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## THE INTERNATIONAL COURT OF JUSTICE*

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The organization of the International Court of Justice is of interest to students of law and of politics. It gives a place to the lawyer and to the law in the new world organization which is coming into being, and it marks the recognition of justice as an essential element in the world order. The Canadian bench and bar have a general interest in the development of judicial settlement of disputes and they have a particular interest arising out of the important part played by our country and by our profession in this development.

The first landmark in the modern history of international arbitration was the Jay Treaty of 1794; in the succeeding century, during which resort to arbitration became increasingly frequent, the pace was set by the arbitrations between Britain and the United States in which Canadian interests were largely concerned and in some of which Canadian lawyers were engaged.

By the end of the last century, judicial settlement had become a normal method of deciding international disputes and there was a need for more permanent institutions to administer international justice. It was, even then, widely recognized that a world court should consist of a permanent bench, independent of national influence, giving continuity and certainty to international jurisprudence. The lack of permanent international political institutions made it impossible to work out any generally acceptable method of selection of judges. Accordingly, when the Permanent Court of Arbitration was established at the Hague Peace Con-

*It was not thought necessary in the present article to make an extended reference to the proceedings of the Committee of Jurists or of the San Francisco Conference. These have been dealt with in the report made by Chief Justice Farris to the Canadian Bar Association, which is printed in the 1945 Proceedings at page 110. Nor was it thought necessary to make a comprehensive analysis of the new Statute; for this readers may refer to Professor Hudson's study published in the American Journal of International Law, Vol. 40, No. 1, January 1946.

ferences of 1890 and 1907, provision was made for panels of judges, named by the parties to the conventions, and procedures were laid down whereby tribunals could readily be constituted for particular cases.

During the two decades within which the Permanent Court of Arbitration was active, sixteen cases were decided, including the North Atlantic Fisheries Arbitration in which Canadian jurists took part on the tribunal and as counsel. During the same period, an even greater number of cases came before other tribunals and the Central American Court of Justice and the International Joint Commission were established.

In the past quarter of a century the history of international justice is mainly concerned with the Permanent Court of International Justice. During eighteen years the court was actively functioning and delivered thirty-two judgments and twenty-seven advisory opinions. It was the only element in the peace system emerging from Versailles that survived the second world war as a going concern.

The peace conference, which met at Versailles in 1919, did not create a world court, but it decided that a court should be established. It entrusted to the Council of the League of Nations the task of formulating the necessary plan by Article 14 of the Covenant 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.

A draft Statute of the Court was prepared, approved by the Assembly and became open for signature and ratification on December 16th, 1920. The Statute came into force by September 1st, 1921, and the Court was constituted and met in January of 1922.

During the earlier years in the history of international arbitration Canadian participation, even in matters that concerned Canada, was indirect. Canadians served as judges, agents and counsel under the aegis of the Government of the United Kingdom. It is, however, possible to trace a course of development, in the case of international justice, not dissimilar from that which is found in other aspects of international relations. When the International Joint Commission was constituted, the conduct of proceedings was undertaken by the Canadian Govern-

ment. By the year 1929, when the *I'm Alone* case had to be dealt with, it was recognized that the proceedings were, in all respects, the concern of the Canadian Government alone.

The Protocol of Signature of the Statute of the Permanent Court was signed on behalf of Canada on March 30th, 1921, and the Canadian ratification was deposited on August 4th, 1921. Compulsory jurisdiction, subject to specific reservations, was accepted by a declaration dated September 20th, 1929, and the Canadian ratification was deposited on July 28th, 1930. This country was, therefore, ready to accept the jurisdiction of the Court in all but limited classes of disputes. Notwithstanding this position, Canada did not have any cases before the Court and took no part in any of the proceedings. The reason for this apparently anomolous attitude is to be found in the failure of the United States to accede. It was necessary to deal with controversies arising with the United States by improvising *ad hoc* tribunals or by using the services of the International Joint Commission. The nature of Canadian relations with other countries is such that controversies are unlikely to arise and there were, in fact, no substantial disputes requiring adjudication with countries other than the United States during the period under consideration.

During this period the Pecuniary Claims Commission dealt with a substantial docket of claims, the *I'm Alone* tribunal disposed of a controversy involving vital questions of international law, the *Trail Smelter* tribunal settled a complex dispute involving scientific and legal questions of far-reaching importance, and the International Joint Commission dealt with a substantial number of important matters and a large number of routine questions. The matters of major importance that were before the Commission included the regulation of the levels of Lake Champlain, the utilization of the economic resources of the St. Croix and St. John rivers, the St. Lawrence and Champlain water-ways investigations, the Pollution of Boundary Waters, the Lake of the Woods and the Rainy Lake references, the Roseau and the Souris river questions, the St. Mary-Milk rivers controversy, the disposition of the various problems arising out of the regulation of the levels of Kootenay Lake and the Grand Coulee Dam.

In the later years of the second world war studies were undertaken among the United Nations with a view to planning the international institutions that would be needed in the post-war world. In the field of legal questions, the most important were the work of the London Committee (under the chairmanship of

the Legal Adviser of the Foreign Office and including representatives of Belgium, Czechoslovakia, France, Greece, Luxembourg, the Netherlands, New Zealand, Norway and Poland); and the studies undertaken by the Canadian and American Bar Associations.

The material for these studies was the experience of the past. The most important material was the experience of the Permanent Court, but the second source was the North American experience. The work of the Permanent Court had earned the respect of the world and there was complete agreement upon the desirability of continuing the court or at least maintaining substantial continuity between the Permanent Court and any world court that might be established. On the other hand the Permanent Court had not succeeded in attracting to itself the judicial business of the world; it had been almost entirely concerned with problems arising in Europe, western Asia and northern Africa, in other words, the old world. The studies made by the Canadian and American Bar Associations were influenced by the lessons drawn from the North American experience and by the urgent need to make the new tribunal a world court.

The work of the International Joint Commission and of the *ad hoc* tribunals had proved the value of hearings in the countries affected by a controversy. The people actually affected by a controversy were given their day in court. The judges, having seen the actual problem, were compelled to do substantial justice. Further, the concentration upon the factual basis of international controversy, and the development of new techniques in the establishment of essential facts, met with the approval of lawyers and laymen alike. While there is danger in oversimplification, it would not be misleading to suggest that the recommendations of the Bar Associations were based upon three principles: the preservation of the continuity of the world court; the modification of the Statute of the Court so as to enable the Court and its Chambers to give their day in court to the peoples affected by international disputes; and the strengthening of the Court by arming it with new techniques proven by North American experience.

The work of the Committee of Jurists, which met in Washington in April 1945 and drafted the new Statute, and of the San Francisco Conference resulted in the Statute of the International Court of Justice, which is annexed to and forms a part of the Charter of the United Nations. It is a new court with a new statute based fundamentally on the old, incorporating to an

appreciable extent the North American experience and maintaining continuity in all important respects with the Permanent Court of International Justice.

There is a close relationship between the new court and the other organs of the United Nations. Article VII of the Charter provides:

> 1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.
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> 2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

The Court is therefore, from its very foundation, related to the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the Secretariat. It is prospectively related to subsidiary organs that may be established in accordance with the Charter.

The position of the Court is closely analogous to the relationship of the Supreme Court of the United States to the legislative and executive authorities under the constitution. It is similar in principle to the relationship between the Supreme Court of Canada and the executive and legislative powers in this country. It may not be too much to expect that, in the case of the world court as in so many instances, judicial independence may be the natural and probable consequence of interdependence, a paradox for which many precedents can be found in the history of legal institutions.

The interdependence of the Court with the other organs of the United Nations has made it possible to solve such practical problems as election of judges, finance and the independence of judges from national pressure and influence. Further, it has removed from the Court problems of a political character. The Security Council and General Assembly decide the conditions upon which non-members of the United Nations may become parties to the Statute. The Security Council lays down the conditions under which the Court is to be open to states that are not parties to the Statute. The Court is not required to pass upon such questions as state recognition or moral worth in the case of states seeking to appear as litigants.

Within the fields delimited by the Charter and the Statute, the Court and the judges are placed in a position of absolute independence of national or international authority. The judges are not dependent upon any external authority for any possible

political or monetary advantage. There is no reason why the new court should not establish the same sort of judicial independence as characterized the Permanent Court.

The new statute is based upon the old. While it was decided at San Francisco to establish a new court operating under a new statute, it was recognized that, in substance, the new statute should be an amended and improved version of the old and that continuity between the two courts should be preserved. Consequently, there is little difference between the two statutes. Even the numbering of the articles is maintained.

The new court, like the old, consists of fifteen judges, who were elected by the General Assembly and Security Council at meetings held in London on February 6th, 1946. There is no substantial change in the provisions for election and tenure of office, apart from the temporary arrangement for staggering the terms of the judges chosen at the first election to enable elections to be held every three years to fill five vacancies.

The new court, like the old, has jurisdiction in matters referred to it by contesting states, by special or general agreement. It also has jurisdiction to give advisory opinions under conditions set forth in the Charter. Compulsory jurisdiction is not created by the Statute; but, under Article 36, commonly referred to as the "optional clause", parties may make special declarations accepting the compulsory jurisdiction of the Court. Forty-five nations had made declarations accepting the "optional clause" under the old statute, and about twenty of these declarations remained in effect when the new statute came into force. Compulsory jurisdiction, under declarations still in force, was preserved by paragraph 5 of Article 36 of the new statute and consequently Canada is, subject to the terms of the declarations made under the old statute, bound by the new "optional clause". The number of countries accepting the compulsory jurisdiction may be increased by new declarations made within the next few years.

The old court had extensive jurisdiction arising out of multilateral and bilateral treaties of a general character, providing for reference of disputes in matters of interpretation and the like. An attempt has been made to preserve most of this jurisdiction for the new court, by Article 37 of the new statute, and, upon universal acceptance of the Charter, the original jurisdiction may be largely restored. Meanwhile it is being augmented by similar provisions in new treaties.

The most important difference between the new court and the old is to be found in Articles 22, 26, 28 and 30 of the Statute. The

seat of the Court is maintained at The Hague, but Article 22 makes it clear that the Court may sit and exercise its functions elsewhere, "whenever the Court considers it desirable". It may well be that the Permanent Court could have sat elsewhere than at The Hague, but the incorporation of the express provision in the new statute may influence states in submitting to the Court disputes which are of such a character that they can only be dealt with effectively by a tribunal sitting in the countries concerned and hearing local evidence.

The provisions for chambers in Articles 26 to 29 are fundamentally different from those in the old statute. The Court is empowered to form chambers to deal with particular categories of cases; and also to form chambers to deal with particular cases. A chamber formed to deal with a particular case might be called upon to deal with the sort of case that was formerly referred to an *ad hoc* tribunal. It would be possible for the Court in this manner, and with the consent of the parties, to deal with controversies like the *I'm Alone* or *Trail Smelter* questions, involving the hearing of local witnesses or extensive technical and scientific testimony.

All of the chambers are authorized to sit elsewhere than at The Hague and their judgments are considered as rendered by the Court.

Article 30 contains an important innovation. In the old statute there had been provisions for assessors in the special chambers and in proceedings before the full court in labour, transit and communications cases. There had, however, been no cases in which assessors had been used in chambers or in the full court. The new statute contains a general and flexible provision under which the use of assessors in the full court or in the chambers is subjected to the rule-making power of the Court.

The new court, like the old, follows procedures in part prescribed by the Statute and in part prescribed by rules made under the authority of Article 30. When the International Court of Justice met in April and May of this year, its task of organization included as an essential element the making of rules of procedure, so as to enable matters to be submitted to the Court for decision or opinion. As a result of the close correspondence between the new statute and the old, it was possible to use the Rules of Procedure of the Permanent Court as the basis for the new rules, in much the same way as the old statute was used as the basis for the new. There were some changes that were necessary to give effect to modifications incorporated in the new statute.

The Rules of Procedure are being printed and distributed and, in due course, the Court will be concerned with judicial business. The innovations thus introduced into the new statute and rules will then be tested by experience.

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## LEGAL EDUCATION FOR CITIZENSHIP

The Charter of the United Nations undoubtedly has unknown powers and obligations which no one can forecast or foresee. From our common experience in the development of constitutional law, we know of the hidden depths. If the Charter is to have the support of governments and people so that their common aspirations and intense desire for peace may not again be thwarted, the study of the Charter and its operations in practice must be the subject of our intense, devoted and continuous effort. International law and practice must become by-words of lawyers and laymen, not the property and domain of the few. Truly a difficult task, a monumental task that of increasing general knowledge of international law and practice, but absolutely necessary if popular opinion is to stand behind the Charter. Surely here is a field of legal education which the lawyers, law schools and bar associations will not neglect. If they do neglect it, how can we ever hope to attain the necessary object of general education and interest in the subject? (Carl B. Rix: "Legal Education for Citizenship" in the Journal of the American Judicature Society, April, 1946).