ILLINOIS
LAW QUARTERLY

Volume 4 FEBRUARY, 1922 No. 2

STRENGTH AND WEAKNESS OF THE NEW INTERNATIONAL COURT

EDWIN M. BORCHARD*

For an adequate understanding of the origin, jurisdiction and functions of the newly established court of international justice at the Hague, it will be necessary to revert to the two Hague Conferences of 1899 and 1907 and to examine the organization of the Permanent Court of Arbitration at the Hague created and developed at those Conferences. The characteristic feature of the Court of Arbitration as distinguished from the new Permanent Court of Justice lies in the fact that the personnel of the former consists of an eligible list or panel, of which there are now some one hundred and twenty persons throughout the world, from which the two nations proposing to enter into arbitration may select their judges for the particular case, whereas the new court has a fixed bench whose members have a tenure of nine years and are subject to re-election. The word "permanent" used in both titles refers to the institution itself, for which permanency was designed, rather than to the composition of the court.

The movement to establish a fixed tribunal with obligatory jurisdiction reaches far back into history, but has always proved abortive for reasons which I shall later venture to suggest. Its modern development is more closely identified with the United States, always a leading proponent of arbitration, than with any other country. At the Hague Conference of 1907 the United States proposed the establishment of such a fixed court with a constant personnel, denominated Court of Arbitral Justice; but the inability to agree upon a method for the selection of seven or nine judges from some forty states wrecked the plan, just as it did the plan for the establishment of an International Prize Court.

*Professor of Law, Yale University, School of Law.

Some of the dominating reasons inspiring the current movement for the creation of the fixed court rested upon a certain dissatisfaction with courts of arbitration, which I cannot find altogether justified. It was argued that courts of arbitration decide cases not by fixed principles of law but by methods of diplomatic compromise, and that a well-developed and systematic body of international law required a fixed court with certainty and continuity in the application of legal principles, on the analogy of municipal courts. It was not easy to determine from this argument whether the court was to exist for the sake of the law, or the law for the court. But I believe the argument without substantial justification. A somewhat exhaustive analysis of the hundreds of arbitrations to be found in Mr. Moore's monumental work and in repositories like Ralston and La Fontaine and other works, has convinced me that principles of law are constantly and almost uniformly applied by international tribunals of arbitration, with a respect for precedent hardly less than that of municipal courts; and if it is believed that the element of compromise is wanting in the adjudications of municipal courts I invite attention to Judge Cardozo's notable work on "The Nature of the Judicial Process." Nor do I believe that municipal law has reached that stage of certainty which justifies serious disparagement of international law in this regard—at least the law of peace—though I freely admit that the many and varied interpreters of the two systems respectively have disproportionate power to give effect to their own particular views on a rule of law. Thus, the rules of international law may seem more uncertain because nations, acting upon their own view, refuse to alter it to accommodate it to that of another nation or even of an international tribunal in which they do not appear. Note, for example, the American view of the most-favored-nation clause and the superiority, constitutionally speaking, of statutes over earlier and conflicting international treaties.

But it can hardly be doubted that any new agency to encourage the amicable submission of international disputes serves a valuable public purpose and should strengthen the fabric of law among the nations. Hence the new court must be welcomed. It is distinctly provided in the statute creating the court, that the existing Court of Arbitration is not to be superseded, however; for besides having decided some twenty very important cases, the limitations upon the jurisdiction of the new court of justice make it seem probable that the old court may receive in the future as many important cases as the new.

The new court owes its origin to the Covenant of the League of Nations, and the inclusion of the operative clause is in all probability largely due to the efforts of the United States. Whatever view we may entertain as to the League, whether we regard it as a hopeful

experiment or a disappointing panacea, it can hardly be denied that the machinery it devised for the creation of the court and particularly for the selection of its judges solved a problem which the second Hague Conference had found too difficult. The Council of the League, to whom the Covenant entrusted the execution of the plan, organized an international advisory committee of jurists to formulate and submit an organic statute for the constitution of the new court. The Advisory Committee was made up of Mr. Adatci, Japanese Minister at Brussels, M. Rafael Altamira, Professor of Law at Madrid, Baron Descamps, a veteran in the movement for arbitration, Dr. Francis Hagerup, formerly Professor of Law at Christiania and a leading statesman of his country, M. de Lapradelle, Professor of Law at Paris, Dr. Loder of Holland, a member of the Dutch Supreme Court, Lord Phillimore of the Privy Council in England, M. Ricci-Busatti, legal advisor to the Italian Minister of Foreign Affairs and Professor of Law at Rome, and Mr. Elihu Root, former Secretary of State. Mr. Clovis Bevilaqua, Professor of Law at Pernambuco, was unable to be present. The qualifications of these men are a guaranty of the sincerity and character of the work they produced.

This committee incorporated in the statute a proposal for the obligatory jurisdiction of the court, which in my judgment constitutes one of the principal justifications for the creation of a new, and particularly of a fixed court with determinate personnel. But on the ground that this would in effect constitute an amendment of the Covenant, which left jurisdiction voluntary, the Council of the League, dominated by the larger powers, eliminated the provision for obligatory jurisdiction—therein again exemplifying the experience of 1907—though permitting nations to agree to obligatory jurisdiction if they so desired. In thus refusing to grant the court obligatory jurisdiction, which in the present stage of international relations is hardly surprising, one of the major weaknesses of the new court is apparent. The larger powers still prefer to be the judges of their own causes, and the sheriffs as well, and resist any plan to bring about an obligatory submission of disputes to judicial or other determination. Fortunately, some fifteen of the smaller states have signed the provision for obligatory jurisdiction; spasmodic and ephemeral treaties for this purpose between a few individual states have thus been enlarged into an organic convention which new states may join by the simple procedure of adherence. It is to be hoped that the example of the smaller states will by force of public opinion, prove contagious to the larger powers. But if experience is any guide, nations that are not compelled to submit their dispute to a court will, if they submit it at all, prefer to have some voice in the selection of their judges, and will refuse to litigate rather than submit to a rigid court if they believe only a single judge

of the eleven to be prejudiced against them, nationally or in his view of the law of the case. The minuteness with which the United States combed the records of prospective nominees for the Court of Arbitration which decided the Fisheries dispute between the United States and Great Britain in 1910 impressed me with the reluctance of nations not bound to arbitrate, to submit to judges they cannot individually select and agree upon. Fixity of the judges of the court is more likely to deter than encourage the larger nations to litigate, though fortunately the Court of Arbitration with its eligible list is still in operation, and to it the United States and Norway have just submitted a dispute arising out of the requisitioning of Norwegian ships by the United States during the war.

One of the sources of strength of the new court is the calibre of the men elected to it by the Council and Assembly of the League, to whom this function was entrusted by the Covenant. The judges were nominated by the existing national groups of the members of the Court of Arbitration in each country, who were empowered to nominate from two to four candidates, not more than two from their own country. From a list of eighty-nine thus nominated, the Council and Assembly then elected eleven judges and four deputies, taking into consideration the fact that the principal legal systems had to find representation and that not more than one judge could come from any one country. In its reconciliation of national representation with superior mental equipment, or I might say, subordination of the former to the latter, the League has performed a noteworthy service, hitherto found impossible. The Judges of the Court are Professor André Weiss, Professor of International Law at Paris; Dr. Dionisio Anzilotti, Professor of International Law at Rome; Dr. Rafael Altamira, Professor of Legislation at Madrid; Ruy Barbosa, a famous Brazilian lawyer and statesman; Antonio Bustamante, lawyer and Professor of International Law at Havana; Viscount Finlay, now of the British House of Lords; Max Huber, Professor of Public Law at Zurich and Advisor of the Swiss Foreign Office; B. C. J. Loder, member of the Dutch Supreme Court; Didrik Nyholm, President of the Mixed Court at Cairo; Yorozu Oda, Professor of International Law at Kyoto; and John Bassett Moore, the dean of American authorities on international law. The four deputy-judges are Dr. Negulescu, Professor of Law at Bucharest; C. H. Wang, President of the Chinese Supreme Court; Dr. Jovanovich, Professor of Law at Belgrade; and Dr. F. V. N. Beichmann, President of the Court of Appeal, Trondhjem, Norway. The men selected are among the outstanding lawyers and judges of the world, and law teachers may feel some satisfaction in the fact that almost all of them are or have been professors of law in some leading university.

The court is open not only to states, members of the League, but also to other States, mentioned in the Annex of the Covenant, who may sign the protocol by which the statute is accepted. Among these is the United States, and it is hoped that this country will soon formally join in this useful work, which has no relation to the political responsibilities contemplated by other parts of the Covenant. In the near future, the court will doubtless be opened to every state in the world.

The jurisdiction of the court is confined mainly to legal questions, concerning primarily the interpretation of treaties, questions of international law, the existence of any fact which, if established, would constitute a breach of an international obligation or the nature or extent of the reparation to be made for the breach of an international obligation, the interpretation of the court's judgments, or any other question the parties may submit. The Communications and Labor Clauses of the Treaty of Versailles (Parts XII and XIII) and of the corresponding parts of other treaties look to the submission of differences to the court. They will doubtless in the beginning furnish the majority of the cases for the court's attention. In addition, the court is given power to render advisory opinions to the Council or Assembly of the League.

In view of the limited jurisdiction of the court, consisting of what have been called justiciable or strictly legal questions, the reluctance of the larger Powers to make jurisdiction in these cases obligatory is to be regretted. It is an indication of the fact that we are still a long way from the substitution of amicable for belligerent methods in the settlement of international disputes. One of the necessary weaknesses of the court consists in the very fact that it is not likely to prove an effective agency in removing or even minimizing for a long time to come the bane of war from the recognized institutions of international relations. This weakness goes to the very root of international relations in what I venture to call this medieval age. No mere addition of machinery can create that necessary will to peace which is the most effective guaranty of the efficacy of an International Court. The unwillingness to submit to judicial settlement is conditioned by underlying factors inherent in the existing international system, which persuades nations to decline to submit what they consider important issues to the arbitrament of external judges. Note the almost uniform exception of questions of independence, national honor and vital interests from arbitration treaties. The judicial process is weakened by a stipulation that there shall be no submission of anything important.

This weakness of the court, in its dependence upon the existing order of international life, by the fact that international relations are conditioned among the larger powers upon a continual struggle for economic or political advantage raising issues which are not in any

degree legal in their nature and, therefore, incapable of determination by judicial processes, necessarily reduces its usefulness as an agency for peace. Whether the Argentine or the Chinese market shall be controlled and in what degree by British, German, French, Japanese, or American commerce; whether the unsuccessful competitors will become reconciled to their defeat; whether the coaling, oil or cable stations of the world are too largely controlled by certain nations for the safety of the foreign trade of other countries; in what degree the raw materials of the mandated territories and of colonies shall be monopolized by the countries in immediate control—these questions, typical merely, present no issue of legal right or wrong. Yet it is these conflicts of interest that largely furnish the effective causes of war. Is it not apparent, therefore, that so long as international trade implies rivalry between national units organized politically and commercially with all the instruments of unfair competition, the hope of an international court as a substitute for war rests on the weakest of justifications? No such economic issues are presented by the differences among the states of the United States with their free trade; so that the analogy for the new court sought to be found in our Supreme Court, with its obligatory jurisdiction, is unwarranted and misleading.

Nor is it, I fear, true that nations seriously desire an international court for the settlement of their difficulties. Nations may wish to submit to an international court—and have no difficulty in establishing one *ad hoc* when the occasion arises—when the dispute is unimportant or would not justify the expense of war or when political considerations dictate submission to arbitration rather than recourse to war—in short when peaceful settlement seems more profitable than war. In 1914, President Wilson, then engaged in concluding the so-called Bryan treaties for commissions of inquiry, refused to submit to such inquiry the Tampico incident, when two Mexican subordinates were alleged to have insulted the American flag, but at once in ebullient patriotism despatched American forces with tragic results to Vera Cruz. President Huerta was thus to be convinced that he was *persona non grata* in Washington. France resents the efforts of Great Britain to determine by peaceful methods continental disputes in which France has an interest, preferring to rely for satisfactory results upon her large and unemployed army. Chile, holding Tacna and Arica, resists the efforts of Peru to submit this long-standing dispute to arbitration. While peaceful settlement even of legal questions is therefore by no means insured by the establishment of an international court, I nevertheless believe that a permanent organization ready to deal with cases whenever they arise will exert an important influence particularly upon public opinion to induce the nations to form a habit of submission of legal questions, and if the court proves its ability and value by the char-

acter of its decisions, this habit is sure to grow and the prestige of the court certain to be increased.

It would be wrong to assume, I think, that a peaceful decision, judicial or other, is necessarily a guaranty of peace. One need but refer the student of American history to the Dred Scott decision to be convinced of this. Some years ago Peru and Ecuador submitted their boundary dispute to the arbitration of the Spanish Council of State; but the conclusion of the Council having become known, both nations joined in a request for the withholding of the award on the ground that its publication would cause war. The experience with the Silesian plebiscite exemplifies the occasional reluctance to be bound by solemn verdicts. The Panama-Costa Rican hostilities are still fresh in mind.

Nevertheless, I would not leave this discussion without some feeling of hope in the development of the new international court to a position of great influence among the nations. Our own Supreme Court was not overburdened with cases in the early days of its existence and there was some doubt as to whether it would ever be accepted by the country. It is to be hoped that the realization that suicide of the existing civilization will be the ultimate result of a continuation of the present disastrous methods of adjusting international conflicts of economic and political interests, will persuade the peoples of the world to confer an ever-growing jurisdiction upon and to employ with increasing frequency the civilized institutions exemplified by the Permanent Court of International Justice.