

THE EVOLUTION OF A WORLD COURT

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The progress towards the establishment of a world court has naturally been slow. It was necessary that some nations must combine to set up such a tribunal for themselves, before all nations could combine to set up one for the world.

The first real step in this direction in modern Europe was taken in the treaty of 1804 between France, owning the left bank of the Rhine, and the States constituting the Holy Roman Empire, owning the right bank, to frame and enforce regulations for the navigation of the river. An international commission of three members was created for this purpose, to meet annually at Mayence. France named one of the Commissioners, the Empire another, and the third was to be a jurist selected by the other two.

From that day the commerce of the Rhine, in time of peace, has been regulated by some such tribunal.

In North America the confederacy of the old Thirteen States under the name of the United States of America, in 1781, was the first governmental union of sovereign States. In Central America, in 1907, a closer union was organized by a treaty between five sovereign States, carrying judicial powers to be administered by a court in which each of the five appointed a judge. This "Central American Court of Justice" was to run for ten years, subject to renewal, but in 1917 no renewal took place.

Before the negotiation of the Central American treaty of 1907, the first of the two Hague Peace Conferences had been held. At this about half the world was officially represented, and a convention was adopted, *ad referendum*, under date of July 29, 1899, for the "Pacific Settlement of International Disputes," which established a "Permanent Court of Arbitration." This convention was duly ratified by 44 Powers and is still in force. It went into effect, by the due exchange of ratifications, on September 4, 1900. The second Peace Congress of 1907 proposed a few alterations in its provisions, which were ratified in due course, as incorporated in a revised convention dated October 18, 1907.

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Each of the constituent Powers was to name, and did name, not exceeding four members of the court. All those chosen became a standing panel from which Judges to try cases could be selected. They were to be persons "of known competency in questions of international law" and of "the highest moral reputation."

The mode of appointment by each nation was left to its own choice.

This resulted in the creation of a very able set of men to constitute the panel. Among those selected have been the late Dr. Estanislao Zeballos and Dr. Carlos R. Larreta of Argentina; Count Albert Apponyi of Hungary; Dr. Ruy Barbosa of Brazil; Dr. Alejandro Alvarez of Chili; Dr. Wu Ting Fang of China; Dr. Leon Bourgeois and Baron d'Estournelles of France; the late Professor von Bar of Germany; Sir Edward Fry of England; Senator Tommaso Tittoni of Italy; Baron Motono of Japan; the late Dr. T. M. C. Asser of the Netherlands; Baron Taube of Russia; Dr. Eugene Huber of Switzerland; and from the United States, the late Chief Justice Fuller, the late President Harrison, and Judge Gray.

The United States and England would have preferred a smaller panel, but Germany stood out for four members from each Power, in order to give room for the appointment of some who were not lawyers or jurists.¹

A special tribunal of five of these members of the Court is to be formed to try each case that may be presented. Any nations that are parties to a dispute may agree on five such "arbitrators." If they cannot agree on the five arbitrators, each Power may appoint two, and the four thus named are to choose an umpire. If the votes are equally divided, the choice of the umpire is intrusted to a third Power, selected by the parties by common accord. If an agreement is not arrived at on this subject each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected. If within two months' time; these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court of Arbitration, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be umpire.

The object of the court is briefly indicated in the preamble to the convention which created it. The parties to the convention

¹Holls, *The Peace Conferences at the Hague*, 260.

adopted it because they "recognized the solidarity uniting the members of the society of civilized nations"; desired "to extend the empire of law and strengthen the appreciation of international justice"; and were convinced that the permanent institution of an arbitral jurisdiction accessible to all "would contribute efficiently to that result." They added (Article 41) that the new court should be accessible "at all times." This was the soul of the project. It was to set up such a court as would be accessible to all civilized nations at all times. All such nations were therefore invited to adhere to the convention.

The first case brought before the Permanent Court of Arbitration was docketed in 1902, and the number of controversies submitted to it and decided by it up to the breaking out of the world war in 1914 was sixteen. The seat of the tribunal is at the Hague. There it maintains a permanent secretarial bureau, and sits in a splendid court house, built by an American citizen, Andrew Carnegie, as a contribution to the promotion of international peace.

In the treaty of peace negotiated at Versailles in 1919, it was proposed by the victors in the war to establish with the co-operation of neutral Powers, another court, which should be more distinctly a court of international law. The treaty, in its provisions for a League of Nations, did not abrogate the Hague Tribunal. On the contrary the Covenant of the League provides as follows (Art. 21):

"Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace."

The signatories of the Convention of 1907 for the Pacific Settlement of International Disputes thereby entered into "international engagements," in a "treaty of arbitration," for securing the maintenance of peace.

By another article of the Covenant of the League (Art. 13) the members

"agree that whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration. Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration. For the consideration of any such dispute

the court of arbitration to which the case is referred shall be the Court agreed on by the parties to the dispute or stipulated in any convention existing between them."

The Hague Tribunal is certainly a court stipulated for in a convention between all or any of the Powers that were parties to the Hague convention of 1907.

The League of Nations came into being in January, 1920.

The Covenant of the League contemplated the creation of a new court. Its functions are determined mainly by Article 14 which reads as follows:

"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."

Under this authority, the Council of the League appointed, at one of its first meetings, an advisory committee of jurists, to recommend suitable plans for creating and commissioning the new court. The members of this committee were mainly of nations already adhering to the Covenant of the League, but an exception was made as respects the United States, Elihu Root being invited to act on the committee, and accepting the invitation.

On July 23, 1920, this committee made its report. This draft scheme was largely the work of Mr. Root and Lord Justice Phillimore of England. It contains sixty-two Articles.

The first two are as follows:

"ARTICLE 1

A Permanent Court of International Justice, to which parties shall have direct access, is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organized by the Hague Conventions of 1899 and 1907, and to the special tribunals of arbitration to which States are always at liberty to submit their disputes for settlement.

"ARTICLE 2

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

There are to be not exceeding fifteen Judges and six Deputy Judges. Every Judge is to sit in every case unless otherwise expressly provided. If in any case eleven Judges cannot sit, Deputy Judges are to be called in.

The Court forms annually a chamber of three Judges, and any case may be heard in this Chamber by consent of the parties.

Judges are elected by the Assembly and the Council voting separately. They must be nominated by the members of the Permanent Court of Arbitration in each nation which is a member of the League of Nations, acting as a national group. No such group can nominate more than two persons. Nominees may be of any nationality. Before making nominations, each group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

The electors are to bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.

Should more than one person of the same nationality be elected, the eldest only shall be deemed elected.

If there is a failure to elect after three trials, a joint committee may be formed, at the request of either the Assembly or the Council, to make a new nomination for each vacant seat. They may, by unanimous agreement, nominate one not on the original nomination list. If no election follows the action of the committee, the members of the Permanent Court of International Justice previously elected may fill the seats from those nominees who have obtained votes either in the Assembly or the Council. Should there be an equality of votes among such Judges, the eldest Judge shall have a casting vote.

The Court meets annually at the Hague on June 15. It elects a President, who may summon special meetings, and a Registrar, who may also be the Secretary General of the Permanent Court of Arbitration.

The matter of membership is thus judiciously treated in a scientific manner. The new court is built upon or evolved from the old.

Its scheme of organization departs from the old, however, in important particulars.

The parties do not select the Judges who are to hear their dispute from a very large panel of qualified persons. They agree to submit their dispute to the court, but the members of the court who are then to hear the case are not agreed on in advance.

Judges of the nationality (Article 28) of each contesting party retain their right to sit in the case before the Court.

If the Court includes upon the bench a Judge of the nationality of one of the parties only, the other party may select from among the Deputy Judges a Judge of its nationality, if there be one. If there should not be one, the party may choose a Judge, preferably from among those persons who have been nominated as candidates by a national group of the Court of Arbitration.

If the Court includes upon the bench no Judge of the nationality of the contesting parties, each of these may proceed to select or choose a Judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only.

If (Article 24), for some special reason, a member of the Court considers that he cannot take part in the decision of a particular case, he shall so inform the President. If, for some special reason, the President considers that one of the members of the Court should not sit on a particular case, he shall give notice to the member concerned. In the event of the President and the member not agreeing as to the course to be adopted in any such case, the matter shall be settled by the decision of the Court.

States not parties to the League of Nations may (Article 32) sue before the Court, on conditions determined by the Council.

Between States which are (Article 34) members of the League of Nations, the Court shall have jurisdiction (and this without any special convention giving it jurisdiction) to hear and determine cases of a legal nature, 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 reparation to be made for the breach of an international obligation;
- e. The interpretation of a sentence passed by the Court.

The Court shall also take cognizance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties.

In the event of a dispute as to whether a certain case comes within any of the categories above mentioned, the matter shall be settled by the decision of the Court.

If the dispute (Article 39) arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that circumstances so require, the provisional measures that should be taken to preserve the

respective rights of either party. This would seem to authorize a provisional interdict or injunction.

Whenever (Article 52) one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favor of his claim.

The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 33 and 34, but also that the claim is supported by substantial evidence and well founded in fact and law.

All judgments (Article 58) are final and without appeal. In the event of uncertainty as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Whenever the construction (Article 61) of a convention in which States, other than those concerned in the case, are parties, is in question, the Registrar shall notify all such States forthwith. Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be as binding upon it as upon the original parties to the dispute.

Submission to arbitration is not made compulsory, but (Article 52) judgment by default may be rendered when a case is properly brought and no defense put in.

The smooth interworking of the Permanent Court of Arbitration and the Permanent Court of International Justice is greatly facilitated by allowing the Registrar of the latter to be also made Secretary-General of the Permanent Court of Arbitration.

If this last scheme for a world-court is adopted, its practical success will depend largely on the personal qualities of the President. Great powers are given him, including the right to cast two votes in case the Judges are equally divided on any point.

The weak point in the scheme is that it aims to constitute at first a court for some nations instead of one for the whole Society of Nations. This is the necessary consequence of the fact that the League of Nations is now an association of some nations, only. So was the United States at its outset. It was an association of eleven States out of a possible thirteen. This, however, did not prevent a subsequent enlargement.

On the whole, the Root-Phillimore plan seems the best yet devised for a world-court and, if adopted by the League, will give good promise of success in its main end, which is to set up, in addition to the Hague Tribunal, another better adapted to the decision of legal points in legal fashion.

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