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INTERNATIONAL JUSTICE ACCORDING TO INTERNATIONAL LAW—THE PRESENT OUTLOOK*

Je suis très honoré d'avoir le privilège d'assister à cette réunion de l'Association du Barreau Canadien, et je suis heureux que je puis être présent au moment ou mon ami Monsieur le Président Brais est encore en fonction et quand vous êtes à la veille de nommer mon ami Monsieur E. K. Williams comme votre président pour l'année à suivre.

Having often visited among the lawyers in Canada, and having recently enjoyed the privilege of taking part in some of your regional group conferences, I feel myself no stranger in your midst. Instead, it seems that I am but coming home among my brethren in this graciously hospitable land.

Since I became judge of the Permanent Court of International Justice in 1936, and particularly as I have been its only judge from continental North America, I have considered myself directly responsible to you in the discharge of my functions. In 1921 your great Dominion was among the first States to become parties to the Statute of the Court, and eight years later it set a useful precedent for all of us in North America by accepting the Court's obligatory jurisdiction. During these troubled war years, the Government at Ottawa has not faltered in its support of the effort to keep the Court alive and available.

I therefore feel that I owe to you a report on my mission as a representative of the Court, sent to attend the recent meeting of the United Nations Committee of Jurists at Washington, and the United Nations Conference at San Francisco. With your permission, however, perhaps I may intercalate in my report a broader discussion of the present outlook for international justice according to international law.

First of all, let me pay my tribute to the outstanding contri-

*An address delivered before the Council Meeting of the Canadian Bar Association at Montreal, August 29, 1945, by Manley O. Hudson, Judge of the Permanent Court of International Justice.

bution made by Canada in these recent months. I think it is generally agreed that in the seven regional group conferences held last spring, and in the joint conference with the American Bar Association at Chicago in April, the Canadian Bar Association did a most useful job. Chief Justice Farris and the members of his special Committee initiated proposals which had a profound influence in the later official negotiations, and it was most fortunate that President Brais and the Chief Justice were sent by your Government to participate in those negotiations. On the strictly official level, Mr. John Read played a leading role at Washington, as did Mr. Warwick Chipman and Mr. Jean Désy at San Francisco, and to these Canadian representatives we owe many of the improvements embodied in the Court Statute which is now annexed to the Charter of the United Nations.

Justice in international relations is a wide concept, and peoples are prone to give it varying interpretations. When we lawyers refer to it, we think of international justice according to international law. We do not seek to extend to it all of the basic norms upon which we proceed in national law, and indeed we may be wary of drawing too close analogies to the law which regulates individual conduct. We have in mind, the application of the great body of precept and principle which has been evolved during the three hundred years since Grotius. For that purpose, we would rely chiefly upon courts, and we would hold before ourselves the goal of a judicial settlement of international disputes which as time goes on will accumulate a new repository of international law.

In historical perspective, the progress made in our time has been astonishing. During the past generations, we succeeded in establishing the successful Permanent Court of International Justice. Fifty-one nations gave their formal support to that Court, and in hundreds of international instruments, to one or more of which almost every nation became a party, its jurisdiction was enlarged and extended. At one time or another, forty-five States had accepted its compulsory jurisdiction over certain types of legal disputes. Moreover, a practice became quite general to incorporate in various types of treaties provisions that the Court should deal with disputes as to the interpretation or application of their provisions.

This Court functioned over a period of eighteen years to the general satisfaction of the lawyers of the world. It worked smoothly, and in a number of more important cases, as well as in a number of less important ones, it succeeded in finding legal solutions

of vexing inter-State controversies. No State appearing before it ever made any objection to the procedure which was followed, and no State ever attempted to flout the authority of the Court in a case in which judgment went against it.

Perhaps I may refer, by way of illustration, to two cases which came before the Court, each of them of intrinsic interest to all of us. Both of these cases were decided before I became a judge at The Hague.

In the Treaty of Peace signed at Versailles some references were made to the "free zones" which had existed for many years on French territory around Geneva, and in which no customs duties could be levied on importations from Switzerland. These references were taken by the French Government to authorize its abrogation of treaty provisions establishing the zones, some of which dated from 1815. When the action was taken, consternation was produced not only in the Canton of Geneva but also in other parts of Switzerland. In 1928 the Court was seised of the case. The proceedings were protracted. Tentatives encouraging direct negotiations between the parties failed, and in 1922 the Court gave a judgment upholding the Swiss contentions for the most part and ordaining that by January 1, 1934, the French customs line should be withdrawn from the political frontier. That was bold action. It was imperative. Would the powerful French Republic comply with such a judgment favoring the much less powerful Swiss Confederation? This seemed at the time a very delicate question. Yet France did not hesitate. After careful preparation, the last of the French dcustoms stations was withdrawn from the political frontier on December 31, 1933, several hours before midnight.

A second case to which I would refer, arose out of a long-continued dispute between Denmark and Norway over the great expanse of territory known as Eastern Greenland. Each of these States laid store by the possession of this bleak area, and it was for each of them precisely the kind of dispute which affected vital interests and national honor. In 1931, Norway sought to put an end to the dispute by issuing a royal proclamation declaring the territory to be Norwegian. Denmark did not allow the situation to moulder or to get out of hand. Within two days it appeared at The Hague asking the Court to declare that the Norwegian action was unlawful Norway did not contest the jurisdiction, but the case took a long time. The written proceedings were voluminous, and the oral arguments alone occupied the Court during fifty-seven half-days sittings. Finally, in 1933,

the Court gave a judgment favoring the Danish contention. Then it was Norway's turn. It did not haggle. It did not make matters worse by wrangling. Within two days after the judgment of the Court, it formally withdrew its declaration of occupation.

I think you will agree that these were great cases, and that the establishment of a tribunal for handling them in this fashion was a remarkable achievement. Certainly that must be the conclusion of men in the legal profession, and it is clearly the conclusion of the Governments of the world. That this progress has not been more widely appreciated by the non-professional public is quite understandable when we realize that the legal profession itself has tended to take it for granted. There has been a tendency in the minds of the public to exaggerate the powers of the Court in respect to the maintenance of peace, and when war broke out the great mass of the public, including some of the lawyers themselves, leaped to the concluson that the Court had fallen down on its job. What they have failed to realize is that as a rule wars have been brought about by political rather than by juridical situations. The Permanent Court has played an important part and its successors will continue to play an important part in the maintenance of peace where juridical disputes are involved. Yet of necessity it must play an indirect and secondary role, as threats to the peace of the world more commonly arise where one or more states are disposed to act outside of the law and in definace of it. Situations of this kind can far better be handled by men charged with political responsibility than by Judges on the Bench. The Security Council has now been projected to deal with these very situations. The existence of the Security Council will not diminish the strength of the Court; on the contrary, it will bring clearly before us the important part that the new Court must play in the maintenance of world peace.

In the tumultuous world situation of these recent years, it had seemed to many of us—I think it was practically the unanimous view of the men who participated in our twenty-five regional group conferences in North America—that we should hold fast to this great achievement of the past generation; that we should not plow up the ground which has been so usefully sown, that without attempting to re-write the Statute of the World Court we should confine ourselves to its improvement and adaptation, and that we should keep alive the existing Court. I am confident that our insistence to these ends served a useful purpose even if it was not altogether successful.

The Committee of Jurists which met at Washington in April and the Conference at San Francisco both took their cues from the proposals made at Dumbarton Oaks. The basic idea in those proposals was the substitution of a new Organization for the League of Nations. Without going into the reasons for that decision, I shall merely observe that it had far-reaching consequences. A further decision at Dumbarton Oaks was that the Court of the future should be an organ—the "principal judicial organ"—of the United Nations, either with the old Statute amended or with a new Statute.

No choice between these alternatives was made at Washington. At San Francisco, however, the political implications of the question of new court versus old court soon became apparent. No criticism was made of the old court—indeed, high tribute was paid to it. Yet the question arose, what States should be permitted to take part in maintaining a court? If some of the delegates were disposed to say that the umbrella of judicially-applied international law should be opened as wide as possible, others wished to exclude certain States from any participation at the present time in maintaining an organ of the United Nations.

The situation was complicated by the fact that a number of the parties to the Statute of the Permanent Court were not represented at San Francisco, and a number of the States there represented were not parties to that instrument. Some modifications in the existing Statute had to be made in any event—without a replacement of the League of Nations the judges could not be paid. As the Statute made no provisions for its own amendment, it was feared that the process of modification might involve protracted negotiation, and might entail a considerable loss of time. In the end it was thought to be the simpler and more expeditious course to create a new Court under a new Statute.

This decision involved a change in the name of the Court. Some attempts have been made to rationalize the change—the objective "Permanent" has been said to be too prophetic, and the characterization of "Justice" by the qualifying term "International" has been said to be too limitative. These rationalizations are beside the point, for there was little discussion of the matter. Dumbarton Oaks had thrown out references to "an international court of justice," and in seizing on this name for the new Court the delegates at San Francisco had in mind no substantive significance. This very name had been proposed and rejected in 1919, and again in 1920. I have always thought

that Sir Robert Borden made one of the best suggestions in 1919, when he proposed the name "permanent international court of justice."

The International Court of Justice, then, is to be the lineal successor to the Permanent Court of International Justice. In composition, in organization, in procedure, even in jurisdiction, the difference between the old and the new Court is very slight indeed. The draftsmen of the new Statute refused to wander down strange paths, and I think many of the members of this Association will be gratified to note that in its broad outline, as well as in most of the details, the new Statute is hardly distinguishable from the old. Even the numbering of the Articles has been kept, in order to facilitate the utilization of former experience. Thus continuity has been preserved, and to such an extent that the new Court can take up where the old Court left off to carry on the same high tradition.

Many of the changes made in the Statute were stylistic, rather than substantive. In some instances, improvements have been affected, though I fear I cannot say that any of them were very essential. It was an improvement to stagger the terms of judges, so that all fifteen judges would not be elected at the same time. It was an improvement to clarify the provision that the Court could not have more than one judge of any one nationality, and at the same time to safeguard your Dominion situation as to British nationality. It was an improvement to abolish two fixed chambers of the old Court which had never been resorted to, and to substitute an authorization to the new Court to create chambers as need may arise either for hearing particular cases or for dealing with particular catagories of cases. It was an improvement to make explicit the Court's function to decide cases in accordance with international law. It was an improvement to provide in the Statute itself for its amendment.

On the other hand, the new Statute preserves the principal features of the old one. Fortunately, and I think it was chiefly due to Canadian intervention, the method of nominating and electing the judges remains unchanged, organs of the new Organization merely replacing those of the League.

Nor did any disposition appear to discontinue the Court's power to give advisory opinions. To Canadian lawyers the exercise of such a judicial function is very familiar—to the south, however, it has excited apprehension in some quarters. Yet I think no one can deny the immense usefulness of the advisory opinions of the Permanent Court.

May I recall one of the advisory opinions which might have escaped your recollection. In 1921, the French Government promulgated certain nationality decrees relating to Tunis and Morocco which would have imposed French nationality on a large number of British subjects who had long been residents in North Africa. On the basis of the international instruments applicable, the British Government made a prompt protest and it suggested that the matter be referred to the Court or to arbitration. The negotiations which ensued led to an agreement. When the dispute came before the Council of the League of Nations, the French Government contended that it related to a domestic question, but agreement was reached that on this aspect of the matter the Council should ask the Court for an advisory opinion. After a full hearing, the Court gave an opinion disapproving the French contention. This cleared the air, and within four months it led to a complete settlement of the dispute. Who could ask for a more satisfactory demonstration of the usefulness of the advisory function of an international court?

The question chiefly discussed at San Francisco was that of the jurisdiction of the Court, but the discussion was only a rehearsal of the debate at Geneva twenty-five years earlier. On the one hand, many of the delegates, particularly those of the smaller non-European States, came out clearly for obligatory jurisdiction over legal disputes; on the other hand, some of the larger States, particularly the United States and the Soviet Union, foresaw possible difficulties in this course, and wished to continue the option accorded to States by the old Statute. Unanimous agreement was essential if the Statute was to go into the Charter, and in the interests of such agreement the smaller States receded from their insistence. Hence the new Statute, like the old, leaves it to each State to say whether and to what extent it will accept the obligatory jurisdiction of the Court. The record from 1921 to 1939 gives ground for hope that considerable progress may be achieved as a result of States' exercise of this option.

Of course, the creation of a new Court involves a possibility that some of the obligatory jurisdiction of the old Court may be lost. Express provisions in the new Statute make the former treaties and declarations applicable to the jurisdiction of the new Court. Yet these provisions can operate only as between the States which are parties to the new Statute. As to other States, the same result can be attained only if the former treaties and declarations are in some way renewed or re-negotiated. The

price we pay for a new Court may, therefore, entail some loss of jurisdiction. It was partly for this reason, no doubt, that your delegate at San Francisco, Mr. Chipman, observed that the creation of a new Court "offered greater difficulties than those which would be raised by the continuation of the old Court."

Neither at Washington nor at San Francisco, did any disposition appear to create other international tribunals to exist alongside the International Court of Justice. Various special types of tribunals have been officially suggested—an international prize court, an inter-American court of justice, an international criminal court, an international loans tribunal, and international commercial tribunals.[1] In recent years, writers have frequently proposed that individuals should have access to an international court. If no step has been taken to realize any of these aspirations, neither has any door been closed to meeting the needs which may be thought to exist in the future. The new Court will continue to be, like the Permanent Court, a strictly inter-State tribunal.

With the United Nations committed in the new international organization to the general purpose of bringing "about by peaceful means" the settlement of disputes in conformity with the principles of justice and international law," with the creation of a Security Council invested with "primary responsibility for the maintenance of peace and security" and competent to recommend ways of avoiding friction, I think we can say that steps have been taken which may enable the world to maintain an atmosphere in which international justice can flourish according to international law. The International Court of Justice is now to be the chief organ of international law, and with the experience of the Permanent Court behind us, I believe that we can conclude that it is well-adapted to playing that role. It will need to have additional jurisdiction conferred upon it, and even with that accomplished it will need the vigilant protection and support of the legal profession of the world. Organized justice in an organized world has ceased to be a mere dream of the poets—it has become an actual responsibility of lawyers everywhere.

In our time, I see two great factors which can operate to help us to balance the scales of international justice. The peoples of the world are now generally agreed upon the requisites of the judicial process. Notice to every party to a dispute, opportunity for each party to present its contentions and to reply to those

[1]The various proposals are surveyed in a small volume which I have recently published under the title "International Tribunals—Past and Future" (Brookings Institution and Carnegie Endowment, Washington, 1944).

of other parties, deliberations by impartial judges upon the contentions presented, and judgment confined to the issues thus raised—these are universally conceded to be essential to the functioning of an international court. The extent of agreement goes even further, however. We are in general agreement, also, on the sources of the international law which an international court is to apply. The enumeration of those sources in the Statute of the Permanent Court has commanded general approval, and it is now to be continued in the new Statute.

The members of this Association have dedicated themselves to the nurture of justice, and to the service of the law as a means of its realization. The travail of these recent years of dark pages in human history was not needed to persuade you to include international justice within the sphere of your dedication. Yet perhaps that travail will serve to intensify the zeal which has inspired you. If so, I would hold before you the present outlook for international justice according to international law as encouraging to your persistence, and as unfolding for all of us of the legal profession a great opportunity.

MANLEY O. HUDSON.

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