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## AN ALTERNATIVE TO THE CONNALLY AMENDMENT AS A PRACTICAL AND REALISTIC STEP TOWARD WORLD PEACE THROUGH LAW\*

RIGNAL W. BALDWIN†

The International Court of Justice represents the most concrete effort to bring the Rule of Law among nations to reality. The status of the United States in relation to that Court is a matter of concern to the United States Senate, members of our Bar, and to all our citizens at this time. It is the purpose of this article to discuss that Court, the nature of the adherences to it by the United States and other leading nations, and the changes advocated in connection with our adherence from the point of view of a Report of its Committee on World Peace Through Law recently adopted by overwhelming vote of the Maryland State Bar Association.

### I. THE INTERNATIONAL COURT OF JUSTICE.

The International Court of Justice, or World Court, was established in 1946 under the Charter of the United Nations. It is essentially a continuation of the Permanent Court of International Justice established in 1922 under the League of Nations. The Court has fifteen judges, elected by the Security Council and the Assembly for nine year terms. The present judges are from: Italy, Japan, France, United Kingdom, United States, Poland, United Arab Republic, Peru, Soviet Russia, Argentina, Mexico, China, Greece, Australia and Panama. Judge Winiarski, of Poland, was elected President of the Court in April, 1961, and in February of this year Professor Philip C. Jessup, of Columbia University, became the American Judge on the Court. In any case involving a nation not having a judge, it is entitled to nominate an additional judge of its own choosing on an *ad hoc* basis. Adherence to the Court's jurisdiction is optional and may be qualified or unqualified.

At present no member of the Soviet bloc of nine nations has adhered on any basis whatever, though Poland and the U.S.S.R. have judges. Cuba has never adhered. Thirty-nine

\*Adapted from an address delivered at Law Day Exercises at the University of South Carolina Law School on May 1, 1961.

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nations of the ninety-nine in the United Nations have submitted to the Court's jurisdiction in one form or another, but only thirteen without material reservations or qualifications. Of the fifteen judges, ten are from nations that have not accepted jurisdiction of the Court at all and four others from nations that may withdraw at will.

The "Statute of the Court" provides that the Court shall determine its own jurisdiction. In general, this concerns disputes among nations as to treaties, questions of international law, and breaches of and reparations for international obligations. The Statute requires the Court to apply "international law," and lists a number of standards. The United Nations Charter prohibits intervention "in matters . . . essentially within the domestic jurisdiction of any state,"<sup>1</sup> and the Court has held this limitation binding on it.<sup>2</sup>

## II. THE RECORD OF THE COURT.

Through 1960 the Court has dealt with twenty-five contested cases and has rendered ten advisory opinions. When the United States sued the U.S.S.R. for the shooting down of an unarmed plane over the Sea of Japan, and in a suit by Great Britain against Bulgaria, these communist nations simply refused jurisdiction to the Court. Only one case involving a communist nation has ever been decided. Britain sued Albania for loss of a destroyer in international waters which the latter had mined. Although Britain was awarded damages for loss of its vessel and men, the award has never been paid. This points up the fact that the Court is totally without power to enforce its own judgments. In event of non-compliance, the aggrieved party has recourse to the Security Council for enforcement, but any vote thereon would be subject to veto by the five permanent members. This is an ultimate escape hatch relied on by those favoring outright and unqualified repeal of the Connally Amendment.

## III. THE UNITED STATES' ADHERENCE TO THE COURT.

In August 1946, the United States Senate passed a resolution under which we became a party to the Statute of the Court and accepted its compulsory jurisdiction subject to certain reservations.<sup>3</sup> This brings us to the Connally Amendment.

1. U. N. CHARTER, art. II, § 7.

2. *Interpretation of the Peace Treaties with Bulgaria, Hungary and Roumania*, I. C. J. Rep. (1950).

3. S. RES. NO. 196, 79th Cong., 2d Sess. (1946).

The Senate Foreign Relations Committee's recommendation of adherence contained a specific reservation of "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States."<sup>4</sup> On the Senate floor, Senator Tom Connally, of Texas, Chairman of the Committee, proposed an amendment to this reservation by adding the words "as determined by the United States of America."<sup>5</sup> These eight words constitute the Connally Amendment. In support of this proposal, Senator Connally argued:

But under the Charter the Court might decide that immigration was an international question. It might decide that tariffs were an international question. It might decide that the navigation of the Panama Canal was an international question. It is pretty close to it.<sup>6</sup>

It is interesting that Senator Morse<sup>7</sup> voiced similar views at that time, as did Senator Vandenberg<sup>7a</sup> and LaFollette.<sup>7b</sup>

The opposing view then was and is now that such an amendment impairs the prestige of the Court; that no litigant, not even a sovereign state, should have the right to determine the jurisdiction of the Court before which it appears.<sup>8</sup>

Since some attempt is made today to attribute the Amendment to lack of proper consideration by the Senate, or to some personal quirk of Senator Connally, the Senate votes are extremely important as well as impressive. The Amendment was debated on July 31 and August 1, and was adopted on August 2, 1946, by the vote of 51 to 12. Fifteen of the nineteen voting members of the Foreign Relations Committee

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4. 92 CONG. REC. 10621 (1946).

5. S. RES., *supra* note 3, clause (b).

6. 92 CONG. REC. 10624 (1946).

7. *Id.* at 10685.

7a. *Id.* at 10688.

7b. *Id.* at 10689.

8. To this Senator Connally replied:

Under the present Charter, the United States has the option of accepting compulsory jurisdiction or the option of not accepting it and simply relying on special provisions regarding each case which might be accepted by the Court. So, within these extremes we have a perfect right to stipulate the extent of our agreement as to compulsory jurisdiction.

. . . . There is nothing in the Charter which requires us to submit a domestic question, and the effect of my amendment is to say that as to domestic questions we will not submit them, but we will submit other matters.

Mr. President, there is nothing violative of the concepts of the Charter or of international law in that course. We can abstain and can stand where we stand now, if we so desire. We are going a long way when we accept all character of jurisdiction except jurisdiction as to domestic questions.

voted in favor of the Amendment. The final vote on adherence was 60-2, with all voting members of the Committee favoring the declaration as amended except Senator Shipstead, who was joined only by Senator Langer.

As succinctly put by a high official of the State Department, which opposed the Amendment in 1946 and still officially stands for its repeal: The Connally Amendment "was prompted . . . by a desire to *safeguard the vital interests of the United States.*"<sup>9</sup>

#### IV. PRESENT STATUS OF THE MATTER.

Senator Hubert Humphrey introduced a resolution<sup>10</sup> in the 86th Congress in 1959 calling for repeal of the Connally Amendment. Behind this move was a strong group of highly articulate American Bar Association members. Their springboard was a vote of the House of Delegates of the ABA in 1947 favoring a resolution that the Connally Amendment be deleted from the American declaration. The vote then was 85 to 45, out of a membership of 248.

In offering his resolution, Senator Humphrey quoted from and put in the Congressional Record a speech of the Chairman of the ABA Special Committee on World Peace Through Law, to whose statements reference will be made. However, great opposition to repeal developed at the hearings and the Humphrey resolution did not get out of Committee.

A similar resolution, introduced by Senators Humphrey, Morse and Javits, is pending at the present session of the Senate.

#### V. RESERVATIONS OF OTHER MAJOR NATIONS.

To properly understand any proposed alternate to the Connally Amendment it is imperative first to consider the reservations of other major nations.

The position of the American Bar Association Special Committee on World Peace Through Law, apparently sold to high officials of our Government, and to a large segment of the American public, was partly based on statements of its Chairman and other members regarding the reservations of other nations. One such statement, made in an article by the Committee Chairman, published in the American Bar Association Journal in July 1960, was:

<sup>9</sup> Wilcox, *The United States Accepts Compulsory Jurisdiction*, 40 AM. J. INT'L L. 699, 713 (1946).

<sup>10</sup> S. RES. NO. 94, 86th Cong., 1st Sess. (1959).

Such action [repeal of the Connally Amendment] *would only place our relations with the Court on the same basis as those of France, the United Kingdom, Canada and thirty other nations.*<sup>11</sup> (Italics supplied.)

Originally eight other nations adopted reservations with clauses similar to the Connally Amendment. Much is made by those favoring repeal, that of these countries, England, France and India eliminated their so-called "self-judging" reservations. But let us see what sort of reservations they simultaneously adopted. These are facts not referred to by so much as one line in the thirty-three page Report of the Special Committee nor in numerous articles by its present members.

Great Britain's new declaration of 1958 has nine specific reservations or exclusions from the Court's jurisdiction. Among these are: ". . . disputes arising out of, or having reference to, any hostilities, war, state of war, or belligerent or military occupation . . ." <sup>12</sup> Britain's declaration also contains the privilege of withdrawal immediately upon notice <sup>13</sup> (whereas the United States' declaration requires six months' notice). <sup>14</sup> And it reserves the right "*at any time . . . to add to, amend or withdraw any of*" its reservations, to take effect "*from the moment of notification.*" <sup>15</sup>

The present French declaration (1959) contains four reservations. One excepts from the Court's jurisdiction "disputes arising out of a crisis affecting the national security or out of any measure or action relating thereto." <sup>16</sup> After July 1, 1962, France also will be able to withdraw its adherence at will. <sup>17</sup>

Both Britain <sup>18</sup> and France <sup>19</sup> exclude disputes with states that had not accepted compulsory jurisdiction of the Court at the time the dispute arose, or for at least twelve months before filing suit, or which joined the Court only for the purpose of the particular dispute. Such a provision would

11. Rhyne, *An Effective World Court Is Essential*, 46 A.B.A.J. 749, 752.

12. *International Court of Justice Yearbook*, 1959-1960 [hereinafter cited as '59-'60 Yearbook], pp. 254, 255.

13. *Ibid.*

14. *Id.* at 233-255.

15. *Id.* at 254-255.

16. *Id.* at 240.

17. *Ibid.*

18. *Id.* at 254.

19. *Id.* at 240.

bar Castro from accepting compulsory jurisdiction solely to enforce Cuba's "titular sovereignty" to our naval base at Guantanamo, as he has several times threatened to do.

Also India<sup>20</sup> and Canada<sup>21</sup> now have at least some of the exclusions and reservations provided by Great Britain's declaration.

Finally, as to the thirty-nine adherents to the World Court, twenty-three have the right to withdraw at will, in contrast to our six months' notice requirement.<sup>22</sup>

#### VI. THE AMERICAN BAR ASSOCIATION REPORTS AND ACTION.

Two Committees of the American Bar Association reported on the Connally Amendment at its annual meeting in Washington in August 1960. That on World Peace Through Law, the Chairman of which was Mr. Charles S. Rhyne, recommended repeal by a 7-4 vote, while that on World Peace and Law Through The United Nations recommended against repeal by a 6-2 vote. Both stood on an absolutely "black or white," "all or nothing" approach to the problem. The debate and vote, unfortunately, were conducted on that basis by two camps which showed they had built-in prejudices either for repeal or for retention, with not the slightest admission by either side that any reasonable alternative might exist. A resolution for repeal carried by a vote of 114 to 107, out of a membership of 249, with a number of Delegates who were present not voting.

It is highly significant that neither report even mentioned the British, French or other reservations or withdrawal rights discussed. Far worse, where the present status of the British, French and Indian adherences to the Court were mentioned in the Rhyne Report, it was implied that these nations had simply repealed their so-called "self-judging" Connally type reservations without enacting any other restrictions or reservations. This Report stated:

India, England and France have repealed their Connally type clause. They and thirty other nations now accept the Court's compulsory jurisdiction. The United States is the only major free-world nation that is holding back.<sup>23</sup>

and concluded:

<sup>20</sup> *Id.* at 241.

<sup>21</sup> *Id.* at 236.

<sup>22</sup> *Id.* at 233-255. (See the text of the various declarations.)

<sup>23</sup> Rhyne, *op. cit. supra* note 11, at 763.

We must join the 33 free world nations who have accepted, without such reservation, the obligatory jurisdiction of the International Court and urge all other nations to follow our lead.<sup>24</sup>

Not a word anywhere in this thirty-three page Report about the national security or other reservations by France, England, India or Canada, or that twenty-three of the thirty-three nations can get out at will!<sup>25</sup>

One might say that the foregoing statements simply lack candor or are not the whole truth.

Such action [repeal] *would only place our relations with the Court on the same basis as those of France, the United Kingdom, Canada and thirty other nations.*<sup>26</sup>

(Italics supplied.)

And, having in mind France's new reservation of "disputes arising out of a crisis affecting the national security,"<sup>27</sup> consider the following statements by Messrs. Rhyne and Tondel, made with no reference whatever thereto:

That France with her Algerian problems nonetheless repealed her self-judging reservation is certainly a vote of confidence in the Court.<sup>28</sup>

24. *Id.* at 779.

25. Professor Arthur Larson, of Duke University Law School, a member of the ABA Committee on World Peace Through Law, wrote in the July 1960 ABA Journal, "France has repealed her self-judging clause. So has India. So has Britain." He has also written, "The trend is now away from this kind of clause. The leadership has been taken by France and India which repealed their self-judging clauses in 1959. The United States is now the only major power retaining this reservation." See Larson, *The Self-Judging Clause and Self-Interest*, 46 A.B.A.J. 729, 747 (1960). Mr. Lyman Tondel, of New York, also on the ABA Committee, wrote in the same Journal, "France and India have recently given up their self-judging reservations." See Tondel, *The Connally Reservation Should Be Repealed*, 46 A.B.A.J. 726, 727 (1960).

Even Professor Jessup, our new judge on the Court, in a prepared statement to the Foreign Relations Committee on February 12, 1960, said:

Great Britain has not felt or found it necessary to attach a self-judging clause to its acceptance of the optional clause and it has had more actual experience with the world court than the United States has had. France, which had a self-judging clause copied from that of the United States, withdrew it after its experience in the Norwegian Loans case described above.

There was not a single sentence, line or word in any of these reports or articles concerning the national security and other new reservations which England, France or India adopted simultaneously with their repeal of Connally type reservations, nor their ability, along with twenty-three other nations of the thirty-nine, to get out at will! (Excepting only in a "Dissenting Statement" of David F. Maxwell, Esq., of the Rhyne Committee, filed in August during the Convention.)

26. Rhyne, *supra* note 11.

27. '59-'60 *Yearbook*, p. 240.

28. Rhyne, *op. cit.*, p. 751.

Even France, in the face of its Algerian problem, withdrew its self-judging reservation last summer. What clearer testimonial could there be to the Court's reputation for not taking jurisdiction of domestic disputes.<sup>29</sup>

All of these statements, made with no mention whatever of the national security and other protective reservations adopted by Britain, France and India, when they dropped their so-called "self-judging" provision, nor of the fact that twenty-three nations of the thirty-nine adherents may get out on notice, appeared in a barrage of publicity just before the American Bar Association Convention last August. They seem to have been accepted uncritically by Secretary Herter and Attorney General Rogers, judging from their testimony before the Senate Committee,<sup>30</sup> and even by President Eisenhower, as indicated by his address on the subject to the American Bar Convention.

## VII. THE PRINCIPAL ARGUMENTS PRO AND CON REPEAL OF THE CONNALLY AMENDMENT.

### *For Repeal*

a) The Connally Amendment is "self-judging" in permitting a litigant to determine the Court's jurisdiction in his own case.

b) This undermines and impairs the prestige of the Court.

c) It is basically "immoral."

d) It may prevent use of the Court by the United States when invoked reciprocally by our opponents.

e) We have ultimate protection anyway in our ability to prevent enforcement of any decision by exercise of our veto power in the Security Council.

### *Against Repeal*

a) We have a complete sovereign right to limit our submission to the Court's jurisdiction, and would be foolhardy not to do so; (that the characterization as "self-judging" is simply a slogan or cliché adopted by repealists for its propaganda effect).

b) The Connally Amendment protects the national security and "safeguards the vital interests of the United States."

29. Tondel, *op. cit.*, p. 727.

30. *Hearings on S. 94, supra* note 25.

c) Other important nations have reservations considerably more far-reaching.

d) The changing balance of power in the United Nations.

- 1) ninety-nine nations membership now instead of forty-six when the Court was established;
- 2) the new African bloc of twenty-six nations;
- 3) Red China's probable ultimate admission to the U.N.; if as a permanent member of the Security Council, it will have a member of the Court.

e) Lack of any body of International Law.

f) Court judges are simply agents of their own State.

- 1) Soviet Law — Vyshinsky's statement on, per Dean Stason.<sup>31</sup>
- 2) Two communist nations on Court; also United Arab Republic.
- 3) Possible votes of Latin American nations — (Panama, Peru and Argentina) on questions involving our Cuban and Panama Canal bases.

#### VIII. THE ALTERNATIVE SOLUTION.

The chief criticism of opponents of the Connally Amendment is that it is "self-judging," that is, against the basic legal principle that one should not be the judge of his own case, and that, therefore, it is "immoral." The Amendment more properly can be characterized as "self-preserving" in respect of a sovereign nation for the reasons stated by Senator Connally himself.<sup>32</sup>

The Maryland Bar Association Committee definitely believed that outright repeal alone is not the proper answer. It felt that this would amount to unilateral legal disarmament in a world where we cannot afford unilateral military disarmament. The Committee arrived at and recommended a solution which it considered a fair and sensible answer to the problem without compromise of principle. The Maryland State Bar Association, by an overwhelming majority on January

31. Vyshinsky, *SOVIET CONSTITUTIONAL LAW*, 55 (1938) as quoted in Stason, *LAW AND THE ADMINISTRATION OF JUSTICE IN THE SOVIET UNION*, 43 *J. AM. JUD. Soc'y* 152 (1960).

32. 92 *CONG. REC.* 10624 (1946).

21, 1961, adopted the Committee Report which made the following statement of findings the basis of its recommendations:

The present American declaration, embodying the Connally Amendment, is not as vicious as some of its opponents would have us believe nor as sacrosanct as some of its proponents would contend. It has been prompted by the same motives which have prompted the reservations of other major powers — some of which, we submit, are considerably more comprehensive in scope, more effective in their result, and less damaging to the prestige of the World Court and the ideals it represents. In short, we believe that the time has come to restate our declaration in terms which, on the one hand, will protect our independence, sovereignty and security, and yet, at the same time, will promote to the maximum extent practical under present world conditions the advancement of the rule of law among nations. This is a balancing point of reference which, we believe, has been all too often ignored by both sides in the heat and hysteria of the Connally debate. We further believe that the so-called 'self-judging' aspects of our present declaration and the danger of their reciprocal invocation against us can be eliminated by the substitution of a new reservation which will afford, in practical effect, a greater safeguard of our national security, but which, at the same time, will be less damaging to our position as an advocate of world peace through law and to the prestige and usefulness of the Court.<sup>33</sup>

In line with this statement of principle the basic recommendation was that:

Our present declaration should (a) neither be amended by the deletion of the Connally Amendment; nor (b) left in its present form; but (c) it should be rewritten so as more fully to protect our independence, domestic freedom and national sovereignty, while at the same time restating our belief in the principles of world peace through law to the maximum extent practical under present world conditions.<sup>34</sup>

33. The Special Committee on World Peace Through Law (of the Maryland Bar Ass'n), *Report on the Connally Amendment*, p. 31 (1960). (Submitted to the Maryland Bar Ass'n for consideration at the Mid-Winter Meeting, January 21, 1961.)

34. *Id.* at 32.

This exact language was used in a Resolution "adopted by a substantial majority" by the Pennsylvania Bar Association on January 28, 1961, after its committee had recommended outright repeal.

The specific recommendations of the Maryland Report are that our entire present acceptance of jurisdiction be withdrawn and a new acceptance substituted simultaneously which will:

*First*—Unconditionally accept jurisdiction over all claims for damages due to actions of a state causing injury to the person or property of another state. This will obviate completely the criticism that Connally is against our self interest by reasons of the right of other states to invoke its protection reciprocally against us in such cases.

*Second*—In lieu of our entire present domestic matters reservation, which contains the Connally Amendment, substitute an exclusion of jurisdiction by the Court over specifically enumerated items, such as, tariffs, immigration, atomic energy, offshore rights, currency changes, and such other matters as "have *traditionally* been considered within our domestic jurisdiction."

*Third*—An exclusion of jurisdiction, modeled generally after the British and French declarations, excepting from the Court's jurisdiction disputes arising out of such matters as war, international hostilities and military occupation, or our rights in canals, waterways, military, naval and air bases, and any other matter affecting the defense of the United States or its national security.<sup>35</sup>

The last two exclusions from jurisdiction specify clearly in advance the extent to which we do *not* confer jurisdiction on the Court. This is an absolute right of a sovereign state. Such reservations would avoid any later requirement of "self-judging" since they explicitly spell out the ground rules before the game begins. The word "*traditional*" has taken on enormous significance recently in view of the fact that many areas formerly considered purely domestic have been regarded as international by the United Nations. A United States State Department publication stated, "There is no longer any real distinction between domestic and foreign affairs." Professor Jessup, our new judge on the Court, in his book entitled *Transnational Law* espouses the doctrine that many matters closely

<sup>35</sup>. *Id.* at 31.

related to national security are the subject of international law.<sup>36</sup>

How much better and more effective to have specific domestic and national security reservations spelled out in advance, in order to safeguard the vital interests of the United States, than to leave a declaration of reliance on Connally to the decision of any particular State Department or President, particularly a State Department that already regards it as "immoral"! Such specific provisions would be in line with our historic concept of a government of laws and not of men.

A specific national security reservation is, the Committee felt, far more protective in some areas than the Connally Amendment. In the Committee's view it might be extremely difficult sensibly to maintain that the determination of our rights *vis à vis* Panama or Colombia, as to the Canal Zone, or as to Cuba, in regard to Guantanamo, may properly be regarded as purely domestic issues. We hold our rights in both the Canal Zone and the Cuban naval base under long term leases, with what is called "titular sovereignty" reserved in the lessor nations.

The ability to get out immediately, if we wish, merely levels us with England, France, India and Canada, the nations used as prime examples by those favoring outright repeal only, and with twenty other nations.

Lastly, in the judgment of the Committee, there is great advantage in being forthright in the first instance. How much more "immoral" to rely on and use our veto power in the Security Council *after* a dispute has been argued, submitted to the Court for determination and an award made against us, than to prescribe in the first instance by clear and definite exclusions from jurisdiction what we hold to be *traditionally* domestic and necessary to safeguard the vital interests of the United States!

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36. JESSUP, *TRANSNATIONAL LAW* (1956).