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The United States and the World Court: Report of the Association's Committee

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THE UNITED STATES AND THE WORLD COURT; REPORT OF THE ASSOCIATION'S COMMITTEE

Hon. John H. Denison,
President of the Denver Bar Association.

Dear President Denison:

Your Committee on the question of whether the United States should adhere to the Permanent Court of International Justice, through ratification by the Senate, of the act of President Hoover in directing the signing at Geneva of the Protocol of Adherence, the Protocol of the Statute of the Court, and the Protocol of Revision of the Statute, is now ready to report.

The conclusion of the Committee favors the ratification. The reasons follow:

The Permanent Court of International Justice, or, as it is more commonly known, the World Court, was chartered and organized in 1921, under an international Statute drafted in 1920, and subscribed to by many States in a document called the Protocol of Signature.

Since organization, the Court, composed of eminent judges, has been functioning steadily, has decided sixteen international cases, rendered sixteen advisory opinions, and has grown rapidly in world esteem.

The Court has jurisdiction, under Article XXXVI of the Statute,—

FIRST: Of all cases which the disputing States refer to it by special agreement, and all matters which their general treaties and conventions likewise provide shall be referred.

SECOND: Of certain classes of legal disputes, the submission of which, when arising, is agreed upon in advance at the time of subscribing to

the Protocol of Signature (the Protocol adopting the charter Statute of the Court), by electing to accept, although there is no obligation to elect, certain provisions of the Protocol imposing this submission. Many of the States, by their election, have accepted this compulsory jurisdiction,—others have not. The United States, if adhering, would adhere as a State of this latter class.

The Court is further empowered by Article XIV of the Covenant of the League of Nations, to render advisory opinions to and at the request of either the Council or the Assembly of the League of Nations upon any dispute or question thus requested, and after adopting appropriate rules, has been exercising this advisory function, although the Protocol of Signature has nothing to say about advisory opinions. The Protocol for the Revision of the Statute, is designed to effect in the Statute certain changes, among which are those supplying the advisory jurisdiction lacking in the older Statute, and also harmonizing the Statute with the Protocol of Adherence, which is the principal international agreement by which, if ratified by the Senate, the United States would enter the Court.

In view of the fact that for the time being at any rate, the United States has adopted the policy of co-operation with, rather than membership in, the League of Nations, the wisdom of adherence by this country to the World Court would seem to depend upon two questions:

(1) Whether the other States which are members of the Court have now complied with the reserved conditions upon which if accepted by the other members of the Court, our Senate declared in 1926 that it would be willing to see the United States adhere.

(2) Upon whether there is anything in the adherence to the Court, which, either through the Protocol of Adherence, or through the Covenant of the League of Nations, would subject the United States to the League.

SENATE RESERVATIONS

These famous reservations are five in number:

The *first reservation* is to the effect that the adherence of the United States to the Court shall not involve any legal relation to the League of Nations, or the assumption of any obligations by the United States under the treaty of Versailles. While this reservation is not accepted by the Protocol of Adherence in specific language, it is accepted in the general

language of the Introduction and of Article I, relating to all five of the reservations.

The *second reservation* demands a right of participation by the United States in the election of the Judges who comprise the Court, these Judges now being elected by a concurring majority of the Council and of the Assembly of the League, voting separately. This demand is met specifically by Article II of the Protocol of Adherence, and under it the United States, although not a member of the League, would, for the purpose of electing Judges, have the same right to vote as if a member.

The *third reservation* contemplates that the determination of what share of the expenses of the Court should be borne by the United States shall be made by the Congress of the United States itself. Compliance with this reservation is to be found in the general language of acceptance in the Introduction of the Protocol of Adherence and in Article I.

In the *fourth reservation* the Senate stipulates that the United States be permitted at any time to withdraw its adherence to the Court, and that the charter Statute under which the Court was created, shall not be amended without the consent of the United States. The right of withdrawal is completely provided for in Article VIII of the Protocol of Adherence and the right to veto any amendment of the charter Statute is fully conceded by Article III.

The *fifth reservation* is the one which has given the most trouble. This reservation is to the effect that,—(1) the Court shall not render advisory opinions except publicly, after notice to all States belonging to the Court, and after public hearings or opportunity for public hearings is given to all States concerned, and also, that,—(2) the Court shall not, 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.

Under the present governing laws of the Court, advisory opinions may be called for only by the Council or by the Assembly of the League of Nations, and not by individual States. The Court has rendered sixteen such opinions already. They are considered of great value to the States

belonging to the Court. They tend, among other things, to avert a crisis between States before it becomes acute. While advisory opinions, being advisory, are not binding, they nevertheless, carry great moral weight. To provide for the desired publicity has been easy enough, but to find a formula that would satisfy the United States in its desire to possess a veto power to prevent rendition of an advisory opinion on any matter in which the United States might have or claim an interest and at the same time not destroy wholly this useful function of the Court for the remaining States which do not ask for any similar veto power, has been a difficult problem.

Article IV of the Protocol of Adherence complies with the publicity demand by providing irrevocably what the rules of the Court already provided revocably, namely, that advisory opinions shall be rendered only in public session of the Court after notice and after opportunity to be heard publicly.

Article V of the Protocol goes even further in respect to the right of the United States to be heard as to advisory opinions than demanded by the Senate itself, for this Article provides that even before a request is made upon the Court for an advisory opinion, and while the proposed request is still pending in the Council or Assembly of the League, notice shall be given to the United States so that there may be an exchange of views between the United States and the Council or Assembly as the case may be, on the question of whether or not an interest of the United States would be affected by an advisory opinion on the subject matter of the proposed request.

In respect to the desire for a veto power, it may be said that most questions for which an advisory opinion would be sought probably would be questions in which the United States neither would have nor claim an interest. This has been true as to all sixteen of the advisory opinions thus far rendered. Again, if by chance the question involved in the proposed advisory opinion should happen to be one in which the United States has or claims an interest, the Government might be perfectly willing to have an advisory opinion rendered upon it, and even might join in the request. If, however, it should turn out that the United States not only has or claims to have an interest, but persists in its insistence that

no opinion should be rendered, then, as provided under Article V of the Protocol, the United States could exercise its expressly reserved power of withdrawal from the Court "without any imputation of unfriendliness or unwillingness to cooperate generally for peace and good will." Thus the formula by which the Protocol solves the problems of the fifth reservation is of such a nature that the Court could not, while the United States is a member of it, render an advisory opinion on any subject matter in which the United States either has or claims to have an interest. True, the Court could entertain the request and render the opinion after the United States had withdrawn. But to do this, in other words, for the Court to render an advisory opinion while the United States is not a member is, however, a function the Court is exercising already. Manifestly, then, the United States no more subjects itself to the influence of the advisory opinions by joining the Court than by remaining outside. Indeed, under membership, the subjection would be actually less, because membership in itself carries a greater opportunity of control to the State possessing it. Then, too, the universal desire to have the United States become a member of the Court may be depended upon, in the event we should join, to induce, in all probability, the other States not to press for an advisory opinion which the United States really would not want rendered.

In the Senate's Resolution of Adherence, and following the recital of the five reservations are a *couple* of *"understandings"* with which also it would be contemplated that the United States would be joining the Court. According to the first of these, recourse to the Court for the settlement of a difference between the United States and any other State, is to be had only through general or special treaties concluded between the parties in dispute. This is provided for already in the charter Statute of the Court. No State, on signing the Protocol of Signature, need subscribe to the Court's compulsory jurisdiction unless it wants to, although many States have done so. The United States contemplates subscribing only to the Court's voluntary jurisdiction, that is, the jurisdiction assented to voluntarily by the parties themselves through general or special treaty or agreement aside from that represented by any of the Protocols under consideration.

The other "understanding" which the Senate prescribed, was to the effect that adherence to the Court should not be construed as requiring the United States to depart from its traditional policy of not interfering with, or entangling itself in, the political questions of policy or internal administration of other States, or as implying a relinquishment by the United States of its traditional attitude toward purely American questions. There is nothing in the Protocol of Adherence implying in the slightest degree a departure either from the policy or the attitude mentioned, since under the Protocol the United States could not be obliged to submit to the Court any dispute with another State unless electing to do so, and since it could veto the rendition even of an advisory opinion while a member of the Court.

THE COURT AND THE LEAGUE OF NATIONS

Since the present policy of the United States is to cooperate voluntarily with the League rather than to be a member, it becomes important to inquire whether acceptance by the United States of membership in the Court would carry with it an agreement to be bound by the provisions of the Covenant of the League of Nations or would otherwise create a subjection of the United States to the League.

We have considered this inquiry and answer it in the negative.

While it was the League of Nations that under Article 14 of the Covenant brought about the organization of the Court, it was not the League that chartered it or gave it the breath of life. Both charter and life came directly from the many States which, while members of the League, nevertheless, acting apart from the League, separately and independently adopted the charter Statute and by so doing brought the Court into being.

The Court and the League are different entities or organizations. The decisions of the Court are not subject to the control of the League. Membership in the Court is not membership in the League or an acceptance of the provisions of the Covenant.

The relation between the Court and the League is, however, a close one. The common purpose of promoting international peace, together with the large degree of identity in membership, make it so. Fifty-four states are members of the League and fifty-two of them have signed the Protocol of Signature (the Charter Statute) of the Court and thirty-two of these have ratified it. There are now only two states belonging to the Court which do not belong to the League. The relation between Court and League is not one, however, which need deter the United States in the slightest degree from entering the Court.

The judges of the Court are elected by the Council and the Assembly of the League, and their salaries are a part of the budget of the League collected from the League's member States, but the United States, under the Protocol of Adherence, is to have in the election a voice equal to that of any other State and is to determine the amount of its own contribution to the expenses of the Court's maintenance.

We have noted already that the Council or Assembly may call for advisory opinions from the Court, although under the Protocol of Adherence the United States would have a veto power against the rendition of these opinions as long as the United States is a member of the Court.

In the examination of the relation between the Court and the League we now come to the subject of "sanctions", that is to those inducements which lead the States, when litigants before the Court, to abide by the Court's decree.

In the domestic or national courts of individual States the usual "sanction" or inducement for exacting obedience to the judgment of a court, is force—the force of the marshal or sheriff and his agents, or corresponding officers.

The only "sanction" found in the Protocols themselves by which to exact submission to the decree of the World Court is the moral obligation and the honor of the litigant State, whether a member of the League or not, which has submitted its case under an agreement to abide by the result. True, there is always the public opinion of the World—another powerful "sanction", but this lies outside of any agreement.

Although the Protocols contain no language calling for any "sanction" other than that of moral obligation yet, as to member States of the League it is clear that under Articles 13 and 16 of the League Covenant the members of the League contemplate the possible use of economic and even military "sanctions" under certain circumstances against one of their own number refusing to abide by the decision of the Court.

As to States which are not members of the League but are members of the Court, it is equally clear that no legal connection between the Court Protocols and the Covenant of the League would make any "sanction" of economic pressure or physical force applicable to the United States should the latter, upon adhering to the Court refuse to comply with a decision in a matter voluntarily submitted. This does not mean that the member States of the League have not, by Article 17 of the Covenant, agreed in such wise as to contemplate the possible use of economic and even military pressure against a non-member of the League which, on invitation of the Council, either refuses to submit a controversy to the Court or, having submitted it, refuses to abide by the decision but does the wholly unlikely thing of resorting to war instead; for there is an agreement among the League States to that effect. But it does mean, that the United States no more becomes a party to that agreement contained in the Covenant, no more assumes an obligation in respect thereto and no more subjects itself to the League by adhering to the Court under the Protocols before us, than by not adhering at all.

WHY THE UNITED STATES SHOULD JOIN THE COURT

Since under the Protocol of Signature creating the Court, the United States, although not a party to that Protocol, is already eligible as a suitor or defendant before the Court, the question of why the United States should become a member is a fair one. Consideration proves that eligibility is not enough; that there should be actual membership.

The reasons for membership are two. The Court needs the United States. The United States, from the standpoint of enlightened self-interest, needs the Court. The process of diverting the thought and habit of the Nations from war to a judicial tribunal, as an agency for the settlement of interna-

tional conflict, is a slow one at best. The adherence of the United States means everything to the increasing strength and prestige of the Court and to its acceptance by all Nations as an agency for peace. As for the self-interest of the United States we are more likely, as a matter of human nature, to receive exact justice from the Court, as a litigant before it, if we appear as a member under the Protocols than if as a foreigner under the privilege of eligibility, no matter how graciously extended. Then too, international experience proves that wars come not only to the original disputants but also, as in the case of our own nation in the World War, to neutrals whose rights the original disputants violate. The World Court advanced in power and influence by our own membership in it, would have a strong tendency to minimize the frequency of the wars in which our country would be engaged, and, therefore, to increase the security of the life, opportunities and achievements of our people.

RECOMMENDATIONS

For these reasons and in conclusion, the committee respectfully recommends to the Denver Bar Association the adoption of the attached Resolution for the adherence of the United States to the World Court.

Respectfully submitted,

GEORGE F. DUNKLEE,
JAMES H. PERSHING,
WILL SHAFROTH,
ROGER WOLCOTT,
L. WARD BANNISTER, *Chairman.*

RESOLUTION OF THE DENVER BAR ASSOCIATION RELATING TO THE WORLD COURT

WHEREAS, the representative of the United States at Berne, acting under the direction of the President of the United States, has signed the Protocol of Signature of the Statute of the Permanent Court of International Justice, the Protocol of Adherence of the United States to said Protocol of Signature, and also has signed the Protocol of Revision of

the Statute referred to, all to the end that the United States may become a member of said Court, and

WHEREAS, the Permanent Court of International Justice, or World Court as it is more commonly called, is a great constructive agency for the maintenance of international peace, needs increasing support from the public opinion of the World and is needed in turn not only by other Nations but, from the standpoint of enlightened self-interest, by our own Nation as well, and

WHEREAS, the United States may now safely become a member of said Court under the Protocols referred to without either sacrifice of sovereignty or violation of traditional policies in international affairs,

NOW, THEREFORE, BE IT RESOLVED, that the Denver Bar Association earnestly favors the ratification of these Protocols by the Senate of the United States; that a copy of this Resolution, together with a copy of the report of the committee of the Association, which is hereby approved, be sent to the Senators representing Colorado at Washington and that a copy of the Resolution be sent to the President of the United States.*

*EDITOR'S NOTE: After due consideration the above report of the committee was approved and accepted by the Association and the resolution adopted as recommended.