THE UNITED STATES and THE WORLD COURT

1920–1935

Michael Dunne

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To Pen,

Becky and Bronwen

Foreign policies are not built upon abstractions

(Charles Evans Hughes, 1923)

Advisory opinions ... are ghosts that slay

(Felix Frankfurter, 1924)

Behind legal phrases and forms lie the active forces of national and international ... life

(Julius Curtius, 1931)

All law, of course, is political

(Louis Henkin, 1974)

Preface

In writing this study of United States foreign relations I have been helped and encouraged by many people. Above all I have benefited from the personal warmth and intellectual stimulus of my colleagues at the University of Sussex. Words can express only inadequately the depth of gratitude I feel to them; but they will know why I mention by name the following for their special help: Geoffrey Best, Sheila Brain, Colin Brooks, Steve Burman, Marion Cox, Stephen Fender, Rosemary Foot, Jane South, Christopher Thorne, Rupert Wilkinson.

Many librarians and archivists have helped me, as the Bibliographical Essay and footnotes will suggest. But this space allows me to thank formally the friendly and professionally outstanding staff of the University of Sussex Library. Once again I feel confident I can mention individuals, whose special assistance has helped produce this book. They and their colleagues will know that they carry the palm for the team as a whole: Marian Framroze and all in the Inter-Library Loans Division; Jenny Marshman; and John Burt.

Two libraries in London have been exceptionally helpful: the Royal Institute of International Affairs and the London Library; while a number of the constituent bodies and research centres of the University of London have treated me as one of their own: the main University Library, the LSE, the Institute of Historical Research, the Institute of United States Studies and the Institute of Advanced Legal Studies.

I have, of course, been helped by many librarians, here and abroad. For permission to use copyright material I am indebted to the Public Record Office, Kew; the University of Birmingham Library; the British Library; the Library of Congress; the Houghton Library and Harvard Law School Library; the Sterling Memorial Library, Yale; the Bancroft Library, University of California at Berkeley; the Hoover Institution on War, Revolution and Peace, Stanford University; the Hoover Presidential Library, West Branch, Iowa; the Franklin D. Roosevelt Library, Hyde Park, New York; the Lauinger Memorial Library, Georgetown University; and the Dinand Library, College of the Holy Cross, Worcester, Mass.

Many scholars in North America have helped me in various ways. The first was the late, beloved Armin Rappaport, who started me in 'diplomatic history'. For this present text I owe a special debt to the following: Robert D. Accinelli, J. Leonard Bates, Terry Deibel, Larry Gelfand, George Herring, Harold Josephson, James T. Kenny and Marshall Kuehl. They may not recognize (to anticipate my text) this 'offspring'; but they have all been part of its intellectual formation.

Warmest thanks, too, to those friends who have hosted and stimulated a peripatetic researcher: Diane Clemens, Bill Issel, Linda Kerber, Larry Levine, Tom Paterson and Jim Patterson. I hope they will think my

transatlantic perspective adds something to their own deep historical insight.

To my other American friends, the McCarthys of Worcester and the Hortons of Berkeley, professionals in other fields, generous and kind beyond comparison, I send this wordy 'thank you'–overdue like all the others!

For financial aid I should like to thank the Arts Research Fund of the University of Sussex, the Trustees of the Herbert Hoover Presidential Library Association, and the US Embassy in London.

Vanessa Couchman, my editor, has been a constant source of encouragement and support to me in this project. I should like to think the finished text fulfils her best hopes.

My dear friends will read the hidden messages that run through these formal–though heartfelt–words. And they will also know that no words of mine can ever express my love for those to whom I offer this work.

Note on terminology and place-names

This is a study of American relations with the Permanent Court of International Justice (PCIJ), inaugurated in 1922 as part of the League of Nations system. Contemporaries and historians referred to the PCIJ as the World Court–or, more confusingly, as The Hague Court. Certainly the League-sponsored Court was established at The Hague in The Netherlands; but The Hague was also the organizational base of the Permanent Court of Arbitration (PCA), an arbitral system derived from the Peace Conferences held at The Hague in 1899 and 1907. The PCIJ and PCA co-existed, but they were quite distinct. The PCIJ was dissolved in 1946 and succeeded by the International Court of Justice (ICJ) as part of the United Nations Organization. The new court has also become known as the World Court; and, as in the interwar years, the ICJ has been called The Hague Court, while the PCA continued its separate existence.

In the following pages the term World Court is used to refer only to the PCIJ or the ICJ. Context and date will show which is involved.

Place-names

Place-names present a minor problem: Rome or Roma? Bern or Berne? Breslau or Wroclaw? In general I have used the form recognizable to English-speaking contemporaries. Linguistic consistency is, I think, impossible.

Where a publishing house gives two locations in the same country (e.g. Berkeley and Los Angeles), only one is cited for bibliographical purposes. Where two places in different countries are given (e.g. Vienna and Leipzig), then both are cited.

Abbreviations

ABA:	American Bar Association
ABAJ:	*American Bar Association Journal*
ACJ:	Advisory Committee of Jurists
AF:	American Foundation
AJIL:	*American Journal of International Law*
Annals:	*Annals of the American Academy of Political and Social Science*
APS:	American Peace Society
APSR:	*American Political Science Review*
BYBIL:	*British Year Book of International Law*
CDT:	*Chicago Daily Tribune*
CEIP:	Carnegie Endowment for International Peace
CFR:	Council on Foreign Relations
CPPA:	Conference for Progressive Political Action
CR:	*Congressional Record*
CSM:	*Christian Science Monitor*
DBFP:	*Documents on British Foreign Policy*
DSB:	*Department of State Bulletin*
DWEA:	Division of Western European Affairs
FCCCA:	Federal Council of the Churches of Christ in America
FO:	Foreign Office
FPA:	Foreign Policy Association
FRUS:	*Foreign Relations of the United States*
GPO:	Government Printing Office, Washington, DC
HMSO:	Her/His Majesty's Stationery Office
ICJ:	International Court of Justice
LAT:	*Los Angeles Times*
LEP:	League to Enforce Peace
LNNPA:	League of Nations Non-Partisan Association
LNOJ:	*League of Nations Official Journal*
LWV:	League of Women Voters
MD, LC:	Manuscript Division, Library of Congress
NA:	National Archives, Washington, DC
NCPW:	National Council for Prevention of War
NWCC:	National World Court Committee
NWP:	National Woman's Party
NYH-T:	*New York Herald-Tribune*
NYT:	*New York Times*
PASIL:	*Proceedings of the American Society of International Law*
PCA:	Permanent Court of Arbitration
PCIJ:	Permanent Court of International Justice
PRO:	Public Record Office, Kew, England
PSQ:	*Political Science Quarterly*

RIIA:	Royal Institute of International Affairs
RTAA:	Reciprocal Trade Agreements Act
SAFR:	*Survey of American Foreign Relations*
SCFR:	Senate Committee on Foreign Relations
SFC:	*San Francisco Chronicle*
SFE:	*San Francisco Examiner*
SIA:	*Survey of International Affairs*
USD:	*United States Daily*
USWA:	*United States in World Affairs*
WP:	*Washington Post*
WPF:	World Peace Foundation
WWCC:	Women's World Court Committee

Contents

Preface vii

Note on terminology and place-names ix

Abbreviations x

1 The United States and the first World Court: history and historiography 1

2 League Court–Root Court: the United States and the establishment of the PCIJ, 1919–20 17

3 Back door to the League: the Court in US–League relations, 1920–23 53

4 The most intimate connection: the Court, the League and the advisory jurisdiction, 1922–25 86

5 Reservations, understandings and conditions: the US Senate's terms for adherence, 1925–26 122

6 Textual language and political meanings: the League, the Court and the United States, 1926–31 156

7 Legal phrases and active forces: the Austro-German Customs Union adjudication, the divided League and Roosevelt's New Deal, 1931–34 197

8 Basic differences: the Senate, the Roosevelt administration and the Court defeat, 1934–35 231

9 Retrospect and prospect: the United States and the two World Courts 261

Bibliographical Essay 271

Index 297

1 The United States and the first World Court: history and historiography

On Tuesday, 29 January 1935 the US Senate voted on a resolution to effect American membership of the Permanent Court of International Justice. When the roll-call was completed, the Ayes numbered 52, the Nays 36. But the simple majority was not sufficient: under Article II, Section 2 of the Federal Constitution, a *two-thirds* majority was required for the approval of a treaty. With 88 votes being cast, the resolution was 7 votes short. In a phrase coined at the time and used ever since, the World Court had been defeated.[1]

In the United States and abroad the 'defeat of the World Court' was described as a mark, indeed a 'triumph' of American isolationism.[2] Diplomatic historians have broadly endorsed this contemporary judgment; and the episode is frequently cited in more general histories to exemplify a pattern in American interwar foreign relations.[3] Hesitant moves by internationalists inside the Roosevelt administration were thwarted by isolationists outside. Reduced to a brief sentence, this remains the dominant interpretation of the January 1935 vote.

The purpose of this study is to re-examine the Senate vote – and the fifteen preceding years. It might seem a daunting task. Not because the material is intractable; but rather because the indictment against the isolationists has been drawn in such lengthy and damaging terms. Since the 1935 vote only one monograph has been published on American relations with the World Court; and the reason for this neglect undoubtedly lies in the shared sense of historians that the Court defeat

was a contributory factor in the outbreak of World War II and that the truth of this deplorable episode is well known.[4] Any attempt to offer a new account of the Court's history must begin by addressing this double prejudice, even if limitations of space mean that the counter-arguments will be put in the baldest language.

Despite the voluminous writings of 'new-left revisionists' in particular and political economists in general, American foreign relations during the interwar years continue to be schematized as follows:

— World War II was produced by the moral and material weakness of the Western democracies in the face of totalitarian aggression;
— such weaknesses would have been transformed into strength by American political and physical aid: complaisance would have become resistance;
— such emotional and practical aid was denied by the American isolationists;
— therefore, the isolationists brought about World War II, with its appalling loss of life, physical destruction and political upheaval.

This reasoning no doubt looks implausible when rendered schematically; but unless we appreciate that this basic pattern informs most American historiography we shall fail to understand either the professional inhibition against re-opening the Court issue or the consensus which characterizes the existing literature on the Court.[5] For however much Court scholars express their scepticism about the established aetiology of World War II, the tone and effect of their writing reinforce this explanatory model.

Against the few hundreds of pages of World Court historiography we are presented with many hundreds of thousand of pages on World War II and its origins. Obviously this study cannot provide a systematic analysis of such an enormous literature. It is possible, however, to pose a number of hypotheses to counter the conventional wisdom on the isolationists' responsibility for World War II. The following propositions refer specifically to the war in Europe and stress the role of the British government; for as contemporaries and historians have both acknowledged, the indictment against the isolationists has even less plausibility in the Pacific–Asiatic phases of World War II. (This was the major 'paradox of isolationism': its Asia-first quality.)[6]

— Until spring 1940, the British government sought to conciliate Hitler's Germany and Mussolini's Italy;
— such conciliation was prompted not just by economic and military considerations but in the hope of turning Nazi Germany and international fascism in general against the Soviet Union;
— American support for the British government, in these circumstances, would have been (as the isolationists pointed out) aid not *against* but *for* appeasement;
— the governments of the United Kingdom, France, Germany, Italy and the Soviet Union had little regard for the United States: at

> one extreme the British, under Prime Minister Neville Chamberlain, mistrusted the United States and wanted no interference; while Hitler's domination of German foreign policy ensured that the Wilhemstrasse's accurate assessments of American power and the commitment of policy-makers to prevent hostile control of the Atlantic were ignored in the Nazi high command.[7]

The first set of propositions above represents the essential case against the isolationists; the second offers a different perspective. More specifically, the former is the framework within which most historians continue to locate and analyse the World Court defeat; the latter schema is the conceptual grid into which the following analysis fits. With these markers in place, we can now review the history and literature of the World Court in the interwar years.

The story of American relations with the Permanent Court of International Justice (PCIJ) falls into five distinct stages. The first covers the years 1920–3 and begins with the establishment of the Court as part of the League of Nations system. Not surprisingly, the close connection of the Court with the League raised the possibility, frightening to some, encouraging to others, that American entry into the Court would be a large step towards membership of the League itself. But there was an added uncertainty. One of the drafters of the PCIJ's Statute (or constitution) was Elihu Root, the influential Republican politician who had played such an ambiguous role in compromising his party's divisions during the presidential election of 1920. We shall examine Root's actions closely later on; but the immediate effect of Root's involvement in the Court's creation was not in doubt. The new World Court was frequently referred to as the 'Root Court', with the implication that American adherence (or membership) should and would quickly follow – despite the Senate's recent rejection of the Treaty of Versailles and the Covenant of the League of Nations.

We all know that the Senate votes of November 1919 and March 1920 on the Treaty and its Covenant disguised American support for some sort of new international system – vague language, perhaps, but certainly compatible with the promotion of an international court. So despite the Senate votes and the Republican victory in the November 1920 general elections, the campaign for American adherence to the League-sponsored court continued. By the beginning of 1923 a set of conditions for American adherence had been devised by diplomats and jurists in Geneva (the home of the League), The Hague (the home of the Court), London and Washington; and these terms were presented by President Harding to the Senate with his warm endorsement. The first stage had been completed.

The second stage lasted from early 1923 to January 1926. As we shall see, the details were complicated but the net result was clear. In January 1926 the Senate easily approved the terms originally sponsored by Harding, but added a number of extra conditions. The additions

caused no disagreement between the Senate and the Executive: the Coolidge administration identified itself completely with the enlarged terms for American adherence. However the consensus in Washington was countered by the League. Determined to refuse the American proposals, the League collectively responded with the offer of a compromise. The crucial area of conflict lay in the Court's advisory jurisdiction: its power of rendering a judgment when required by the League despite (it was said) the wishes of the disputants – a form of unqualified 'compulsory jurisdiction' which no Great Power was willing to surrender to any international body.

From 1926 to 1929 the US government and the League were at an impasse over the American demand for a veto on the advisory jurisdiction – a right the League simply would not concede. It was during this third stage that Root reappeared on the scene, his task being to break the acknowledged 'deadlock' between Washington and Geneva. The result was the so-called Root Protocol, which was less a method of resolving the deadlock than skirting the fundamental conflict. For the next two years (stage four) details of the Root Protocol were overshadowed by the onset of the Depression; and when the Senate resumed discussion of the proposed new terms, two foreign crises intervened to put the whole question of American adherence into serious doubt. The first was the Austro-German Customs Union scheme of March 1931; the second was the outbreak of war in Manchuria later that year.

The fifth stage in the Court history, from 1931 to 1935, was dominated by these two external events. Questions of the Court's jurisprudence and jurisdiction, questions which initially had seemed rather abstract perhaps to some, were now given immediate political force. Moreover a new domestic ingredient was added – or rather intensified. The partisanship present in the League controversy and never completely absent in its aftermath surfaced again in 1935 under the influence of Roosevelt's New Deal. As we shall see, this combination of foreign and domestic factors induced the Senate narrowly to reject in January 1935 almost the self-same terms it had approved in January 1926.

Not everyone will agree with every detail of this skeletal chronology; but its broad lines may be accepted provisionally. Its purpose, after all, is not to win converts but rather to provide a narrative framework for examining the historical literature on the Court issue in American politics. These last words are an important qualification. A number of major works appeared in the interwar years discussing the organization and activities of the Court, notably the English-language studies by M. O Hudson and A. P. Fachiri; but such legal treatises were not primarily concerned to describe the Court campaign in the United States.[8] Conversely a few monographs were written during the 1920s deliberately to influence that campaign. The leading authors for the proponents of adherence were Hudson and the Cuban jurist and judge of the Permanent Court, Antonio Sanchez de Bustamente y Sirven, whose

work reached a wide audience in an English-language translation.[9] The opponents were more numerous, in book-form at least: the teams of Frances Kellor and Antonia Hatvany; James Giblin and Arthur Brown; and David Jayne Hill. Less partisan was the work of Edward Lindsey.[10] Much of this contemporary literature has faded from view and is rarely even cited by modern scholars, whose concern has focused on the final 1935 vote. Since then only one monograph has been published on the whole campaign; and that was by Denna Frank Fleming.

Today Fleming is best known for his criticism of American foreign policy in the making of the Cold War – a war he rightly traces to 1917 and the American response to the October Revolution in Russia.[11] Until the early 1960s, however, Fleming's reputation lay with the series of books and articles he had written damning American interwar isolationism. In Fleming's indictment the earliest, characteristic crime had been the rejection of the Versailles Treaty and the League of Nations; the major culprit had been the Senate; its weapon had been the unrepresentative and obstructionist provision of the Federal Constitution requiring a two-thirds majority for the approval of treaties.[12] For Fleming the defeat of the World Court in 1935 was only a stage in the terrible sequence which led from the American failures in the wake of World War I to the even greater tragedy of World War II. Such was the simple yet awesome argument of his monograph, *The United States and the World Court*, published in 1945. As we shall see, this small volume has influenced World Court historiography until the present day.[13]

Fleming was not the only critic of the procedures and decisions of the Senate. In the previous year Kenneth Colegrove had published his hostile study of *The American Senate and World Peace*. The roster of earlier critics included Eleanor E. Dennison, *The Senate Foreign Relations Committee* (1942); Wallace McClure, *International Executive Agreements: Democratic Procedure under the Constitution of the United States* (1941); George H. Haynes, with his massive two volumes on *The Senate of the United States: its History and Practice* (1938); and W. Stull Holt, *Treaties Defeated by the Senate: a Study of the Struggle between President and Senate over the Conduct of Foreign Relations* (1933). Even the few scholars with something to say 'in extenuation of the Senate' (as Colegrove put it), tend to share Fleming's criticisms on the Court campaign. Here the prime example is Royden J. Dangerfield, whose *Defense of the Senate* was published two years before the Court defeat.[14] This last citation shows that nuances can be distinguished between these different studies. Even so their basic agreement is not in doubt; nor indeed their cumulative effect. Together they reinforce the guilty verdict on the isolationists, not least by trivializing the case against American membership of the Court.

The group, with Fleming at their head, may be thought of as the First Generation of World Court scholars. Like any label, the term tends to minimize differences; but it is helpful in recording the common values and methods which united these critics. Collectively they deplored the American rejection of the League – and particularly its manner. In their judgment partisan, xenophobic Senators had exploited an archaic