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REVISION OF THE UNITED NATIONS CHARTER AND THE DEVELOPMENT OF THE LAW

Willard B. Cowles*

Article 109 of the Charter of the United Nations requires that the agenda of the 1955 General Assembly contain a proposal for the establishment of a General Conference to review the present Charter.¹ A Senate Commission was chosen in September, 1953, to study proposals for revision.² Secretary of State John Foster Dulles, announcing in August, 1953, that the United States favors holding the conference, said that if we are to have real security we must do those things which ". . . are necessary to put international intercourse on a friendly and nonfriction basis." There were "serious inadequacies" in the Charter which required alteration, he said, one of which arose out of a disregard for the fact that, in the long run, world order depended upon law and justice. He pointed out that the General Assembly has made "but little progress" in codifying international law, and that the 1955 conference, which ". . . will be comparable in its importance to the original San Francisco Conference . . ." will provide ". . . a conspicuous opportunity for which the lawyers of America should be prepared."³ Mr. Dulles has thus invited the cooperation of American lawyers in implementing present American policy to strengthen the United Nations.

I.

There are two chief ways to develop the law—by judicial decisions and by the establishment of codes. In contrast with what has not been accomplished in attempts at codification, very substantial contributions have been made by international tribunals.⁴ Indeed, Sir Arnold McNair, President of the International Court of Justice, said recently that "the main feature of the past half century" as regards the development of international law, "has been a great output of judicial decisions," not only of the Courts at The Hague but of ". . . numerous claims commissions, mixed tribunals and ad hoc tribunals."⁵

The purpose of this paper is to suggest that the key to the solution of the "serious inadequacy" regarding the progressive development of international law may lie in an accelerated use of international adjudication and the systemization of international tribunals. What

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¹ The Conference must be held if a majority vote of the members of the General Assembly and seven members of the Security Council so decide.

² N. Y. Times, Sept. 10, 1953. The members of the Commission are Senators Alexander Wiley, Chairman, John Sherman Cooper, Homer Ferguson, Guy M. Gillette, Spessard L. Holland, William F. Knowland, Mike Mansfield, and John J. Sparkman.

³ Address before the American Bar Association, August 27, 1953, 29 Dep't State Bull. 307 (Sept., 1953).

is in mind may be pointed up as follows. Former Chief Justice Charles Evans Hughes once observed that:

Throughout its history the United States has consistently supported this sort [the ad hoc system] of judicial process, but we have long recognized that it leaves much to be desired. Arbitrators are selected to determine a particular controversy, and after the controversy has arisen. When the decision has been made the arbitral tribunal ceases to exist. There is unnecessary expense in the creation of a separate tribunal for every case and there is a regrettable loss in the experience of judges because of the lack of continuity in service. *For the same reason, the development of the law suffers, as, instead of a series of decisions with appropriate relation to each other by a permanent bench of judges, thus gradually establishing a body of law, there are sporadic utterances by temporary bodies disconnected with each other, acting under different conditions, and having a widely different capacity.*⁶

Elihu Root remarked in this connection that the work of the International Joint Commission between the United States and Canada, was "... a signal illustration of the true way to preserve peace—by disposing of controversies at the beginning before they have ceased to be *personal* and nations have become excited and resentful about them."⁷

II.

Before Dumbarton Oaks, some American lawyers, such as members of the Committee on International Law of the Association of the Bar of the City of New York and members of the Section of International and comparative Law of the American Bar Association, were giving time and thought to the postwar development of international law in connection with the then-talked-of United Nations organization. Many of these lawyers had had practical experience in international litigation. One of the results of this activity was reflected in a resolution of the House of Delegates of the American Bar Association in March, 1943, directing its Section of International and Comparative Law "... to study and report to this House an adequate post-war judicial system of permanent international courts which will provide for an accessible and continuous administration of justice." In response to this mandate, a report, known as the Murdock report, was submitted to the Association together with specific recommendations which were adopted by that Association on September 13, 1944. This report puts much content into observations such as those of Hughes and Root and epitomizes a fundamental problem in international relations. In much the same words as those used by Mr. Dulles, it commenced by saying that "...

⁴ No criticism is here intended of the fine work of the International Law Commission.

⁵ Address before a society of British law professors, J. Soc'y Pub. Teachers of Law 10 (Sept., 1952).

⁶ Proc. Am. Soc'y Int'l L. 75, 77 (1923) (emphasis added).

⁷ 16 Can. Geog. J. 27 (1938).

the administration of international justice presents a unique challenge to the lawyers of the world." The essence of the report ran as follows:

The bulk of the cases decided under international law or treaties, under the present system, are decided by temporary tribunals established under special agreements between nations. By the terms of the agreements establishing them these tribunals are usually bound to base their decisions on international law, justice, and equity. The quality of their decisions, from the point of view of international justice, varies with the competence of their members, many of whom have had no previous experience in international adjudications. Their jurisdiction is limited to the cases specified in the agreements. Since 1920 approximately 50,000 cases have been decided by such tribunals under agreements between many nations.

The Permanent Court of International Justice has so far been generally considered to be not adapted to the determination of more than a small fraction, less than one-tenth of one per cent, of the justiciable international cases arising since its establishment. The jurisdiction of the Court in actual practice has been the same as though it had been specifically limited to major controversies between nations. It has been deemed to be as impracticable to take all international cases to the World Court as it would be to take all federal cases to the Supreme Court of the United States.

The temporary tribunals, whether chosen from the panel of the Permanent Court of Arbitration or otherwise, are usually constituted only after long delays and the accumulation of hundreds or thousands of cases requiring determination. Their sessions often extend over many years and not infrequently terminate with many cases undecided.

The usual course of an international claim is the filing of a statement in a foreign office, the marking of time for a number of years, and the presentation of the claim to an international tribunal established under a special agreement if, as, and when the general relationship of the claimant and the respondent government is deemed propitious. In many instances this happy and largely fortuitous coincidence never occurs. The claimants have usually received only perfunctory suggestions with reference to the preparation of evidence, and most of the claims are, in consequence, wholly unsupported by evidence which might have been obtained if there had been any hope of early adjudication. It is only in rare instances that those prejudiced by violations of international law by governments obtain prompt settlement of their claims or even obtain prompt hearings of their complaints.

It is manifest that the present improvised methods of adjudication are wholly inadequate as to both accessibility and continuity and that in relation to violation of international law by governments to the injury of individuals there can be said to be at present no adequate administration of justice. A court which, like the Permanent Court of International Justice, operates on the basis of hearing three or four cases a year or, at its highest peak of activity, hands down a total of eleven judgments, orders, and advisory opinions in a year, is not organized in such a manner as to provide a continuous administration of justice in the thousands of cases which arise every year involving alleged violations of international law and treaties.⁸

⁸ A.B.A., Report of the Coordinating Committee on Postwar International

The report brought out that injustices to citizens abroad, due to the failure of governments to protect their life and property pursuant to international law, often raise serious international controversies which could be avoided if the cases were promptly adjudicated on the merits, that "... the effective administration of international justice is an indispensable element in the maintenance of peace, ..." and that "... if justice delayed is justice denied, there is at the present time no assurance whatever of the availability of justice to those prejudiced by violations of international law." It recommended that the World Court be established as "... the highest tribunal of an accessible system of interrelated permanent international courts, ..." that international courts of first instance be given obligatory jurisdiction over claims of governments on behalf of their nationals against other governments, and over such other cases as might not be deemed to be of sufficient importance to require direct resort to the original jurisdiction of the World Court. Review by the World Court of questions of law raised by such decisions was envisaged by the Committee. Such a system of international tribunals, said the report, "... would command the confidence of those who trade, travel and invest in foreign countries and would thus do much to protect and extend international commerce."

III.

Practically all leading international lawyers in the United States and elsewhere approved the basic ideas of the Murdock report. The vast number of unsettled international claims has not been generally known except by specialists in international law. While one readily recalls the recent Voegler and Oatis cases and the expropriations of oil interests in Iran and banana interests in Guatemala, it is scarcely known that even in the peaceful 1930's (when only some 13,000 Americans resided abroad), claims presented to the Department of State on behalf of American citizens injured abroad in alleged violation of international law aggregated, on an average, more than a thousand a year.⁹ This number has been greatly accelerated by the disorders resulting from World War II; and the number of Americans residing abroad has now jumped to over half a million.¹⁰

Judicial Organization, Proc. Sect. of Int'l & Compar. L. 92, 96, 97 (1943-1944). The members of this committee were James Oliver Murdock, Chairman, Edwin D. Dickinson, Amos J. Peaslee, Edgar Turlington, and the present writer.

⁹ Statement made to the writer by Bert L. Hunt, then Chief of the Claims Section of the Legal Adviser's Office, Department of State.

¹⁰ In 1939 Americans residing abroad numbered 13,239. (Data furnished by the Immigration and Naturalization Service, Department of Justice.) In 1952 the number was 522,788. (Letter from R. B. Shipley, Director, Passport Office, Department of State (July 7, 1953).)

Such facts as these were, of course, well known to the responsible officials of the Department of State charged with the drafting of the Charter and the Statute of the International Court of Justice. Many of them had had day-to-day contact with such claims for years. But though personally favoring the establishment of a permanent system of interrelated international courts, these drafters were predominantly preoccupied with what happened to the Covenant of the League of Nations in the United States Senate, and they had been instructed from the top level to avoid including anything in the draft of the Charter which might run into Senate opposition. Nevertheless, the thinking of these American lawyers is in fact reflected both in the Charter of the United Nations and the Statute of the International Court of Justice. The drafters were able to open the door for future implementation by inserting a clause providing that the International Court of Justice would be the "principal" judicial organ of the United Nations; and another, that under certain conditions a few judges of the Court could sit elsewhere than at The Hague in so-called "chambers" for particular cases or categories of cases.¹¹ This last provision was directed to a point which had been made by American lawyers that The Hague seemed too far away to take cases arising outside Europe and that, in any event, the venue of an international case, like any other law suit, should be in the country where the claim arose. Although these provisions were accepted by the members of the United Nations, and accordingly became a part of the Charter and Statute respectively, it was made known to some of these American lawyers that any implementation of the clauses must await 1955 because of concern for the Senate's reaction.

IV.

Thus we have a situation in which, on the face of the Charter, the International Court of Justice is the "principal" judicial organ of the United Nations. Yet "subsidiary" international judicial bodies do not exist, nor have members of the Court sat in "chambers" in or out of The Hague, despite the fact that the International Court reports that it receives "...applications from private individuals with the object of bringing before the Court some matter at issue between them and a government,..."¹² and that "...numerous applications from private persons anxious to have recourse to the Court to obtain justice..." have to be rejected.¹³

¹¹ U.N. Charter Art. 92; Stat. Int'l Ct. of Just. Art. 28. In addition to the Charter of the United Nations, itself, the San Francisco conference dealt with the Statute of the International Court of Justice which forms "an integral part" of the Charter, U.N. Charter Art. 92.

¹² Yearbook, Int'l Ct. of Just. 31 n.1 (1948-1949).

¹³ Yearbook, Int'l Ct. of Just. 59 (1946-1947).

What has just been pointed out is in no sense a criticism of the Court itself. Secretary General Dag Hammarskjöld put his finger on the crucial point in August, 1953, that "... we must recognize that the nations have been for the most part slow to submit their juridical disputes to the International Court of Justice and thus to build up a body of decisions respected by the international community.¹⁴ While he did not have the "chambers" especially in mind, the same basic reason holds true as regards the lack of their use. Governments have not taken the "chambers" seriously since 1945. One reason is that even those governments most interested in avoiding tensions by settling this type of dispute quickly do not have a sufficient staff of lawyers to handle the enormous number of international claims. The practice has grown up under which foreign office lawyers take the prime responsibility for handling these claims. This may have been satisfactory half a century or so ago when international contacts, and attendant international claims, were far fewer. Our Department of State, for instance, does little today about a particular international claim except when considerable pressure is put on it. Most American citizens wronged by governments abroad are not in a position to exert such pressure, nor should they be required to do so in order to obtain reparation for injuries received abroad in violation of international law.¹⁵

Except that the number of claims has greatly increased, the situation today as regards the inaccessibility of international tribunals is essentially the same as it was in 1945, when Mr. Justice Jackson took occasion to remark:

The profession generally has, I think, vaguely realized and appreciated the work of the Permanent Court of International Justice. . . . But to most of the bar such international tribunals as we have had were inaccessible professionally as well as geographically. . . . While private claims based on alleged violation of international law or treaties are numerous, no permanent judicial machinery has been available for their adjudication. We still leave the traveler, the business man or the owner of property in a foreign country who suffers a violation of international law or treaty rights pretty much in the unhappy position of having no sure or easy remedy. . . . Claims commissions have settled many such disputes, of course, and the problem of providing judicial remedies is receiving more thought than ever before.¹⁶

¹⁴ Annual Report on the Work of the United Nations (July 1, 1952-June 30, 1953) U.N. Doc. No. A/2404 at xi.

¹⁵ There would be far greater stimulation on governmental action in this regard if the "chamber" jurisdiction were compulsory.

¹⁶ Proc. Am. Soc'y Int'l L. 10, 13 (1945). It is interesting to compare this statement of 1945 with the following from the pen of John Bassett Moore, while he was a judge of the World Court, referring to the situation two and three decades earlier. Said Moore in 1924: "Although there are few who oppose international arbitration in theory, yet the scope of its operation has by no means been so much enlarged during the past twenty years as is popu-

The number of international claims which exist today exceeds by hundreds, even thousands, the number of federal cases which arose shortly after 1789, and the experience of appeals to the British Privy Council and the development of our own federal judiciary go far to point the way toward developing an effective international judicial system. It can be said without hesitation that a system of international courts is needed far more acutely today than was the system of federal courts in 1789 by the thirteen original States.

v.

The present administration may well be inclined to act vigorously in this matter. Mr. Dulles was himself one of the lawyers who, in the pre-Dumbarton Oaks days, gave serious thought to the establishment of an international judicial system. He was the Chairman of the Committee on International Law of the Association of the Bar of the City of New York at that time, and, under his leadership, that Committee recommended, in June, 1944, that the United States undertake "for a trial period" to accept the jurisdiction of a decentralized system of inter-related international courts "...to adjudicate disputes as to the interpretation of treaties and other matters of controversy which are clearly of a legal nature in the sense of involving the application of some agreed principle."¹⁷ It would be most appropriate indeed that the United States now take the leadership in the establishment of an international court system. The United States has always favored, and has been a leader in, international adjudication, and has never had cause to regret its continuing policy. We need only mention arbitration under the Jay Treaty, the Alabama Claims, the Bering Sea Arbitration, and, more recently, the adjudication of some 3,000 claims with Mexico. This policy has never been made an issue in political campaigns.

Compared with the Hague panels set up in 1899 and 1907 and ad hoc international commissions, the establishment of the World Court was a great step. But as important as it is, by itself it is like having a Supreme Court of the United States without a related federal system of courts. Moreover, some such system as that proposed by American lawyers in 1944 would relieve the World Court of much time consumed in hearing evidence, and would allow its judges more time for the consideration of important original cases and questions of law on review from lower courts of the system.¹⁸

larly imagined. When I stated, in 1914, that, so far as concerned the United States, the practice of arbitration was not then so far advanced as it was a hundred and twenty-four years before, I gave precise proof of the correctness of the statement. This condition has not changed." Moore, *International Law and Some Current Illusions* xii (1924).

¹⁷ Ass'n of Bar of City of N.Y., Report, Comm. on Int'l L. 5 (June, 1944).

¹⁸ Though Hammerskjold's observation, *supra* note 14, is accurate, it is

The judicial method, defining rights from case to case, does not have the inherent difficulties which are present in attempts at formal codification at a single stroke. Long experience shows that the best way to build up a body of international law is by judicial determinations related to specific fact situations. Thousands of new judicial decisions, of the type of claim under discussion, would greatly develop the existing body of substantive international law, and the use of permanent international tribunals for the decision of such cases would avoid many irritating international situations which now interfere with the orderly conduct of friendly diplomatic relations.

In most phases of life, friendliness and the absence of irritation are based upon persons being treated as equals. This is perhaps even more true in international relations; and the smallest nation before an international tribunal stands on an equal footing with the greatest power. One of the outstanding impressions one gets from reading decision after decision of international tribunals is that the courts lean over backward to do justice. They are very conscious that they are building a vitally important institution. Their attitude is much the same as that of the United States Supreme Court in its early days.

VI.

It is not suggested here that the organization of international courts is more important than some other matters for the 1955 conference, such as the "veto." But the matter of the prompt and orderly settlement of international claims, important as it is, is not daily so apparent. In times of tension like the present, it is more important than ever systematically to remove relatively minor irritations which play a part in the overall tension. There were great tensions in the United States at the time the federal courts were established. The federal courts have undoubtedly done a great deal to ameliorate irritations by their decisions. The present world situation appears to argue for, rather than against, efforts similar to those of Hamilton and Madison in 1787 and later in the Federalist papers and elsewhere for a system of federal courts in the United States.

The present writer is not now preoccupied with details, such as whether or not tribunals of first instance should be "circuit courts," but he proposes that, in implementing Mr. Dulles' invitation, American lawyers start giving sustained attention to such details. The writer's present concern is with such things as the fact that a thorough-going system for settling existing claims in an orderly fashion would go far to help avoid the accumulating irritations of the cold war; would

nevertheless true that the International Court of Justice has been busier than was the Permanent Court of International Justice between World War I and World War II.

build up a great wealth of international law precedents; would avoid the disadvantages attendant upon the miscellany of ad hoc tribunals which are now used sporadically; would clear up foreign office claims dockets; and would do much needed justice to Americans and others who have been injured abroad by foreign acts or omissions of State in violation of international law, whose claims now only gather dust in the various foreign offices of the world.

The writer presents the foregoing as food for thought for the new Senate Commission, as well as for American lawyers generally. The matter is in no sense political. In its simplest terms the basic idea is essentially to carry the Court of Claims system into international relations, where it has always been recognized that the "King can, and does, do wrong." The United States Government, especially the new Senate Commission, has a rare opportunity to take a great step forward toward the making of an orderly world based upon law and justice. The statesman who will undertake and carry through the creation of such an institution will have accomplished one of the great advances of all time.