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JUDICIAL SETTLEMENT AND THE PERMANENT COURT OF INTERNATIONAL JUSTICE*

AMOS S. HERSHEY†

The main difference between arbitration and judicial settlement in international affairs seems to be that whereas "international arbitration has for its object the settlement of differences between states by judges of their choice,"¹ in real judicial settlement the parties in controversy submit their disputes to a permanent court or to judges who are not selected by them.

Since 1899 there has been growing dissatisfaction with the old Hague Court of Arbitration and in 1907 an attempt had been made to create a real permanent court—the so-called Court of Arbitral Justice—which failed owing to the inability of the States represented to agree upon a method of electing the judges.

The Covenant of the League of Nations provided (in Article 14) that "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 opinion² upon any dispute or question referred to it by the Council or by the Assembly."

The Jurisdiction of the Court (Voluntary).—In order to give effect to this mandate, the Council of the League appointed a Committee of Jurists which sat at The Hague during June and July, 1920, and

* The subject of this article is similarly treated in the forthcoming 2nd Edition of Professor Hershey's book, "The Essentials of International Public Law."

† See Biographical note, page 83.

¹ Hague Convention (1899 and 1907), Arts. 15 and 37.

² The majority of the judgments (using the word "judgments" in a broad or non-technical sense) of the Court of International Justice have thus far been in the form of advisory opinions which are looked upon askance in some quarters. But in giving these "opinions" to the Council, the Court seems to be performing a very useful and even necessary function. In one case—that of the dispute between Russia and Finland over the autonomy of the Eastern Carelia—the Court refused to give an advisory opinion on the ground that Russia, a non-member of the League of Nations, had expressly repudiated any attempted interference in this matter by the League. It held that this would be a violation of the independence of the State which is a fundamental principle of International Law.

The advisory opinions of the court appear to have a judicial character and with due deference to the contrary view of Judge Moore, in giving them the Court seems to be performing a judicial function. Advisory opinions are not unknown to the Anglo-American legal system. They have been freely given in Great Britain and in Massachusetts and a number of other American States.

formulated a plan by which the Court was to have, without any special agreement (or compromise), jurisdiction of cases of a legal nature falling within the four categories enumerated in Article 13 of the Covenant.³ Owing to objections made in the Council by Great Britain, France, and Italy, the Statute for the establishment of the Permanent Court which was finally approved by the Assembly of the League of Nations on December 13, 1920 merely provides (Article 36) that "the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force."⁴ Thus for compulsory jurisdiction in these cases there was substituted a purely voluntary jurisdiction.⁵

The Election of the Judges—The Draft Convention for the Court of Arbitral Justice proposed by the Second Hague Conference of 1907 failed of adoption because the Conference was unable to agree upon a mode of selection of the judges. An ingenious suggestion by

On *Advisory Opinions*, see especially: Bustamente, *The World Court*, ch. 14, *Court of Int. Justice*, 80-86, 136-59; and Moore's *Memorandum on Advisory Opinions*, in *Publications of the Court*, Series D, No. 2. See also *Rules of the Court*, Arts. 71-74 relating to advisory opinions. Judge Moore seems to have modified his views somewhat in *Int. Law and Current Illusions* 114-115.

³ These are: (1) the interpretation of a treaty; (2) any question of International Law; (3) the existence of any fact which, if established, would constitute a breach of an international obligation; and (4) the nature or extent of the reparation to be made for the breach of an international obligation. Art. 13, par. 2 of the Covenant.

⁴ But Art. 36 of the Statute further provides for what is known as the "Optional Clause" attached to a separate Protocol or treaty. "Any Power may declare that it recognizes as compulsory, *ipso facto* and without any special agreement, as regards any other Power accepting the same obligation, the jurisdiction of the Court in all or any of the categories above enumerated."

Art. 36 also contained the important provision that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

The Optional Clause had, on December 1, 1924, been signed by 23 States, including France, China and Brazil which were the most important Signatories in respect to size. The ratifications numbered 15. But the signature of France was contingent on the entrance into force of the Geneva Protocol.

On the *Optional Clause*, see particularly Hudson, *The Permanent Court of International Justice* (1925), *op. cit.*, (see index). For the text of the Optional Clause and a list of the States that have signed it, see *Ibid.*, 335-39.

⁵ The court may in a sense be said to have compulsory jurisdiction conferred upon it by treaty, not merely for those States that have signed and ratified the Optional Clause, but for the Signatories of the Paris Peace Treaties which confer on the new Court jurisdiction respecting ports, waterways, and railways, etc. The special treaties with Poland, etc., for the protection of minorities also give the Court a certain obligatory jurisdiction. For these and other instances, see Bustamente, 208-18; Faction, 71-84; Hudson, 20-21, 40-43, 119-123, 204, 221-222, 235-236. See also a publication by the Court (series D, No. 4) containing "extracts from International Agreements affecting the Jurisdiction of the Court" (1924).

Ex-Secretary Root enabled the Committee of Jurists of which he was a distinguished member to hit upon a plan for the election of judges which proved highly satisfactory. He suggested that inasmuch as there was a preponderance of the Great Powers in the Council⁶ and of smaller Powers in the Assembly of the League,⁷ a solution of the baffling problem might possibly be found in the election of judges by the concurrent vote of the assembly and the Council.

Accordingly, a scheme was devised that is too complicated for textual reproduction here, but which has thus far worked admirably.⁸

Composition of the Court.—The Permanent Court of International Justice⁹ consists of fifteen members—eleven judges and four deputy-judges.¹⁰ The members of the Court are elected for nine years and may be re-elected. “The ordinary Members of the Court may not exercise any political or administrative function.”¹¹ “No member of the Court can act as agent, counsel or advocate in any case of an

⁶ This is no longer the case as far as actual representation is concerned, since the decision of the Council of the League of Nations in Sept., 1922, to increase the non-permanent members from four to six—an action approved by the third Assembly.

⁷ For the argument of Secretary Root on this point, see 15 *A. J.* (1921), 2-6.

⁸ The judges are elected by the concurrent vote of the Council and the Assembly, acting separately, from a list of candidates nominated by the various national groups of members of the older Hague Court of Arbitration. For the exact process, see *Statute of the Court*, Arts. 4-12. The text of the Statute may be found, in Bustamente, 353 ff.; Hudson, 340 ff.; Moore, *Int. Law and Current Illusions*, 148 ff.; or Supp. to 17 *A. J.* (1923), 57 ff.

The results of the first election showed that the judges elected fully met the qualifications set by the Statute (Art. 2) that the Court “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 the respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in International Law.”

It is also declared that “the whole body should represent the main forms of civilization and the principal legal systems of the world” (Art. 9).

For lists of the judges elected, with some description of their qualifications, see Hudson, 366-68; and Moore, 105-108.

⁹ It should be explained that this Court is in addition to the Court of Arbitration organized under the Hague Conventions of 1899 and 1907 and to the special Tribunals of Arbitration to which States are always at liberty to submit their dispute for settlement” (Art. I of the Statute).

¹⁰ “The number of judges and deputy-judges may hereafter be increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of fifteen judges and six deputy-judges” (Art. 3). The deputy-judges are substituted for absent judges.

¹¹ Art. 16. But “this provision does not apply to the deputy-judges except when performing their duties on the Court.”

international nature."¹² "Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court."¹³

The Court shall sit at The Hague at least once a year, but the President of the Court may summon an extraordinary session whenever necessary. Nine judges constitute a quorum sufficient to constitute the Court.¹⁴ "The expenses of the Court shall be borne by the League of Nations."¹⁵

Competence of the Court.—"Only States¹⁶ or Members of the League of Nations can be parties in cases before the Court" which

¹² But "This provision only applies to the deputy-judges as regards cases in which they are called upon to exercise their functions in the Court."

"In interpreting the provisions of the Statute forbidding the judges to act as counsel in any case of an international nature, or to exercise any political or administrative function," the Court held that the political function exercised by Viscount Finley as a member of the House of Lords, and by Mr. Altamira as a senator, did not fall within this inhibition." Moore, *op. cit.*, 116.

"No member may participate in any case in which he has previously taken an active part, as agent, counsel, or advocate, for one of the contesting parties as a Member of a national or international Court, or of a commission of inquiry or in any other capacity." (Art. 17.)

¹³ But if the Court includes upon the bench a judge of one of the parties only or if the Court includes no judge of nationality of the contesting parties, provision is made for selection of national judges. Art. 31 of the Statute and Art. 4 of the *Rules of Court*. For these *Rules*, see Bustamante, 365 ff.; Hudson, 351 ff.; Moore, 161 ff.; or *Supp. to 16 A. J.* (1922), 173 ff.

¹⁴ Arts. 22, 23 and 25.

¹⁵ Art. 33. For information regarding the compensation of judges, see Moore, *op. cit.*, 110.

Arts. 26-29 provide for three classes of cases for the decision of which a full Court is not necessary: (1) The Court will appoint every three years a special chamber of five judges for the consideration of labor cases. (2) The Court will also appoint every three years a special chamber for cases relating to transit and communications. "With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure." (Art. 29.)

¹⁶ The projected International Prize Court had provided for appeals by enemy as well as neutral individuals on certain cases.

The Central American Court of Justice which was inaugurated in 1908 and lasted until virtually destroyed by its creator, the United States, 1918, had jurisdiction over cases arising between any of the Contracting Governments and individuals as well as between the Governments themselves. The five Central American States had also bound themselves to submit to this Court "all controversies or questions which may arise among them, of whatsoever nature, and no matter what their origin may be, in case the respective Departments of Foreign Affairs shall not have been able to reach an understanding." Arts. 1-3 of the Convention of 1907, in *Supp. to 2 A. J.* (1908), 231 ff. For comment see Scott in *2 A. J.* 140-43, and in *12 A. J.* (1908), 380-82. See *Supp. to 8 A. J.* (1914), 179-213 for "Regulations" and "Procedure" of the Court. For a brief survey of the inauguration and work of the Court, see *7 W. P. F.* (1917), No. 1, pp. 131-144. See also Bustamante, *op. cit.* ch. 5.

“shall be open” not merely to the Members of the League, but “also to States mentioned in the Annex to the Covenant.”¹⁷

“The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.”¹⁸

Law to be Applied by the Court.—Article 38 of the Statute declares: “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;

¹⁷ This provision appears to have been primarily intended to make it possible for the United States to participate in the work of the Court without joining the League of Nations.

¹⁸ Art. 35 which adds: “When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute towards the expenses of the Court.”

On May 17, 1922, the Council adopted a resolution laying down the conditions under which the Court shall be opened to States not members of the League or mentioned in the Annex to the Covenant. This resolution merely requires the previous deposit with the Registrar of the Court of a declaration accepting the jurisdiction of the Court, in accordance with the Covenant, Statute and Rules, and undertaking to carry out in good faith its decisions and not to resort to war against a State complying therewith. Such declaration may be either particular as respecting a particular dispute; or general, as embracing all or a particular class of disputes. For the text of the Resolution, see Hudson, 364-65.

On Feb. 17, 1923 Sec'y Hughes recommended that the Senate be asked for its consent to the adhesion of the United States to the Protocol of Dec. 16, 1920 on four conditions. These were: (1) that such adhesion shall not be taken as involving any legal relations to the League of Nations or obligations under the Covenant; (2) that the United States be permitted to participate in the election of judges; (3) that the United States pay a fair share of the expenses of the Court; and (4) that the Statute for the Court be not amended without the consent of the United States. To these reservations President Coolidge added another to the effect that the U. S. should not be bound by advisory opinions which it had not joined in requesting.

The objections to the Court in the United States have been based mainly on the idea that it is a League Court, *i. e.*, the creation or instrument of the League of Nations which, having been an object of misrepresentation for political purposes, is still anathema to many Americans. But the fact is, as Secretary Hughes has well pointed out, that “the Court is an independent judicial body with appropriate judicial functions and abundant safeguards for their proper discharge. It is not a servant of the League; and its decisions are not supervised or controlled by the League.” *Proc. Am. Soc. I. L.* (1923), 86.

On “America’s Relation to the Court” and the views of Harding, Hughes, Root, etc., see 17 *A. J.* (1923), 331-43; Hudson, *op. cit.*, 95-96 173 ff.; *Int. Concil.* (May, 1923), No. 186; *W. P. F. 5 League of Nations* series No. 5; adn 86 *Advocate of Peace* (1923), 169-187.

3. The general principles of law recognized by civilized nations;
 4. Subject to the provisions of Article 59,¹⁹ 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.”

It is added that “this provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”

Procedure of the Court.—French and English are the official languages of the Court.²⁰ Cases are brought before the Court either by the notification of the special agreement or by a written application addressed to the Registrar. The parties shall be represented by agents who may be assisted by counsel or advocates. Proceedings are both oral and written. The hearings are to be public, unless the Court shall decide otherwise or unless the parties demand that the public be not admitted. Minutes, which shall be the only authentic record, must be made at each hearing.

The deliberations of the Court shall take place in private and remain secret. All questions are to be decided by a majority of the judges present at the hearings and, in the event of an equality of votes, the President or his deputy shall have the casting vote. The judgment shall state the reasons on which it is based with the names of the judges who have taken part in it. Dissenting judges are entitled to deliver separate opinions. The judgment shall be read in open Court, and is to be regarded as final and without appeal.²¹

¹⁹ Art. 59 declares that the “decision of the Court has no binding force except between the parties and in respect of that particular case.” This seems to mean that the Court is not bound to follow its previous decisions, but of course they are certain to have great moral weight, as precedents.

²⁰ However, at the request of the parties, the Court may authorize another language to be used.

²¹ But in the “event of dispute as the meaning or scope of the judgment, the Court shall construe it upon the request of any party” (Art. 60).

“An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the court and also to the party claiming revision, always provided that such ignorance was not due to negligence.” (Art. 61.)

“Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party. It will be for the Court to decide upon this request.

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

“Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.” (Arts. 62 and 63.)

For the procedure of the Court, see Arts. 39-64 of the *Statute* and Arts 32-75 of the *Rules of Court*. Both are printed in Hudson, 340-65; and Moore, 147-78.

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

The Permanent Court of International Justice began its first session on January 20, 1922 and has already given a considerable number of advisory opinions and decisions of more or less interest. It promises to become an important organ in the pacific settlement of international controversies and the development of International Law.²²

On January 27, by a vote of 76 to 17, the United States Senate finally approved the resolution in favor of our Government's adherence to the Protocol of Signature of the Statute of the Permanent Court of International Justice with the following reservations:

"1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations, or the assumption of any obligations by the United States under the Treaty of Versailles.

"2. That the United States shall be permitted to participate, through representatives designated for the purpose and upon an equality with the other State members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the Council or the Assembly for the election of Judges or Deputy Judges of the Permanent Court of International Justice, or for the filling of vacancies.

"3. That the United States will pay a fair share of the expenses of the Court, as determined and appropriated from time to time by the Congress of the United States.

"4. That the United States may at any time withdraw its adherence to the said Protocol, and that the Statute for the Permanent Court of International Justice adjoined to the Protocol shall not be amended without the consent of the United States.

²² On Dec. 1, 1924 the States that had signed the Protocol of Signature numbered 48. The number of ratifications was 37. For a list of signatories see Hudson, 334 or *W. P. F. Yearbook* of L. of N. (1925), 581-82.

The most important advisory opinions have perhaps been those with regard to the Nationality Decrees issued in Tunis and Morocco, involving the meaning of "domestic" jurisdiction; the status of Eastern Carelia, denying the jurisdiction of the Court over Russia, a non-Member of the League; certain intricate questions arising out of the application of the Polish Minorities Treaty to German settlers in Poland; and a recent opinion to the effect that, under the Treaty of Lausanne, the Council of the League had the right to fix the boundaries of Mosul in Iraq.

The most important judgment or decision has been that of the S. S. Wimbledon, respecting the freedom of the Kiel Canal.

For lists of judgments and advisory opinions given prior to 1925, see Hudson, 369; and *Yearbook*, *op. cit.*, 583-84. For discussions of cases, see Bustamante, Ch. 15; *Fachiri*, Cr. 5; Hudson, *passim*; 2 Kellor, *Security Against War*, chs. 27-23; and Moore, *op. cit.*, 119-40. For the text of the opinions and decisions, see Publications of the Court, *Series A.* and *B.*

"5. That the Court shall not render any advisory opinion, except publicly after due notice to all States adhering to the Court and to all interested States, and after public hearing given to any State concerned; nor shall it without the consent of the United States entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.

"The signature of the United States to the said Protocol shall not be affixed until the powers signatory to such Protocol shall have indicated through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adherence by the United States to the said Protocol.

"Resolved, further, as a part of this act of ratification, that the United States approve the Protocol and Statute hereinabove mentioned, with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other State or States can be had only by agreement thereto through general or special treaties concluded between the parties in dispute; and,

"Resolved, further, that adherence to the said Protocol and Statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with or entangling itself in the political questions of policy or internal administration of any foreign State; nor shall adherence to the said Protocol and Statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions."

These reservations are for the most part quite harmless or mere surplusage. It goes without saying that adherence to the Protocol does not involve us in any legal relation to the League of Nations. The Court is a separate organization and entirely independent of the League except in the matters of expenses, advisory opinions, and the election of judges from a list furnished by the national groups which constitute the list of members of the old Hague Court of Arbitration. Naturally, we wish to pay our share in the expenses of the Court and participate in the election of judges "upon an equality" with other members of the Council and the Assembly of the League.

The "right to withdraw" exists without the reservation on this point, for a treaty of this sort which merely sets up an international institution may be denounced at any time by any party to the agreement.

The fifth reservation relating to advisory opinions is the only one that may cause serious trouble. There was much less objection to this reservation in the form originally proposed by President Coolidge which made our consent necessary before an advisory opinion could be regarded as binding. Since such an opinion is not binding in any case, the Coolidge reservations had no real meaning. But, in the form

in which this reservation was adopted by the Senate, our consent is necessary before the Court can entertain any request by the Council for an advisory opinion "touching any dispute or question in which the United States has or claims an interest." If Turkey had been a member of the Court with such a reservation, the recent opinion of the Court affirming the right of the Council of the League, under the Treaty of Lousanne, to fix the boundaries of Mosul could not have been rendered.

The requirement that all the 48 Powers Signatory to the Protocol must indicate through an exchange of notes their acceptance of these reservations may delay our entrance to the Court, but it is not likely to prevent it. However, it would contribute to the gaiety of nations if some small State like Haiti or San Domingo were to object to our entrance to the Court upon these terms.

These reservations are supplemented by two resolutions containing declarations of policy which do not require the acceptance of the other States, but which may limit American participation in the Court, or rather in the application of the principles of international justice to ourselves.

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