

AN EXPERIMENT IN INTERNATIONAL JUSTICE A BOOK REVIEW*

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WE ARE soon to be confronted for the second time in the first half of the twentieth century with the problem of organizing the world so as to maintain peace, at least long enough to give civilization a chance to recover from a devastating world conflict, and to afford mankind an opportunity to resume that march of progress which was so rudely interrupted in 1914. If man could not learn anything from the past, then there would be little hope for the future; yet, it is not utopian to believe that the lessons of history may not go wholly unheeded, and that when the moment comes, after an Allied victory, for world reconstruction, the experiences of the past may count in the reorganization of the relations between the nations.

Between 1919 and 1939 a great experiment in organizing the judicial settlement of international disputes was attempted and was attended with a very considerable measure of success. For the first time in history a Permanent Court of International Justice, fully organized and implemented, functioned freely and rendered judgments and opinions in controversies among the civilized nations. This is an experience too precious and too important to ignore, and, whatever form an international settlement takes, one cannot doubt that there will at least be an equivalent, if not a retention and amplification of the Permanent Court of Justice. As our author, Judge Manley O. Hudson, says:

Circumstances make it impossible to foretell when and how the activities of the Court will be resumed, but it seems unthinkable that this twenty years of human experience will be disregarded in the course of the events which are to come. Whether as a history of the past or as a guide for the future the author ventures to hope that this volume may serve as a starting point for the investigations of those who are interested in the administration of international justice according to law.¹

It is, indeed, fortunate that this tribunal has had as one of its members so capable a recorder and so devoted an historian of its activities as Judge Hudson. From the beginnings of the Court, as professor of international

* Manley O. Hudson, *The Permanent Court of International Justice*. New York: The Macmillan Company, 1943. Pp. xxiv, 807. \$7.00.

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¹ Hudson, *The Permanent Court of International Justice* vii (1943).

law at Harvard University, our author has followed with meticulous care and scrupulous accuracy the life of the Court. Writing annually of its work, he has kept before the lawyers and publicists of the world the ever-growing importance of the Permanent Tribunal of International Justice.

In 1934, the author published a treatise on the Permanent Court of Justice. Since then, changes and developments in the Court have called for an elaboration of the earlier treatise, and at present we have before us a complete work upon the Court, which is indispensable to those who must deal with the future of judicial settlement of controversies among the nations. As the author says:

The present treatise is based upon a conception of the work of the Court as a continuation of the process of international adjudication which began to be developed during the nineteenth century, and it is assumed that in spite of its present inactivity the Court is assured of a continuing existence.²

In endeavoring briefly to review so detailed and important an historic work, we can do little more than sketch the main points therein treated and give a general outline of the Court in its organization, functioning, and accomplishment. To understand the creation of the Permanent Court, one must realize that it is a culmination and a continuation of generations of effort to bring about the judicial settlement of international disputes. In that effort the United States has played a leading role. While our author begins his account of the origins of the Court with the creation of the Permanent Court of Arbitration at the Hague, it is not irrelevant to mention some of the earlier efforts at arbitral justice.

Whatever the lawyer, as an individual, may think regarding American foreign policies, he cannot but be interested in the solution of international controversies through methods of law and justice rather than determination through military force. However men may differ, and they do most widely, in regard to the philosophy and teachings of history, we of the bar cannot but feel that throughout the long ages in the struggle for civilization the march of progress has been marked by the substitution of law for force, of reason for violence, and of the methods of the lawyer for those of the soldier. It is only in the early nineteenth century that the last offender offered "trial by battle" as a method of determining his rights under English law. This strange survival of an earlier age, obsolete, but not wholly dead, had lingered on, in theory at least, if not in fact, until a little more than a century ago. That method within the jurisdiction of civilized nations has been abolished. The last remnant of self-help in the form of the duel became first unfashionable and finally illegal. The resort to vio-

² Ibid.

lence is now restricted to the revolutionist, the anarchist, or the common law criminal.

Far different has been the situation among the nations. In the ancient world, arbitration among the Greek cities and states had been known, and in the Middle Ages the Papacy, as a great spiritual power, had composed quarrels between potentates or peoples through mediation. But with the breakdown of the unity of Christendom, this method became exceptional, and Grotius, the father of international law, devoted a great portion of his magisterial work to the laws of war and the distinction between what he termed "good and bad wars."

Yet the distinction between good and bad wars was never really accepted. The nations continued to be thought of as sovereignties wholly independent of each other. The doctrine of the divine right of kings, impaired by the English revolution of the seventeenth century and shattered by the great French Revolution, was transferred, under different phraseology, to the states themselves. Beyond and above the state, there was no law or arbiter. A rather vague thing called the comity of nations did exist, and during the nineteenth century was developed by publicists and by a series of important arbitral decisions. The Congress of Vienna promulgated some rules as to international rivers, and the Congress of Paris in 1856 laid down some rules as to maritime warfare; but no machinery existed for the general development of international law.

The Jay Treaty in 1795 between the United States and Great Britain was a great step in the development of arbitration. The commissions appointed by that treaty decided many burning questions growing out of the severance of the thirteen American colonies from Great Britain, and settled, through lawyers' methods, many questions similar to those which had in the past frequently led to war. The successful settlement in 1872 of the controversy between Great Britain and the United States over the Alabama claims created in both those countries a keen interest in arbitration, and it then began to be recognized that all disputes among the English-speaking people could be settled by the methods of law rather than those of force.

The success with which the difficulties growing out of the Fur Seal Fisheries in the Bering Sea were settled in 1893³ and the successful conclusion of the Atlantic Fisheries case in 1910,⁴ which terminated the inter-

³ The Bering Sea Fur Seal Case, U.S. Foreign Relations App. I (1894), Moore, *History and Digest of the Arbitrations to Which the United States Has Been a Party*, c. XVIII, pp. 755-961 (1898).

⁴ North Atlantic Coast Fisheries, Tribunal of the Permanent Court of Arbitration (1910). Scott, *Hague Court Reports* 146.

national controversy over cod and lobsters, and which, as Lord Salisbury once remarked, had been "fighting words for a hundred years," gave great impetus to the movement. The main difficulty had always been that there was no court ready and prepared to hear cases, and that each controversy had to develop almost to the fighting point before the parties began to discuss the creation of an *ad hoc* tribunal.

For that reason, the question of a permanent court came up before the first peace conference at the Hague in 1899. This conference succeeded in reaching an agreement on the necessity for the pacific settlement of international disputes, and it created the so-called Permanent Court of Arbitration.

The defect in this tribunal is that, while it may fulfill a useful function, it is not a real court. It is a mere panel of the nominees of various governments who may serve as arbiters when chosen by the parties to a dispute. It has been useful in that a number of cases have been submitted to arbitrators chosen from the panel. It also held out to the world the possibilities of a real court and was influential in bringing about the creation of the present Permanent Court of International Justice.

An attempt to make the Court of Arbitration more real and more permanent was undertaken at the second peace conference in 1907, but failed because of the impossibility of obtaining an agreement on any proposed method of electing the judges. The dogma of state equality prevented the states from agreeing to a court in which their own judges did not sit.

Small states refused to agree to set up an international tribunal in which they would not have equal representation with America or Great Britain. An attempt was also made to establish a prize court, but this also failed. The idea of a permanent judicial body, however, was growing, and at the end of the first World War, when enthusiasm was high for averting another cataclysm threatening the destruction of civilization, popular opinion was insistent upon the creation of a world tribunal. In this situation, Article 14 of the Covenant of the League of Nations, which became part of the Treaty of Versailles, was formulated.

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

In pursuance of this Article, an advisory committee of jurists was appointed by the Council which met in June, 1920, at the Hague, and made a report to the Council and the Assembly of the League proposing a per-

manent court of justice with a complete organization as to its membership, functionings, and procedure. This report was approved by the Council and the Assembly and submitted as a protocol to the members of the League. It was ratified by the members; and by 1942 fifty-nine nations of the world, including all the great powers, save the United States and Russia, had signed it.

This event surely seemed to mark a real epoch in the development of organized society. The obstacle which had theretofore prevented the formation of any permanent tribunal was overcome by adopting the suggestion of Elihu Root, jurist and statesman. Under the statute of the Court, the original judges, fifteen in number, were elected for nine years, and a new election of judges was made under a revision of the statutes in 1930. That statute provides:

ARTICLE 4. The members of the Court shall be elected by the Assembly [of the League], and by the Council [of the League], from a list of persons nominated by the national groups in the Court of Arbitration. . . .

Thus, the machinery of the old Hague Court of Arbitration was utilized in part for constituting the new Court. Acting under this machinery, the American group in the old Court has made nominations; and thus we have had four eminent Americans sitting as judges upon the Court, although the United States never adhered thereto. The names of these judges are: John Bassett Moore, Charles E. Hughes, Frank B. Kellogg, and Manley O. Hudson.

It was through this utilizing of the machinery of the League for the election of judges that the difficulty was overcome and that the smaller nations, acting through the Assembly, obtained an equal right with the larger powers represented in the Council to a voice in the choice of judges. Moreover, if parties to cases before the Court find that they are not represented by judges of their own respective nations, a judge may be nominated *ad hoc* by any unrepresented party sitting with the Tribunal.

Adherence to the protocol did not compel acceptance of the jurisdiction of the Court in justiciable cases, but merely committed the adhering nations to an approval of the Court, its utilization when desired, and participation in the election of judges and in the financial maintenance of the Court. Nonmember nations were allowed to avail themselves of the facilities of the Court when they so elected.

There is, however, another form of adherence provided in the so-called "optional clause" of the statute which is more far-reaching. This is a distinction which should be borne in mind but which is often, I think, for-

gotten by those who discussed the question as to the adherence of the United States to the Court.

Mere adherence to the Court by the United States as advocated by our successive presidents since its formation would have entailed no obligation to resort to its jurisdiction. The adoption of the "optional clause," however, is an entirely different matter, and the nations which adopt the "optional clause" obligate themselves to submit to its jurisdiction in matters falling within its competence.

This clause contained in Article 36 of the Covenant provides that:

The Members of the League of Nations and the states mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or state accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

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

The above category of matters which are deemed to be justiciable in international relations is of highest interest and importance. It tends to solve a question that has long perplexed those who have sought for a permanent method of insuring the arbitration of legal controversies. It is generally recognized that there are two types of international controversies: those that may be determined by rules of law, and those that arise out of international interests for which there is no rule of law and no solution except diplomatic arrangement, either between the parties or through the intermediary of other nations.

This, however, is the first time that the nations have agreed upon a definition of those matters which are justiciable; and it can be readily seen that the field is broad and may include a large number of the controversies constantly arising between governments.

Another very interesting and important section is that which determines what law shall apply. As many opponents of the Court have claimed that there is really no international law because it is not codified, this section is of peculiar interest to lawyers. It reads as follows:

ARTICLE 38. The Court shall apply

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

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

[ARTICLE 59 provides that: "The decision of the Court has no binding force except between the parties and in respect to that particular case."]

It is interesting to note that some fifty-six states signed this "optional clause." Among these states are France, Germany, Great Britain, Belgium, and Canada. Surely, it seemed a great stride in the advancement of law when such great powers joined with the smaller powers of the world in accepting the compulsory jurisdiction of an international court.

The jurisdiction of the Court, however, is of two kinds: contentious cases and advisory opinions, as provided by Article 14 of the Covenant:

The Court may be called upon by the Council or Assembly for an advisory opinion upon any dispute or question referred to it by them.

Practice has shown that the Court does not necessarily render such an advisory opinion when so called upon but may refuse to do so at its own discretion.

Twenty-seven advisory opinions have been rendered, each of them in regard to some difficult question of international law. The practice of the Court has been to treat advisory opinions in the same way as opinions in contentious cases, i.e., to hear publicly and fully all the parties affected and to give them all the procedural advantages given to actual litigants. This procedure of the Court has been formally adopted in an amendment to the statute, and any objection arising from the fact that advisory opinions might have been merely discussed *in camera* and rendered without fullest publicity is wholly without foundation.

The Court has seemed thus firmly established. It has maintained a high standard of excellence in its personnel, and dignity in its procedure. Its jurisdiction is specifically referred to in many treaties dealing with a great variety of matters, and its existence has thus become imbedded in the general treaty law of Europe, which has assumed such an important role since the close of the first World War that it constitutes a kind of international legislation.

The Court has already delivered, in addition to advisory opinions, some important judgments in cases submitted to it. The first judgment, rendered in 1923, involved the important matter of the freedom of the Kiel

Canal. Later judgments involved the interpretation of treaties such as those affecting the rights of Germans and Poles in Upper Silesia, questions arising out of the Palestine mandates, the payment of Serbian and Brazilian loans, the interpretation of the Treaty of Versailles in regard to the boundary questions between France and Switzerland, problems relating to the territorial jurisdiction of the International Commission of the River Oder, and the status of Eastern Greenland, an old and bitter controversy.

Perhaps the most criticized of the Court's decisions was that which resulted in an advisory opinion on the matter of the proposed Austro-German Convention.⁵ The question of law involved as to whether the particular arrangement was obnoxious to the clause of the postwar treaties against the alienation of Austrian independence was one of great nicety about which lawyers might well differ. There was much to be said for either interpretation, and any court might find itself divided in such a case, a thing which happens not infrequently in our own Supreme Court. Some of us remember, for example, that the meaning of the simple words "United States" created such divisions in the Supreme Court in the *Insular Cases*⁶ that no permanent definition was able to satisfy a majority until after some twenty years or more of discussion and adjudication.

It can thus be seen that a wide range of cases, every one of them fraught with possibilities of much ill feeling and possible war between nations has been dealt with.

These cases involved important problems of international law, and the Court was slowly but surely building up an international jurisprudence which will be of real value for the future and which may furnish useful precedents for the codification of various branches of international law.

From the standpoint of the lawyer, perhaps the most interesting case was that of the *Lotus*, a French mail ship which collided with a Turkish vessel in the Aegean Sea five miles from land. The officer in charge was prosecuted in Constantinople under the Turkish law. He denied the jurisdiction of the Turkish courts, but the jurisdiction was upheld and he was sentenced to imprisonment and fine. The French government protested against this action and brought the matter before the Court, and the judgment was as follows:

The principles of international law contain no prohibition against a state's taking jurisdiction to punish a national of another state, who enters its territory voluntarily,

⁵ Publications of the Permanent Court of International Justice, Series A/B, No. 41 (1931).

⁶ *Balzac v. Puerto Rico*, 258 U.S. 298 (1922); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901).

for an act done in connection with a collision between the vessels of the two countries, resulting in the death of citizens of the first.⁷

In this case, judgment was reached by a vote of six to six, on the casting vote of the President; Judge John Bassett Moore dissented in a most interesting opinion, but solely on the ground of the nonapplicability of the Turkish Penal Code. He concurred in the judgment of the Court on the major proposition that there is no rule of international law by virtue of which the penal cognizance of a collision at sea, resulting in loss of life, belongs exclusively to the country of the ship by which the wrong was done.

The interesting Advisory Opinion, Number 4,⁸ was one dealing with a dispute between Great Britain and France over French nationality decrees in Tunis and Morocco. It was held that, although nationality questions in general fall within a state's domestic jurisdiction, yet by reason of certain treaties there involved, these nationality questions might be a matter of international law and therefore not solely a matter of domestic jurisdiction. The case involved the very interesting question of whether certain treaties had lapsed as a result of the principle of *rebus sic stantibus*.

It thus appears that the Court has been actively dealing, almost from the time of its organization, with matters of pressing international controversies, and has done so very successfully and with far less general criticism than attended the decisions rendered by our own Supreme Court in its early days.

Our author discusses very briefly and quite objectively the long attempt to obtain the accession of the United States to the Court and the unfortunate result which prevented the United States (whose historic role in developing international law and international justice had been so important) from becoming a member. Since the controversy is now dead, these matters are now, of course, of little more than academic and psychological interest. The tendency of many Americans to believe that the United States can remain aloof from the major problems affecting world peace must have been greatly minimized by the present conflict, and there is now every reason to assume that public opinion will insist upon American participation in a Permanent Court of International Justice adequately organized to deal with all legal controversies between nations.

Our author does point out, however, that so far as the work of the Court was concerned, the importance of American participation was much exaggerated. As he so justly says:

⁷ The Lotus Case, Publications of the Permanent Court of International Justice, Series A, No. 10 (1927).

⁸ Ibid., Series B, No. 4 (1921).

If in a few cases during the decades following 1922 the United States might have gone before the Court as a party, this would not have added greatly to the Court's prestige. The desire of the Signatory States for American participation was probably based in part upon the hope that it would lead the United States to play a larger role in international cooperation.

It is equally true, on the other hand, that the course followed by the United States was largely dictated by exaggeration. In American opinion, mere participation in maintaining the Court was viewed as the assumption of an important role in cooperation to maintain the world's peace; a different estimate would doubtless have prevailed if the United States had been a member of the League of Nations. "Membership in the Court" appeared as a substitute for membership in the League or as leading necessarily toward the latter; in spite of the American Government's past record in urging the establishment of a Court, the step was looked upon in some quarters as one of involvement. This caused the fears expressed in the Senate, and a seeking of a very special position for the United States. The spirit of nationalism prevailing led not only to unfounded criticism of the structure and work of the Court, but also to a distrust of the purposes which it might be made to serve.⁹

As the author has so clearly pointed out, the great difficulty in the organization of an international tribunal consists in finding a method for the appointment of judges satisfactory to the nations. It was impossible to reach this result until the League of Nations was organized, and unless that League is revived or some substitute or equivalent organized by the community of nations in the future, the difficulty remains.

It is obvious that a permanent court with compulsory jurisdiction must be one of the main objectives to be attained in organizing for a peaceful world; but such a court cannot possess a compulsory jurisdiction which would be other than nominal unless back of the court there is an organization of the nations ready to sustain, by preponderant force if need be, international law and the judgments of the court rendered in pursuance of that law.

We can no longer rest under the gentle delusion that world public opinion will compel respect for international law. Until the more powerful and civilized nations of the world are ready to make the sacrifices and assume the responsibilities necessary to make good their commitments, the court can never effectively discharge the functions for which it is intended. A world of law implies a world in which the aggressor and the apostate from law must be curbed by force when need be. International law must remain a primitive and merely customary law until aggressive warfare becomes a crime punishable by the community of nations. Two world wars within one generation should have conclusively taught this simple lesson.

⁹ Hudson, *The Permanent Court of International Justice* 237-38 (1943).