatic immunities. Taking into account this repetition of cases on one point, it is still obvious that on the simple level of numerical comparison state courts are much more reluctant to venture into the field of customary law than are the federal courts.

Keeping the use of rules of customary law in judicial decision-making in proper perspective, what evidence of the existence of rules of law appears most persuasive? The courts frequently refer to multilateral conventions in determining that a general consensus of thought exists among nations sufficient to form a binding rule of customary law. There does not seem to be any real difference between conventions which have been ratified by the United States and those to which the United States is not a party. Nor does there seem to be a significant distinction between conventions which have come into force and those which have not received sufficient ratifications, several cases citing the latter as grounds for a rule of law. The courts have not established any rule requiring a specific number of accessions before a convention will be considered binding on nonsignatories as an expression of the common consent of civilized nations. In fact, in none of the postwar cases does a court inquire into the actual number of ratifications or the composition of the ratifying nations.228

227. 201 F.2d 455 (2d Cir. 1953).
228. For example, it might be worth considering the geographic acceptance of a con-
Two related factors do seem to be of at least minor importance in judicial analysis of international conventions. The more significant of these is whether or not the court considers the convention merely declaratory of already existing general principles. The second is whether the convention expressly states that its provisions are drawn up in accord with accepted principles. In *Bergman v. Dr. Sieyes*, the Second Circuit held a Latin American convention, which only several nations had ratified, binding as an expression of a rule of customary law because of a statement in the preamble that the convention was drawn up in accordance with principles generally accepted by all nations. Where a convention is considered declaratory of already existing principles, the courts do not feel bound to interpret the convention strictly. On the other hand, where the convention itself is the source of the customary rule, the courts show a greater inclination to interpret the convention literally.

From these conclusions, it is evident that no hard and fast rule on the use of international conventions as evidence of a rule of customary law can be safely suggested. International conventions offer a fertile source of evidence in determining whether a rule of law exists. However, because there is no accepted definition of the requirements for a customary rule, the courts are free to wallow in this quagmire of evidence and to draw whatever conclusions they wish. It could be suggested that the courts rarely find international conventions decisive on the question of the existence of a rule. Rather, in most cases, conventions appear to be convenient pegs on which to hang a sticky decision.

Similarly, foreign court decisions and the writings of international law publicists, although frequently cited, are rarely decisive of the issue of law. Often it is impossible to tell whether the courts are truly persuaded by foreign court decisions or publicists or whether they merely select those writers or decisions which favor the point of view they intend to adopt. In *State of the Netherlands v. Federal Reserve Bank*, it seems probable that foreign court rulings were used as an argument to bolster an already made decision. The district court, on the authority of a Greek decision, held that the view prior to World War II was that...
an absent sovereign could not validly legislate for occupied territory. The court of appeals cited other foreign decisions for a contrary holding and concluded that the Greek case was a single aberration in world practice. In *Ivancevic v. Artukovic*, the Ninth Circuit cited American and English publicists for its view and noted in passing that continental authorities take the opposite side of the question. The ultimate in the use of foreign decisions as the basis of a rule of law appears in *American Transatlantic Co. v. United States*, where the Court of Claims found a rule of international law on the basis of English decisions, since no other grounds for disposing of the case seemed possible.

Next to international conventions, foreign court decisions and the writings of international law authorities are most often cited as evidence of the existence of a rule of customary law. It is worth noting that the United States courts refer to English and continental practice almost exclusively in the period under consideration. Only rarely do the courts cite a non-European decision or publicist. As far as these two types of evidence are concerned, then, the American courts apply international law as interpreted by a small homogeneous group of nations. Undoubtedly, the courts should be encouraged to attempt a broader and more inclusive analysis of both publications and foreign court practice in determining upon the existence of a rule.

Diplomatic communications, statements by the executive branch, legislation, failure to protest, and history are subsidiary means for proving a rule of law and are infrequently employed. Occasionally, such proofs are mere embellishments, as in *Aboitiz & Co. v. Price*, where the court thought it necessary to indicate that a Venetian Doge issued leather occupation money at the siege of Tyre in 1122. In contrast to such judicial frivolity, these five means of proof occasionally add weight to an opinion, although they never appear to be decisive of a controversy. Analysis of diplomatic communications, executive statements and legislation is confined to even a smaller group of nations than in the case of judicial consideration of foreign court practice and the writings of law authorities.

Finally, generally accepted principles seem particularly persuasive to the courts as evidence of a rule of law. The step from generally agreed-upon principles to a rule of customary law is an exceedingly narrow one. The rule of law follows directly from the existence of accepted principles. Where no obvious common agreement exists from

231. 211 F.2d 565 (9th Cir.), cert. denied, 348 U.S. 818 (1954).
232. 113 Ct. Cl. 484, 83 F. Supp. 832 (1949); see text accompanying notes 169-70 supra.
the available evidence, the court must initially attempt to construct such a general agreement. Only then can it find the existence of a binding rule of law. Since the basic problem confronting the courts is this intermediate step of finding a general consensus sufficient to form a rule of law, cases in which generally accepted principles are obvious do not present particularly difficult questions.

Where no generally accepted principles appear evident at the beginning of the court's analysis of an issue, it must plunge into a morass of evidence in attempting to prove or disprove the existence of an agreed-upon custom. The problem of too extensive evidence is further complicated by the lack of an authoritative definition of the requirements for a rule of customary law. Some standard is definitely desirable. Although a rigidly inflexible standard would merely serve to handicap the courts to a greater degree than they already are, since no standard could possibly include the many diverse factors that make up a rule of law, some attempt should be made by the judiciary to clarify the framework within which the courts analyze issues of customary law.

It is easy to theorize about the great need for a world society based on law to ameliorate and perhaps solve many of the conflicts in present-day international relations. The step from theory to the realization of a rule of law across national boundaries, however, is an extremely difficult one. The judicial systems of the nations of the world necessarily must play a major part in developing an effective world legal system. Courts must approach problems of international law constructively, by clearly attempting to discover the common usage of nations. Customary international law issues must be faced. International law rules should not be employed solely as a last resort after other bases for decision have proven inapplicable. Where the issue before the court is novel, the court should attempt through its decision to develop an acceptable rule of law.

Undoubtedly, different courts and different nations will continue to disagree on just what the common usage of nations is on any particular issue. Such disagreement is not only inevitable, but it is beneficial. Disagreement on rules of customary law prevents the rules from becoming brittle and ensures that they will be flexible enough to satisfy the ever-changing demands of modern international society.

The American judicial system has an important role to play in the progression toward a world rule of law. By setting up a framework within which to analyze issues of international practice, the courts cannot help but be more successful in discovering just what the practice of nations actually is on controversial points. Beyond the merits of any actual case, however, a standard for analyzing evidence and finding
customary rules will hopefully add to the strength of the foundation on which nations are attempting to develop an international society based on law. Replacing the present random methods for discovering the common usage of nations with a more standardized procedure will serve notice to the world that henceforth American judicial decisions on questions of customary international law will clearly represent the established practice of civilized nations.