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PERMANENT COURT OF INTERNATIONAL JUSTICE.

VARIOUS PROBLEMS SOLVED BY COMMISSION APPOINTED BY COUNCIL OF THE LEAGUE OF NATIONS TO SUBMIT PLAN FOR TRIBUNAL TO DETERMINE JUSTICIABLE QUESTIONS.*

BY ELIHU ROOT.

Gentlemen of the Association: It is a pleasure to take part in this series of discussions because I think it is a very valuable and praiseworthy project on the part of the Association, and I am glad to be able to contribute what I can by talking for a few minutes about the subject scheduled for this evening. It is a very proper subject to discuss here, because this Association has had something to do with it. When the constitution for the League of Nations was proposed and published by the conference at Paris with a request for suggestions, the special committee of this Association upon international law held a meeting for the purpose of considering what they ought to do in that field. The result of that meeting was that there was a unanimous resolution passed, without reference to party, race, creed or previous condition of servitude, by the committee, recommending and urging that there be included in the agreement or League of Nations, the following:

The High Contracting Powers agree to refer to the existing Permanent Court of Arbitration at the Hague, or to the Court of Arbitral Justice proposed at the Second Hague Conference, then established, or to some other arbitral tribunals all disputes between them, including those affecting honor and vital interests, which are of a justiciable character, and which the powers concerned have failed to settle by diplomatic methods. The powers so referring to arbitration agree to accept and give effect to the award of the Tribunal.

Disputes of a justiciable character are defined as disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the nature and extent of the reparation to be made for any such breach. Any question which may arise as to whether a dispute is of a justiciable character, is to be referred for decision to the Court of Arbitral Justice when constituted, or until it is constituted, to the existing Permanent Court of Arbitration at the Hague.

That resolution was communicated to the Secretary of State of the United States, and was cabled by him to Paris. After the communication to the gentlemen at Paris, an amendment was made to the League agreement. I will say nothing because I know nothing on the question whether this was propter hoc or simply post hoc. The substance of the amendment was to include in the covenant for the League the definition as to justiciable questions given in the resolution of the committee of this Association upon international law. That resolution, as I understand, was subsequently approved by the Association in plenary session. The article of the League Covenant originally reads as follows:

The members of the League agree that whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject matter to arbitration.

That is the way it stood before, and being simply an agreement to arbitrate questions recognized as being suitable for arbitration, didn't amount to very much. But the amendment inserts the following words:

Disputes as to the interpretation of a treaty, or as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach are declared to be among those which are generally suitable for submission to arbitration.

Then it goes on:

For the consideration of any such dispute the Court of Arbitration to which the case is referred shall be the Court agreed upon by the parties to the dispute or stipulated in any convention existing between them.

The members of the League agree that they will carry out in full good faith any award that may be rendered, and that they will not resort to war against a member of the League which complies therewith. In the event of any failure to carry out such award, the Council shall propose what steps should be taken to give effect thereto.

You will see that that carries into the article in a general way the definition of justiciable questions included in your resolution. That is a long step forward because what are known as the Taft Treaties of Arbitration, treaties negotiated while Mr. Taft was President, between the United States and France and between the United States and Great Britain, failed because they provided for referring to arbitration all justiciable questions and the term "justiciable"
was deemed so general and vague, so without any precedent upon which to draw the line as to what was justiciable and what was not, that it was considered that an agreement to refer to arbitration all justiciable questions would involve or might involve all sorts of questions, whether of policy or of right. This definition obviates the chief objection which led to the failure of the Taft Arbitration Treaties.

In the League Covenant it is also stated in article 14 that—

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.

Some time in the early spring I received an invitation from the Council of the League of Nations, identical with an invitation which was sent to some dozen gentlemen residing in different nations, inviting us to become members of a committee, or as they call it on the other side, a commission, to devise and recommend a plan for the Permanent Court of International Justice which the League Covenant required the Council to formulate and to submit to the members of the League for adoption. The invitation was to prepare and recommend to the Council of the League a plan by which they might comply with this provision of Article 14, which required them to formulate and submit a plan for a Permanent Court of International Justice.

For many years, people concerned with international affairs have realized that one difficulty about arbitration is that arbitrators too often are apt to treat the cases brought before them as a matter for settlement, for adjustment. They have come to consider, apparently, that their function is to do with the case what seems to them to be the wisest and most expedient thing for all parties and all interests concerned. They tend to act under a sense of judicial obligation. The great difficulty about arbitration has really been not that nations were unwilling to submit questions of law, questions of right, the kind of questions that our courts pass upon as between individuals in municipal law, to impartial judgment, but that they had not much confidence in getting impartial judgment because they found that the arbitrators, when they got together, went into negotiation
as diplomats, and no one could tell what would come out of it. The party having no matter how strong a case, no matter how absolutely right upon the question of legal right, might find itself defeated because it seemed to the arbitrators on the whole that it perhaps would be better that it should not have its legal rights, but that the case should be settled as conveniently as possible.

Now, this proposed Permanent Court of International Justice was designed to differ from the ordinary arbitral tribunal in that respect. It was designed to be a court in which judges would sit and decide according to law, and let the consequences take care of themselves. And that was the problem presented to this committee which met at the Hague in the second week of June last.

The committee was composed of members from ten different countries. Lord Phillimore from England. M. de Laparadella from France. Baron Descamps from Belgium. Judge Loder from Holland. Mr. Hagerup from Norway. Mr. Altamira from Spain. Mr. Adatei from Japan. Mr. Ricci Busatti from Italy. Mr. Raoul Fernandez from Brazil. And myself. Nobody represented any government. We were called there as experts purely and on just as purely expert work as if a lot of engineers had been called together to propose a plan for a bridge.

At the outset, one might suppose that it was quite a simple thing to get up a plan for a court, but there were some very serious difficulties involved.

A plan had been prepared at the urgent instance of the American delegates to the Second Hague Conference in 1907—a plan for a permanent court of international justice. The name that was given to it then was the Court of Arbitral Justice, and that was the name that found its way into our Bar Association resolution—referring to the "Court of Arbitral Justice" proposed at the Second Hague Conference. A general scheme of a court was devised in 1907 and reported to the Second Hague Conference—and was adopted. But, it didn’t take the form of an operative convention or treaty because it was found impossible to agree upon the constitution of the court. That is, it was found impossible to agree upon the way in which the judges should be selected. There was a certain jealousy or suspicion or prejudice or perhaps just apprehension on the part of the small countries towards the big countries which made the small countries
unwilling to allow the big countries to have a voice in the creation of the court, in the naming of the judges, proportionate to their size, proportionate to the influence they thought they ought to have. On the other hand, the big countries were not willing to allow the great numerical preponderance of small countries to override them and to make up the court by overwhelming them with their votes. Great Britain and France and Germany and Russia would not consent that Luxenbourg and Switzerland and Hayti and San Domingo should outvote them. There was no question about that in their minds. So that the great countries would not consent to a vote in which each country was to have a voice—an equal voice—in the selection of the judges, and the small countries would not consent to a vote in which the big countries had any greater voice than each of them had. There the thing stopped, and the court failed in 1907 upon that.

It was a serious difficulty, and many efforts had been made in the meantime between 1907 and the coming on of the war to try to get over that—but without success.

Now, in making up the plan of the court, this committee, sitting at the Hague, adopted a plan for dealing with this subject, which was taken very largely from the experience of the government of the United States. It was pointed out that in 1787, when the Constitution of the United States was framed, just such a question presented itself to the convention. There were the big states, and they weren't willing to be overdone by the numerical superiority of the small states; and there were the small states, not willing to yield their equal rights and give the big states any greater voice in the government of the country than they had. And that was settled by making the two legislative bodies and giving all the states an equal voice—great and small—in the Senate, and giving the population its voice according to numbers in the House of Representatives, so that Nevada has just as much voice in the Senate as New York, while New York has forty-three times the voice in the House that Nevada has. Now, there was a practical adjustment of just the same kind of a difficulty, and after months of discussion, the committee came to a realization of the fact that, after all, this was a mere adjustment of means to an end. It wasn't a question of sovereignty. Many of them came to the meeting firmly resolved never, never to surrender the sovereignty
of their small countries—not to yield one jot or title. But they finally came to the conclusion that after all this was a court in which the sovereignty of everybody was liable to be limited by judicial decision, and that no one had a right to have that done, but it must be done solely by consent. So it wasn't a question of the exercise of sovereignty; but, it was a question of consent—to be given by sovereignty, and the question of sovereignty was satisfied if everybody had the same right to consent or refuse to consent.

Following that line it was perceived that under the organization of the League of Nations—an organization which would be inevitable under any sort of international organization quite independent of specific and particular provisions in the Covenant of the League of Nations—there were two bodies organized on exactly the same principle as the Senate and the House of Representatives of the United States; the Council, in which the big states were predominant, and the assembly, in which the small states were predominant, and accordingly the question of electing the judges was settled by providing that they should be elected just exactly as laws are passed by our Congress, requiring in the election of a judge the concurrent, separate votes of both of those bodies, just as the passing of a law in the government of the United States requires separate and concurrent votes of both the bodies of the national legislature. Then the difficulty that they might not agree was met by importing bodily into the system our American Committee of Conference, in which so many thousands of laws have been thrashed out and settled upon when it seemed impossible that the Senate and the House could agree; and provision was made that if, after a certain number of votes, there wasn't an agreement, a committee of conference was to be appointed, and that they were to have full scope and find somebody whom they could recommend to both houses for election. And on that basis, that old bugaboo of 1907 was dissipated, and that is the way in which the court is now proposed to be organized. You will perceive that that is essentially fair because it enables each party in the community of nations to exercise a veto against unfairness by the other. The assembly can always prevent the Council from being unfair. That is, the small nations in the assembly can always prevent the big nations from being unfair. And the big nations, small in number, in the Council can always prevent the small nations,
in great number in the assembly, from being unfair. They can each force fair treatment of the subject and effect a satisfactory solution.

Then, there was another question which was very serious, and that was the question of jurisdiction. The plan of 1907 provided for no obligatory jurisdiction. It merely provided that this court was to have jurisdiction over all questions—international questions—submitted to it. But, here was a provision in the Covenant of the League, that all questions disagreements, disputes, which were not submitted to arbitration, were to be sent to the Council or brought before the Council. Now, the Council was not a body of judges. It was a body of diplomats. The obligation of a member of the Council is not to do justice as a judge, but to protect the interests of his country for which he casts his vote, and the natural effect of giving the option either to arbitrate or to go to the Council would be that the nations which felt their case to be weak in a matter of law or justice, would always refuse to arbitrate and instead go to the Council where it could be negotiated. Accordingly we came to the conclusion that we ought to have obligatory arbitration upon questions of strict legal right, and we put that into the plan, in the exact words of the resolution of this Association and of the amended Article 13 of the Covenant which embodied those words. We provided that the court should have jurisdiction of all questions that were submitted by both parties—international questions—and should have jurisdiction over all questions of international law, interpretation of treaties or of the direct effects of the obligation over which the dispute arose.

There was one other subject which was quite important, and that was the question whether countries in litigation were to be represented in the court. That was a difficult subject because the first answer if you were to ask any national or municipal lawyer would be—no. Yet, upon very full consideration we all came to the contrary conclusion, and I have no doubt that it was quite proper. Of course, there are representatives of many countries in the court. Every member of the court comes from a different country, and we had a provision that no more than one shall come from one country, but few small countries can be included in the court, and so we provided that a country not included in the court should have a right to have a judge of its own people put into the court for the purposes of that
case. And the reasons for it are these: The greatest obstacle to doing justice as between nations is a failure of nations to understand each other. I don't believe anybody can appreciate that without actual experience. Many years ago I was called upon to argue in the Supreme Court of the United States a case relating to the effect of a French judgment in this country. I see Mr. Coudert in front of me smiling because he remembers the case. There had been a suit brought by the administrator of the old firm of Alexandre, the maker of kid gloves, against A. T. Stewart & Company over some contract for gloves. The suit was brought in Paris and judgment was obtained there, for I don't remember how many millions of francs, and suit on that judgment was brought here in the Circuit Court of the United States. Judge Wallace held the judgment to be conclusive, and he at that time said that it would be merely impudent for us to assert that the French system of obtaining justice was not just as good a system for doing justice as our own. I studied the subject very carefully, and I came to the conclusion that Judge Wallace was right— with a qualification, and the qualification was this: The French system was adapted to doing justice between people who had French ideas and did their business in the French manner, and an American would have very little chance under it. On the other hand, the American system is adapted to doing justice as between people who have American ideas, and who do their business in an American way, and a Frenchman would have very little chance under it. Well, you find that difficulty everywhere in the international affairs, and in no other class of people in the world can you find it more inveterate than among lawyers. We passed hours and hours and days in that committee in discussing subjects where the only difference was not in our discussion or in what we were saying, but in a different set of ideas in the backs of our heads, and it requires experience to understand that there is such a difference of ideas. Lord Phillimore and myself, the two representatives of the common law system countries, found ourselves up against a granite wall very often, and I suppose that the continental lawyers found themselves in the same attitude as to Lord Phillimore and myself. It required long and patient effort to find out what we were talking about. Now, we agreed that in order that justice should be done in the international court, there ought to be some one man at least
in court who understood the habits, the customs and the reactions of
the people—a party litigant to any proceeding, and the result was that
we provided for such a court—for the present—of eleven judges and
four alternates or supplemental judges, to be elected by the separate
and concurrent votes of these two bodies. They are to be judges
sworn as judges under the honorable obligation of the judicial office,
doing no other business, and they are to sit there and decide inter-
national cases according to law.

There were also a great number of ancillary provisions about the
court. They are to be paid regular salaries. They are to reside dur-
ing the sessions of the court at the seat of the court. The seat of the
court is to be The Hague. There are provisions for special tribunals
upon the request of the parties during vacation. There is a provision
for a Chief Judge. Upon application of the parties, the Chief Judge
is to designate three judges to take up a case which may be urgent
during vacation time. The court will always be ready to do busi-
ness. At the same time we provided for the continuance of the old
Permanent Court of Arbitration at The Hague for the purpose of
dealing with questions which involve subjects not altogether justicia-
ble but appropriate for arbitration, so that the old tribunal, which
has some of the characteristics of John the Baptist, is not to be de-
stroyed.

I should have mentioned the fact that the election of these judges
is to be from a list which is made up by the members of the old Perma-
nent Court of Arbitration at The Hague. The members of that old
court from each country are to send to the Secretary General at The
Hague two names for each vacancy when this new court is to be put
into operation. My friend, Mr. Strauss, whom I see smiling before
me, and Judge Gray and Mr. John Bassett Moore and myself will
have to get together and propose two names of men whom we think
fit to be judges and who, we have ascertained in some way satisfactory
to ourselves, will probably be willing to serve as judges, and send
them on to the Secretary. All the countries are to do that. And
from the list thus made out, these two bodies, the Council and the
Assembly, are to make their selections so that you will get the sort
of personnel for the court as far removed as practicable from the
ordinary influences of politics for what there is in it.
Of course, the action of the committee, which was unanimous, does not decide anything. The committee simply reports to the Council of the League of Nations, by which it was constituted, and the Council now has this plan before it. I don't know what they are going to do with it. In some form or other it will be laid before the Assembly of the League of Nations, which is to meet next month in Geneva. I don't know what they will do with it. It may be that there will be so much opposition to the obligatory feature of arbitration, that they will strike it out.* I don't know. I hope not. But, whatever they do with it, that step is taken. Another step forward has been taken, and it is there by the unanimous agreement of fairly competent representatives of the different nations situated in different parts of the world, widely differing in their interests and characteristics and size and wealth—by the unanimous agreement of a fairly representative body of men familiar with the subject—a plan for the formation of a court to deal with international questions upon grounds of public right, just as the Supreme Court of the United States, and the Court of the King's Bench of Great Britain, and the Court of Cassation of France, deal with questions of municipal right. I say a unanimous agreement has been formulated for a plan of such a court. Now, this is a step in advance in the processes of civilization. All the processes of civilization are slow. All advances shock somebody, and an attempt to go too fast, too far at once, almost always ends in failure. "Leg over leg the dog went to Dover." I have often thought in observing the progress of improvement of the law in Washington that every good bill had to have a period of gestation. I remember a bill which did great signal service had been knocking at the door of Congress from year to year for thirteen years. It started with nobody for it, and finally some one opened the door and said, "Why don't you come in?" And that is more so in international affairs. Every step forward has to come in contact with the ingrained habits, preconceptions, involuntary reactions of vast multitudes of people, and they have got to be treated just as a nervous horse is treated. If you go at him too fast, you get into trouble. Now, it is very much so about this judicial business. You have got to go step by step. It is five, nearly six years now since the

*The obligation feature has been eliminated.
Constitutional Convention of this state adopted a provision for the reorganization and condensation of state government and what is known as the budget system. A great majority of the convention had agreed upon it, but it was overwhelmingly defeated at the polls. Yet more than twenty states have adopted it since, and the Governor's Commission appointed by the Governor who at that convention opposed it, has now recommended the same thing. Substantially all the important advances upon the Constitution of 1846, which were made by the convention of 1867 in this state were adopted afterwards, although their plan was rejected at the time.

Now, this idea of arbitration, this idea of affording a substitute for war by the processes of justice, was laughed at in 1899. It was adopted by the 1899 Conference only because they had to do something to save the Czar's face. The Czar had called the Conference of 1899 for the purpose of agreeing upon disarmament, and Germany and some other countries were unwilling to have the subject discussed, but the Conference was called and they had to do something, and so they considered that they would give the children something to play with, and they got up this arbitration proposal. All the wise people said, "Oh, don't bother about it." Very likely, if our government hadn't sent the Pious Fund case there for arbitration between the United States and Mexico, and if it hadn't been for the backing of the government of the United States proceeding upon the universal sentiment of the people of the United States in favor of giving this substitute for war a chance by the attainment of justice through judicial procedure, the court would not have amounted to anything. But, it did; and it was enlarged and improved upon, and it was the adoption of that plan in 1899 which made possible the improvement of the plan by the Conference of 1907. The former Conference provided the basis for the 1907 plan for a Permanent Court of Arbitration, and this in turn was what made it possible for this committee to agree upon the concrete plan for a court; and whether this plan be adopted as the committee agreed upon it, or not, it is a step in the direction upon which hereafter the great progress of civilization towards justice in place of war will go on. (Prolonged applause.)

That is all, I think, I have to say on this court. It is a pleasure to talk to lawyers about it. Perhaps I should speak on one more
little thing about the court, and that is—procedure. There isn’t much procedure provided for. I didn’t think it was advisable to propose to the committee the adoption of the New York code. There is really very little procedure, but a few little things which we thought were necessary were put into the plan of the court. Where you have a great many countries, all with different procedures, it is necessary to be quite general in your rules, and one result of this is, I am sure, that you will get along so much better in dispensing justice.

I want to add that I had very great pleasure later in the summer, in September, of going back to The Hague after finishing the work of the committee, and presiding in an arbitral tribunal and rendering the first judgment of the Permanent Court of Arbitration at the Hague in the Peace Palace—practically inaugurating that building; and I wish I could tell Mr. Carnegie about it. It was a controversy in which England and France and Spain and Portugal were concerned over the liability of Portugal in the seizure of properties in possession of the religious orders in Portugal at the time of the revolution in 1910. The arbitration was agreed upon in 1913 before the war, and M. Lardy, the old Swiss Minister at Paris, and M. Lohman, the Dutch jurist, and myself were made the arbitrators. The war suspended the proceedings, but they were revived after the war, and in September, the case was brought to an end by the judgment, so there is actual demonstration that the old Permanent Court of Arbitration at The Hague still lives.

Now, I would be very glad to answer questions.