§ 1 History of the international advisory function

The advisory function of international courts and tribunals (ICs) has been a feature of the international judicial landscape for more than 100 years.[18] Advisory procedures are judicial procedures of ICs that have as their object not the settlement of a dispute but the clarification of a legal question and they result in advisory opinions that are non-binding.[19] The first IC with an advisory jurisdiction was the Permanent Court of International Justice (PCIJ),[20] which was established in 1920 as an independent international organization under the auspices of the League of Nations.[21] The decision to confer upon the PCIJ the power to render advisory opinions was by no means uncontroversial. The history of the advisory procedure and the controversies it sparked are highly elucidating for the question whether the ICJ may use its advisory procedure to address international legal disputes. That is the case for two reasons: first, the debate coined much of the vocabulary of today's debate on the use of ICJ advisory opinions to settle inter-state

18 *M. Giles Samson/D. Guilfoyle*, The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction, in: C. J. Tams/M. Fitzmaurice (eds.), Legacies of the Permanent Court of International Justice, 2013, 41 (41). On the history of the advisory jurisdiction of the PCIJ and the ICJ, see *M. Pomerance*, The United States and the Advisory Function of the Permanent Court of International Justice, in: Y. Dinstein (ed.), International law at a time of perplexity, 1989, 567; *S. M. Schwebel*, Was the Capacity to Request an Advisory Opinion Wider in the Permanent Court of International Justice than it is in the International Court of Justice?, in: S. M. Schwebel (ed.), Justice in International Law: Selected Writings of Judge Stephen M. Schwebel, 1994, 27; *M. Giles Samson/D. Guilfoyle*, The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction, in: C. J. Tams/M. Fitzmaurice (eds.), Legacies of the Permanent Court of International Justice, 2013, 41; *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1 Ch. 2; *M. Lando*, 61 CJTL 1 (2023), 67.

19 Cf. *R. Kolb*, The International Court of Justice, 2013, 1019 et seq.

20 *H. W. Thirlway*, The International Court of Justice, 2016, 61. There were certain non-judicial bodies that had an advisory function even earlier, including the International Bureau of the Universal Postal Union, the International South American Postal Bureau, and the International Commission for Air Navigation, see *K. Oellers-Frahm*, 12 GLJ 5 (2011), 1033 (footnote 2).

21 See Article 14, sentence 1 of the Covenant of the League of Nations: "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." League of Nations, Covenant of the League of Nations, 28 April 1919.

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disputes. Then like now, the advisory function was criticized for being incompatible with the Court's judicial function. Interestingly, however, while the debate around the PCIJ's advisory jurisdiction similarly centered on the term "judicial function" the underlying reasoning differed significantly. Secondly, while the creation of the advisory procedure of the PCIJ caused intense debates among scholars, practitioners and state representatives, when the ICJ took over the role of World Court as the quasi-successor of the PCIJ in 1945,[22] the matter of advisory opinions received very limited attention. For these two reasons, the origins of the international advisory function merit particular attention.

A. The international judicial landscape before the 20th century

Before examining the origins of the PCIJ's advisory jurisdiction, it is worth reflecting on the judicial landscape that existed prior to the creation of the PCIJ. This allows for a clearer appreciation of the significance of the creation of the PCIJ. International adjudication before the 20th century was mainly done by arbitration.[23] Arbitration is "a procedure for the settlement of disputes between States by a binding award on the basis of law and as the result of an undertaking voluntarily accepted" in which the parties may determine the arbitrators, the competence of the arbitral tribunal, the law to be applied, and the procedure to be followed.[24] As early as the Hellenistic Age, disputes between rival city states were resolved by impartial arbitrators.[25] In medieval Europe, the role of the arbitrator was often per-

22 See, for example, the report of Committee IV/1 to Commission IV at the 1945 San Francisco Conference: "The creation of the new Court will not break the chain of continuity with the past. Not only will the Statute of the new Court be based upon the Statute of the old Court, but this fact will be expressly set down in the Charter [Article 92]. In general, the new Court will have the same organization as the old, and the provisions concerning its jurisdiction will follow very closely those in the old Statute. [...] In a sense, therefore, the new Court may be looked upon as the successor to the old Court which is replaced.", Report of the Committee IV/1, 13 UNCIO 381, 383. On the San Francisco Conference, see *infra*: D.III.

23 On the difference between arbitration and judicial dispute settlement, see *S. Rosenne*, The law and practice of the International Court, 1920-2005, 4th ed. 2006, 9–14.

24 Report of the International Law Commission, [1953-II] ILCYB (A/2456), 202 para. 16.

25 *M. E. O'Connell/L. Vanderzee*, The History of International Adjudication, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013 (42).

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formed by the Pope or by a sovereign ruler of a neutral state that was not involved in the dispute.[26] Over the centuries, the procedure of inter-state arbitration evolved. Arbitrators no longer yielded religious or sovereign power. Instead, states increasingly chose commissions made up of nationals of the disputing parties to settle their disputes. An example of such an arbitration agreement was the 1794 Jay Treaty between the United States of America and Great Britain which created several arbitration commissions to settle disputes that arose as a consequence of the American War of Independence.[27] In the 19th century, the use of arbitration to settle inter-state disputes as a viable alternative to war became even more widespread.[28] A prominent example of a successful arbitration which settled an international dispute that could otherwise have resulted in military confrontation was the Alabama Claims arbitration of 1872.[29] The United States of America maintained that Great Britain violated its duties of neutrality during the American Civil War by not preventing the construction, equipment, and armament of several naval vessels – including the *Alabama* – which were then used as commerce raiders by the Confederate Navy. The international arbitration commission was composed of five arbitrators appointed by five states (Brazil, Italy, Switzerland, Great Britain, and the United States) and awarded the United States $ 15.5 million in damages[30] which Great Britain paid in full.[31] Considering the current geo-political landscape it is easy to overlook just how remarkable the compliance of Great Britain with the arbitration award was. Great Britain was the unchallenged hegemonial superpower of the 19th century. It could have easily ignored the decision of the arbitration commission. However, it decided to comply, a decision

26 Ibid., 43.

27 Treaty of Amity, Commerce, and Navigation, between His Britannic Majesty and the United States of America (Jay Treaty), 1795.

28 *M. E. O'Connell/L. Vanderzee*, The History of International Adjudication, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013 (44).

29 In 1871, the United States and Great Britain concluded the Treaty of Washington in which they agreed to refer all claims “generically known as the Alabama claims” to an arbitral tribunal, see Treaty of Washington, 8 May 1871.

30 *Alabama claims of the United States of America against Great Britain*, Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, United Nations Reports of International Arbitral Awards, Volume XXIX, 125 (134).

31 *M. E. O'Connell/L. Vanderzee*, The History of International Adjudication, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013 (45).

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which strengthened the institution of arbitration as a means of peaceful settlement of inter-state disputes.

The end of the 19th century marked a shift from arbitration to the creation of permanent international courts. The fundamental difference between arbitral and judicial dispute settlement lies in the permanency or pre-established nature of judicial institutions.[32] This extends to the choice of judges, their competences, the rights of the disputing parties, the applicable law and procedure, as well as the publicity of the proceedings.[33] Permanent courts were believed to settle inter-state disputes and thus promote "peace through law" more effectively than ad-hoc arbitration commissions.[34] They could generate a standing body of case law which would make the outcome of proceedings more predictable and could accumulate greater prestige than individual arbitrators, which in turn was hoped to increase the likelihood of compliance.[35] The shift towards courts also signified a shift towards a greater desire for legal rather than diplomatic or political dispute resolution. The work of arbitration commissions was previously perceived as an endeavor focused on finding a political compromise between the disputing parties rather than a solution based on the law.[36] The establishment of disinterested permanent judicial institutions with pre-determined rules significantly limited the parties' power to adapt the procedure for political reasons.[37] The process of dispute settlement is thereby de-politicized to a certain extent.[38] One could therefore say the difference between arbitration and judicial dispute settlement is expressed in the degree of de-politicization.[39]

A first step towards the establishment of a permanent international court was the creation of the Permanent Court of Arbitration (PCA) in 1903 following the first Hague Peace Conference in 1899. The PCA continues to operate to this day and consists of three parts: an Administrative Coun-

32 *S. Rosenne*, The law and practice of the International Court, 1920-2005, 4th ed. 2006, 11.
33 Ibid., 11.
34 *M. E. O'Connell/L. Vanderzee*, The History of International Adjudication, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013 (46).
35 Ibid., 46.
36 Ibid., 46.
37 *S. Rosenne*, The law and practice of the International Court, 1920-2005, 4th ed. 2006, 11–12.
38 Ibid., 11–12.
39 Ibid., 12.

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cil made up of diplomatic representatives of the contracting State Parties which oversee the PCA's budget and policies, a list of arbitrators, known as 'Members of the Court', from which State Parties can select, and a registry, known as the 'International Bureau', which provides administrative support. Despite its name, the PCA has been aptly described as neither permanent nor a court.[40] The PCA is not a permanent court but rather an institutional framework which facilitates the creation of ad-hoc arbitration commissions. It has no judges, despite the somewhat misleading term 'Members of the Court', but rather a list of qualified arbitrators which can be called upon on an ad-hoc basis.

At both Hague Peace Conferences, the first in 1899 and the second in 1907, British and US-American delegates called for the creation of a permanent international arbitral tribunal to settle inter-state disputes.[41] However, both attempts proved unsuccessful as disagreement over the question of compulsory jurisdiction and the selection of judges persisted.[42] The first permanent court for the settlement of inter-state disputes was thus not a global, but rather a regional court: in 1908, the Central American Court of Justice was created.[43] Its jurisdiction was broadly defined and extended to any legal dispute between its Member States, to disputes between a Member State and the national of another Member State, and even, subject to an additional protocol, disputes between a Member State and its own nationals or disputes between a Member State and a third state. Despite its initial success, the Central American Court of justice ceased its operations ten years later when the United States terminated its support for the court and its mandate was not renewed.[44]

40 Quoting James Brown Scott, J Brown Scott, The Hague Court Reports (Oxford University Press 1916) xiii, see *M. E. O'Connell/L. Vanderzee*, The History of International Adjudication, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013 (49).

41 Ibid., 48–51.

42 Ibid., 48–51.

43 Ibid., 51.

44 Ibid., 52.

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B. The advisory function of the Permanent Court of International Justice

The Treaty of Versailles of 1919[45] marked not only the end of the First World War, but also the beginning of a new international organization and of the first "World Court". As part of the Treaty of Versailles, 33 signatory states, including Germany and the Allied states, concluded the Covenant of the League of Nations. It created the League of Nations, a new international organization to promote international cooperation, peace, and security. While previous generations of peace activists placed their hopes on international courts and arbitration mechanisms as guarantors of peace, the creation of the League of Nations indicated a turn towards governance institutions and collective political decision-making to secure peace.[46]

However, the Covenant also laid the foundation for the creation of the PCIJ. Article 14 of the Covenant charged the Council of the League to "formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice."

I. Relationship between the PCIJ and the League of Nations: Between formal independence and organic connection

The reason for the creation of the advisory function of the PCIJ is linked to the Court's relationship with the League of Nations. The relationship between the PCIJ and the League of Nations was characterized by formal independence and at the same time a close "organic" connection.[47] On the one hand, the PCIJ was designed as an independent judicial body. Unlike the ICJ in relation to the UN,[48] the PCIJ was not created as an organ of the

45 *Treaty of Versailles*, Washington, Govt. print. off, retrieved from the Library of Congress, https://www.loc.gov/item/43036001/.

46 Cf. *C. J. Tams*, Peace Through International Adjudication: The Permanent Court of International Justice and the Post-War Order, in: M. Erpelding/B. Hess/H. Ruiz Fabri (eds.), Peace Through Law, 2019, 215 (222 et seq.); *M. E. O'Connell/L. Vanderzee*, The History of International Adjudication, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013 (52).

47 On the relationship between the PCIJ and the League of Nations, see in particular *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1, Ch. 3, § 21.

48 Art. 7 para. 1 UNC lists the ICJ as one of six organs of the UN. The other organs are the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, and the Secretariat.

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League of Nations.[49] The PCIJ's constituent instrument, the PCIJ Statute, was formally independent from the League's Covenant.[50] Hence, the Member States of the League of Nations and the States Parties to the PCIJ Statute were not necessarily congruent.[51] The two instruments thus preserved the independence of the PCIJ from the League of Nations. Taking this into account, the Assembly of the League consistently referred to the PCIJ as an "autonomous institution".[52]

On the other hand, the PCIJ was integrated into the framework of the League of Nations.[53] The PCIJ was created by the Council and the Assembly of the League of Nations on the basis of Article 14 para. 1 of the Covenant.[54] The Covenant of the League of Nations made frequent references to the PCIJ, positioning it as the primary adjudicating body for the settlement of disputes between the League's Member States (Article 13 para. 3) and limiting access to the Court's advisory function to the League's organs (Article 14 sentence 3). The League's organs also had decisive powers to determine the staffing and financing of the Court as well as access to the Court of non-Member States of the League of Nations. The Council and Assembly were thus responsible for the election of the judges of the Court (Article 4 PCIJ Statute) and determined their remuneration (Article 32 para. 1 PCIJ Statute), their pension and the reimbursement of their travel expenses (Article 32 para. 2 PCIJ Statute). The budget of the PCIJ was determined and financed by the League (Article 33 PCIJ Statute). The Council determined the conditions under which non-Member States of the League of Nations could appear before the PCIJ (Article 35 PCIJ Statute).

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49 According to Art. 2 of the Covenant of the League of Nations, the League's organs were the Assembly and the Council which were supported by a Secretariat.

50 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1, Ch. 3, § 21. In contrast, the ICJ Statute "forms an integral part" of the UNC, see Art. 92 sentence 2 UNC.

51 Ibid., Vol. 1, Ch. 3, § 21.

52 *S. Rosenne*, The law and practice of the International Court, 1920-2005, 4th ed. 2006, 99, citing Financial Regulations, League of Nations, Records of the Third Assembly, II Plenary (doc. A.54(3) Ex) 207.

53 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1, Ch. 3, § 21.

54 In 1920 the League's Council appointed an Advisory Committee of Jurists to prepare a draft Statute of the PCIJ. The Assembly of the League of Nations unanimously adopted the PCIJ Statute on 13 December 1920. The Statute of the PCIJ was opened for signature on 16 December 1920 and entered into force on 20 August 1921. On the work of the Advisory Committee of Jurists, see *O. Spiermann*, 73 British Yearbook of International Law 1 (2003), 187.

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The overall picture is thus one of a special, "organic"[55] connection between the League of Nations and the PCIJ.[56] The two institutions clearly did not merely coexist but were significantly interconnected. In *Shaw's* words:

> "[T]he Court was established not as a disembodied dispenser of international justice but as one of the means for the pacific settlement of international disputes envisaged in the very conception of the League of Nations."[57]

Bestowing upon the PCIJ the function to give advisory opinions to the organs of the League of Nations underscores the special relationship between Court and organization. By means of the advisory function, the PCIJ was meant to become an advisor to the League of Nations.[58]

II. The PCIJ's advisory jurisdiction

During the drafting process of the Covenant of the League of Nations, the drafters initially proposed to limit the PCIJ's advisory jurisdiction to the interpretation of the Covenant and to exclude broader questions of international law or concrete disputes.[59] However, this proposal was rejected, and

55 Report of the Informal-Inter Allied Committee on the Future of the Permanent Court of Justice, 39 AJIL 1 (1945), 1 (4, para. 13).

56 According to Shaw, the PCIJ was "metaphysically part of the notion of the League", see *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol.1, Ch. 3, § 21; Hudson speaks of the PCIJ as "part of the organization of the League", see *M. O. Hudson*, The Permanent Court of international justice, 1934, 111.

57 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1, Ch. 3, § 21.

58 *Giles Samson* and *Guilfoyle* refer to it as "expert counsel", see *M. Giles Samson/D. Guilfoyle*, The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction, in: C. J. Tams/M. Fitzmaurice (eds.), Legacies of the Permanent Court of International Justice, 2013, 41 (41).

59 *M. O. Hudson*, 37 Harvard Law Review 8 (1924), 970 (986); on the drafting history of the provisions on the PCIJ's advisory procedure in the Covenant of the League of Nations, see *M. Pomerance*, The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms, in: S. Muller/D. Raic/J. M. Thuránszky (eds.), The International Court of Justice, 1997, 271 (271 et seq.).

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the Court was given a broad advisory jurisdiction.[60] Article 14 sentence 3 of the Covenant of the League of Nations thus stipulated:

> "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."

One of the most controversial aspects of Article 14 was the question whether to extend the PCIJ's advisory jurisdiction to concrete disputes. Elihu Root, the US-American delegate of the Advisory Committee of Jurists tasked with drafting the PCIJ Statute, described this idea as "a violation of all juridical principles".[61] The idea behind giving the PCIJ the power to issue advisory opinions on existing disputes was that the Court could assist the League's organs, the Council and the Assembly, in their duty to peacefully settle international disputes.[62] The advisory procedure gave the League's organs access to the Court to clarify legal questions which lay at the heart of inter-state disputes. As *Hudson* stated in 1928:

> "The Council must deal with the political phases of the dispute. But political questions are frequently masked as legal questions, and to dispose of a political background it is sometimes necessary to deal with the legal foreground of a dispute. It is for this reason that during the past six years (...) the court's giving advisory opinions has proved so useful in the settlement of disputes."[63]

When drafting the PCIJ Statute in 1920, the Advisory Committee of Jurists proposed to pick up on the distinction contained in Article 14 between "disputes" and "questions" by creating different judicial procedures depending on which kind of request was brought before the Court.[64] Legal questions which did not refer to an existing dispute were to be answered by a chamber of three to five judges, while questions arising from actual disputes were

60 *M. Pomerance*, The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms, in: S. Muller/D. Raic/J. M. Thuránszky (eds.), The International Court of Justice, 1997, 271 (271 et seq.).

61 *M. O. Hudson*, 37 Harvard Law Review 8 (1924), 970 (987).

62 With further references, see *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 229; so too *M. Lando*, 61 CJTL 1 (2023), 67 (92–93).

63 *M. O. Hudson*, 22 AJIL 4 (1928), 776 (790).

64 The proposed Article 36 PCIJ Statute read:
"The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.

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to be answered by the full Court.[65] For questions which form the subject of an existing dispute, the Committee proposed that the Court shall reply under the same conditions as if the case had been actually submitted to it for decision. However, this proposition was struck down by the Committee of the Assembly of the League which found that the distinction between disputes and questions was "lacking in clearness and likely to give rise to practical difficulties".[66]

In the early years of the Court, the PCIJ Statute did not contain any guidance for the Court on how to exercise its advisory jurisdiction. The only reference to the Court's advisory jurisdiction was contained in Article 1 which stipulated:

> "A Permanent Court of International Justice is hereby established in accordance with Article 14 of the Covenant of the League of Nations."

Article 14 sentence 3 of the Covenant of the League of Nations contained the legal basis for the PCIJ's advisory jurisdiction. Article 1 PCIJ Statute incorporated this legal basis into its text.[67]

When the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special Commission of from three to five members.
When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision.", cited in *M. O. Hudson*, 37 Harvard Law Review 8 (1924), 970 (987).

65 On this proposal, see *M. Pomerance*, The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms, in: S. Muller/D. Raic/J. M. Thuránszky (eds.), The International Court of Justice, 1997, 271 (272 et seq.).

66 Records of First Assembly, Committee I, 534. See (3rd add) Ser D No 2 at 838, cited in: *M. Giles Samson/D. Guilfoyle*, The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction, in: C. J. Tams/M. Fitzmaurice (eds.), Legacies of the Permanent Court of International Justice, 2013, 41 (58); on the discussions in the Committee of the first Assembly of the League of Nations, see *S. M. Schwebel*, Was the Capacity to Request an Advisory Opinion Wider in the Permanent Court of International Justice than it is in the International Court of Justice?, in: S. M. Schwebel (ed.), Justice in International Law: Selected Writings of Judge Stephen M. Schwebel, 1994, 27 (28–29).

67 *M. O. Hudson*, 22 AJIL 4 (1928), 776 (782).

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III. Early criticism against the legal effects of PCIJ advisory opinions

Most of the early criticism against the PCIJ's advisory jurisdiction was directed against the uncertain the legal nature of the advisory opinions. Some authors feared that the non-binding nature of advisory opinions would cause tension with the Court's dispute settlement function: Since advisory opinions were non-binding, it was feared that the recipients of the opinions would simply ignore them.[68] This, in turn, would damage the reputation of the Court and thus undermine its capacity to authoritatively settle inter-state disputes. Especially US-American international lawyers regarded the activity of issuing advisory opinions primarily as an executive, not a judicial function.[69] Others criticized that the advisory opinion procedure would create a quasi-compulsory jurisdiction of the Court.[70] Although PCIJ advisory opinions were formally non-binding, they were regarded as being highly authoritative. The Court could thus find itself in the position of issuing an advisory opinion on an international dispute and later being asked to settle the same dispute by means of its contentious procedure. In such a situation, the decision on the dispute would be heavily influenced by the advisory opinion.[71]

The USA was among the most vocal critics of the Court's advisory jurisdiction fearing that the PCIJ advisory jurisdiction could be used to create a kind of compulsory jurisdiction under which the Court could adjudicate

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68 *J. B. Moore*, The question of advisory opinions, 1922, PCIJ Series D. No. 2, 398.

69 With further references, see *M. Giles Samson/D. Guilfoyle*, The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction, in: C. J. Tams/M. Fitzmaurice (eds.), Legacies of the Permanent Court of International Justice, 2013, 41 (44); see however Manley O. Hudson who points out that the US-American legal system already provided for similar procedures on state level before the state Supreme Courts of Massachusetts (since 1790), New Hampshire (since 1784), Maine (since 1820), Rhode Island (since 1842), Delaware (since 1852), Florida (since 1868), Colorado (since 1886), South Dakota (1889), Mississippi (1890), Oklahoma (1903), and Alabama (1923), *M. O. Hudson*, 22 AJIL 4 (1928), 776 (791). Other jurisdictions similarly provided for advisory procedures before domestic courts, including Austria, Bulgaria, Canada, Colombia, Ecuador, El Salvador, Finland, France, Honduras, Ireland, Nicaragua, Norway, Panama, Poland, Sweden and the United Kingdom, see *M. Giles Samson/D. Guilfoyle*, The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction, in: C. J. Tams/M. Fitzmaurice (eds.), Legacies of the Permanent Court of International Justice, 2013, 41 (42 et seq.).

70 *M. Giles Samson/D. Guilfoyle*, The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction, in: C. J. Tams/M. Fitzmaurice (eds.), Legacies of the Permanent Court of International Justice, 2013, 41 (45–46).

71 Ibid., 54.

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matters against the will of the United States.[72] When US President Coolidge asked the US Senate for its approval to the adherence of the United States to the PCIJ Statute, the US Senate consented, however it placed its consent under several reservations.[73] Any one of these reservations would have created significant inequality between the United States and the other States Parties to the PCIJ Statute, for example by giving the United States special influence in the election process of the judges (reservation 2), or by allowing the United States to determine how much money it would contribute to covering the expenses of the Court (reservation 3). However, it was only the fifth reservation which created a deadlock between the United States and the other States Parties to the PCIJ[74] and which expressed most clearly the United States' opposition to the Court's advisory jurisdiction. The fifth US Senate reservation read:

> "That the Court shall not render any advisory opinion except publicly after due notice to all states adhering to the Court and to all interested states and after public hearing or opportunity for hearing given to any state concerned, nor shall it 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."[75]

The first part of the reservation concerned procedural safeguards which by July of 1926 had already been enshrined into Articles 73 and 74 of the Rules of the Court.[76] However, the second part of the US reservation was highly controversial, so much so that the existing States Parties to the PCIJ Statute simply could not agree. The reservation would have allowed the United States to block any advisory proceedings which touched upon disputes or

72 Ibid., 45–46.

73 United States Senate Resolution 5 (The World Court) providing for adhesion on the part of the United States to the protocol of December 16, 1920, and the adjoined statute for the Permanent Court of International Justice, with reservations, 23 January 1926, printed in: Congressional Record, January 23, 1926, Vol. 67, Part. 3, 2656–2657, available at: https://www.congress.gov/bound-congressional-record/1926/01/23/senate-section.

74 *M. O. Hudson*, 22 AJIL 4 (1928), 776 (778).

75 Congressional Record, January 23, 1926, Vol. 67, Part. 3, 2657.

76 One potential reason why the US Senate included this first part of the reservation could be that it feared that the Court could change its Rules and eliminate these procedural safeguards. The US Senate might therefore have wanted to make them binding on the Court by incorporating them into the PCIJ Statute, cf. *M. O. Hudson*, 22 AJIL 4 (1928), 776 (783). This occurred during the revision of the PCIJ Statute in 1929.

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questions in which the United States *had* or *claimed to have* an interest. As *Hudson* pointed out:

> "A mere claim of interest would disable the court, and would render it incompetent. Instead of an affirmative interposition of an objection to prevent the court from proceeding, it would take an affirmative yielding of consent to enable the court to proceed once an interest of the United States has been claimed or found to exist. Conceivably, the claim that the United States has an interest could be advanced by another state to bar an advisory opinion relating to a dispute to which two other states were parties."[77]

The US reservation, if accepted by the States Parties, would have created a far-reaching consent requirement which would have had the potential to completely incapacitate the Court's advisory jurisdiction. During the revision of the PCIJ Statute in 1929, the States Parties to the Statute thus deliberately decided against accommodating this request. While the United States eventually signed the PCIJ Statute on 9 December 1929, it never ratified it.

The Court was thus faced with two opposing criticisms concerning the legal nature of its advisory opinions: while some saw the lack of binding effect of its advisory opinions as a danger to the judicial character and authority of the Court, others feared precisely too high a degree of authority emanating from the Court's advisory opinions. The Court primarily addressed the first point of criticism: By procedurally converging the advisory opinion procedure with the contentious procedure, the Court sought to increase the authority of its advisory opinions, thereby ensuring the integrity of its judicial activity.[78] The convergence of the two procedures was an important factor to strengthen the reputation of the advisory opinion procedure.[79] Yet, this convergence came at a price. It reinforced the second of the two main concerns addressed at the advisory opinion procedure.

77 Ibid., 788.

78 *M. Giles Samson/D. Guilfoyle*, The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction, in: C. J. Tams/M. Fitzmaurice (eds.), Legacies of the Permanent Court of International Justice, 2013, 41 (51 et seq., 60).

79 De Visscher in his 1929 Hague Lecture criticized the Court for taking the convergence of the two procedures too far, thereby depriving the advisory procedure of its unique value, *C. de Visscher*, Les avis consultatifs de la Cour permanente de justice internationale, Recueil des cours de l'Académie de La Haye / Hague Academy Collected Courses, 1 (58–59).

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In this vein, *De Visscher* questioned whether the convergence of the two procedures had not turned the advisory opinion into a quasi-judgment.[80]

IV. Converging the Court's advisory and contentious procedure: Rules of the Court and revision of the PCIJ Statute

Initially, the PCIJ did not have any legal guidance on how to exercise its advisory jurisdiction beyond the broadly formulated Article 14 sentence 3 of the Covenant of the League of Nations. The PCIJ was thus left to find its own approach. The Court decided to orient itself towards its contentious procedure in the design of its advisory procedure.[81] This could be seen as an attempt by the Court to rebut the early criticism levied against its advisory jurisdiction.

An example of this orientation towards its contentious procedure can be seen in the Rules of the Court, which the PCIJ formulated on 24 March 1922 in accordance with Article 30 PCIJ Statute.[82] Article 71 of the 1922 Rules stipulated that advisory opinions were given after deliberation by the full Court, as is the case in contentious proceedings. Article 73 stipulated that the Registrar informs the Court, the League's Member States, and any international organizations which are likely to provide relevant information of any request for an advisory opinion. In formulating Article 73, the PCIJ deliberately decided against a proposition which would have limited the notification of a request for an advisory opinion to the Court.[83] Instead, the Court chose a more transparent procedure. This emphasized that the PCIJ in exercising its advisory jurisdiction is acting as a court of justice and performing a judicial function, instead of acting as a legal advisor to the requesting organ.[84] In other words, the PCIJ saw its role in giving advisory opinions more akin to regular contentious proceedings than to

80 Ibid., 60.

81 Cf. *M. Giles Samson/D. Guilfoyle*, The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction, in: C. J. Tams/M. Fitzmaurice (eds.), Legacies of the Permanent Court of International Justice, 2013, 41 (48 et seq.).

82 1922 Rules of the Court, adopted 24 March 1922, PCIJ Series D, No. 1, 1926.

83 *M. Giles Samson/D. Guilfoyle*, The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction, in: C. J. Tams/M. Fitzmaurice (eds.), Legacies of the Permanent Court of International Justice, 2013, 41 (48–49).

84 Ibid., 48–49.

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a lawyer-client relationship.[85] In line with this, Article 74 of the Rules stipulated that both the request and the advisory opinion shall be printed and published, underlining the public function the Court performs in giving advisory opinions.

The 1922 Rules of the Court did not distinguish between advisory proceedings arising from abstract questions and those arising from existing inter-state disputes. Nevertheless, in practice the Court distinguished between the two by applying certain procedural safeguards when dealing with specific disputes in its advisory capacity[86]: The Court's registrar would inform all interested states about the request and invite them to submit memorials and counter-memorials, which the Court would then take into account before issuing the advisory opinion. Once the proceedings were concluded, the Court would deliver its advisory opinion in open court and provide extensive legal reasoning.

This practice found expression in the 1926 amendments to the Rules of the Court. The amendments further converged the Court's advisory jurisdiction with its contentious jurisdiction. For example, the 1926 revised version included provisions for states and certain international organizations to provide the Court with written and oral statements and comments on the submitted question(s) (Article 73 Revised Rules of the Court, 1926).[87] Also, advisory opinions were now read in open court and all immediately concerned states and international organizations had the possibility to be present (Article 74 Revised Rules of the Court, 1926). In 1927, the Court added another paragraph to Article 71, according to which

> "On a question relating to an existing dispute between two or more States or Members of the League of Nations, Article 31 of the Statute shall apply."[88]

85 Ibid., 48–49; see also *M. Pomerance*, The advisory function of the International Court in the League and U.N. eras, 1973, 287.

86 *M. Giles Samson/D. Guilfoyle*, The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction, in: C. J. Tams/M. Fitzmaurice (eds.), Legacies of the Permanent Court of International Justice, 2013, 41 (50 et seq., 59-60).

87 1926 Rules of the Court, adopted 31 July 1931, PCIJ Series D, No. 1, 1926.

88 This addition to Art. 71 was based on a proposal made by Judge Dionisio Anzilotti, see *S. M. Schwebel*, Was the Capacity to Request an Advisory Opinion Wider in the Permanent Court of International Justice than it is in the International Court of Justice?, in: S. M. Schwebel (ed.), Justice in International Law: Selected Writings of Judge Stephen M. Schwebel, 1994, 27 (31).

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Notably, the Court did not regard requests on inter-state disputes to be outside its competence. Instead, it proposed that in such situations Article 31 of the PCIJ Statute would apply, which allows parties to contentious proceedings to appoint a judge ad-hoc if none of their nationals is a judge on the Court. Through this amendment, the Court took a further step towards assimilating its advisory procedure with its contentious procedure.[89]

With the exception of the brief reference to the PCIJ's advisory jurisdiction in Article 14 sentence 3 of the League's Covenant, there were initially no binding provisions concerning the PCIJ's advisory jurisdiction.[90] When the Committee of Jurists was tasked to revise the PCIJ Statute in March of 1929, it decided to remedy the matter by incorporating the Court's practice pertaining to advisory opinions into the PCIJ Statute.[91] The Court's informal practice of converging its two procedures was thus formalized.[92] On 14 September 1929, the Assembly of the League of Nations adopted a revised version of the PCIJ Statute incorporating the proposals made by the Committee of Jurists half a year earlier.[93] Among other modifications, the revised statute contained a new "Chapter IV" on advisory opinions in Articles 65–68.[94] Articles 65–67 incorporated into the Statute provisions on the procedure which were previously part of Articles 72–74 of the Rules of the Court.[95] Article 68 PCIJ Statute established a dynamic link between

89 *M. O. Hudson*, 22 AJIL 4 (1928), 776 (782).

90 The Rules of the Court contained certain provisions on the Court's advisory jurisdiction, however, the Rules merely reflected the Court's practice.

91 *M. Giles Samson/D. Guilfoyle*, The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction, in: C. J. Tams/M. Fitzmaurice (eds.), Legacies of the Permanent Court of International Justice, 2013, 41 (60).

92 Ibid., 60.

93 Resolution Concerning the Revision of the Statute of the Permanent Court of International Justice, adopted by the Assembly of the League of Nations on 14 September 1929, PCIJ Series D. No. 1, Statute and Rules of the Court, fourth edition (April 1940), 8.

94 Statute of the PCIJ, adopted on 14 September 1929, entry into force 1 September 1930, printed in: PCIJ Series D. No. 1, Statute and Rules of the Court, fourth edition (April 1940), 13. The fact that the PCIJ Statute did not contain any provisions on advisory opinions before was referred to by the President of the revising conference as merely "another slight omission in the Statute", League of Nations, Minutes of the conference regarding the revision of the Statute of the Permanent Court of International Justice and the accession of the United States of America to the Protocol of signature of that Statute, September 4th to 12th, 1929 (1929 Minutes), 43.

95 See on this the Minutes of the 1929 Conference of the Assembly of the League of Nations: "The aim of the new Articles 65, 66, 67 and 68 was, so to speak, to consecrate the usage which had grown by introducing into the Statute a number of

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the Court's contentious and advisory procedures. The provision was not previously part of the Rules of the Court, but it could be argued that it encapsulated the core of all of the rules on the advisory jurisdiction as well as the Court's practice. Article 68 PCIJ Statute (which is identical to today's Article 68 ICJ Statute) stipulated:

> "In the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable."

Article 68 PCIJ Statute is the clearest illustration of the League's Assembly's aim to bring the PCIJ's advisory procedure in line with Court's contentious procedure.[96] Article 68 was added to the PCIJ Statute to ensure that the Court had all information it needed to issue the requested advisory opinion. This was intended to be achieved by giving the Court the same procedural techniques it used in contentious proceedings. When explaining the rationale of the new provision, *Henri Fromageot*, French delegate to the 1929 conference, declared:

> "In contentious cases, when a decision had to be pronounced, the procedure naturally had to provide for both parties to be heard; both parties stated their case, and the judges therefore had all the arguments before them. The same ought to be the case in advisory opinions. When an advisory opinion was asked for, the latter could have no value unless the person consulted could know all the relevant facts of the case in the same way as in contentious cases; he should know the arguments of *both parties* and *both parties* should adduce their evidence. It would be quite useless to give an advisory opinion after hearing only one side. For the opinion be useful *both parties* must be heard. It was therefore quite natural to lay down in the Statute of the Court that, in regard to advisory

very important articles which the Court had found itself obliged to include in its Rules.", see League of Nations, 1929 Minutes, 43.

96 When Sir Cecil Hurst, British delegate to the 1929 Conference of the Assembly of the League of Nations revising the PCIJ Statute, was approached by "an enthusiastic gentleman from across the Atlantic", who expressed US-American anxieties regarding "the whole question of advisory opinions" and who hoped that the advisory procedure would be assimilated, as much as possible, to the procedure in contentious cases, he replied "That is exactly what we have provided in the Statute", referring to Art. 68 PCIJ Statute, see League of Nations, 1929 Minutes, 46–47.

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opinions, the Court should proceed in all respects in the same way as in contentious cases."[97]

The provision thus presumed that advisory proceedings may concern matters which were disputed between two parties in the same way as in contentious proceedings. Articles 65–68 PCIJ Statute did not pick up on the distinction between "disputes" and "questions" made in Article 14 of the Covenant. Instead, they only referred to "questions". However, there is no indication in the preparatory materials that the drafters of the revised Statute intended to exclude disputes from the Court's advisory jurisdiction.[98]

C. The collapse of the League of Nations and the beginning of a new world order

The Second World War ended the work of the PCIJ. Two months after the beginning of the war, the Court's administration had taken the first security measures and sent parts of the Court archives to Geneva. Later, the Court moved its operation to Geneva due to the invasion of the Netherlands by Germany.[99] However, since the election of new members of the Court, which had been scheduled for the fall of 1939, never took place, the last public session of the PCIJ was held on 4 December 1939.[100]

Nevertheless, even during the war years, intense discussions about the future of the international political and legal order continued.[101] In varying compositions, several meetings of the Allied states took place which would eventually culminate in the San Francisco Conference of 1945, during which the United Nations and the ICJ were created. The goal of these

97 League of Nations, 1929 Minutes, 48, emphasis added.

98 *M. Lando*, 61 CJTL 1 (2023), 67 (91).

99 President Guerrero, Registrar Oliván and three other PCIJ officials moved to Geneva as the "core" of the Court. The remaining judges returned to their home countries, see *G. Marston*, The London Committee and the Statute of the International Court of Justice, in: V. Lowe (ed.), Fifty years of the International Court of Justice, 1996, 40 (40–41).

100 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1, Ch. 2, § 5.

101 Ibid., Vol. 1, Ch. 2, § 6.

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meetings was to prepare a new post-war international legal and political order that could be implemented immediately after the end of the war.[102]

The first of these "Inter-Allied Meetings" took place in London on 12 June 1941. In the so-called St. James Agreement, delegates from 14 states and exile governments declared their mutual support in the fight against Germany and Italy and declared that "the only true basis of enduring peace is the willing co-operation of free peoples in a world in which, relieved of the menace of aggression, all may enjoy economic and social security; and that it is their intention to work together, and with other free peoples, both in war and peace to this end."[103] The delegates formulated a vision for the time after the war. International cooperation should form the basis of sustainable peace in the world.

Two months later, on 14 August 1941, President Roosevelt of the United States and Prime Minister Churchill of the United Kingdom signed the "Atlantic Charter". They committed themselves to "certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world."[104] The common principles included the respect for territorial sovereignty, the right of peoples to choose their own form of government, economic cooperation, and the renunciation of the use of force. In a modified form, these principles would eventually find their way into the Charter of the United Nations (UNC). Several Allied states joined the Atlantic Charter in the following months.[105]

In January 1942, 26 states, including the United States, the United Kingdom, the Union of Soviet Socialist Republics (USSR), and China signed the "Declaration by United Nations".[106] They committed themselves to a maximum war effort against the Axis states and declared their acceptance

102 Ibid., Vol. 1, Ch. 2, § 6.

103 St. James Agreement, Yearbook of the United Nations, 1946–47, 1.

104 Atlantic Charter, Yearbook of the United Nations, 1946–47, 2.

105 Yearbook of the United Nations, 1946–47, 2.

106 In the following months, many states signed the Declaration by United Nations, including Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa, and Yugoslavia. 21 more states joined over the next two and a half years. These included Bolivia, Brazil, Chile, Colombia, Ecuador, Egypt, Ethiopia, France, Iran, Iraq, Lebanon, Liberia, Mexico, Paraguay, Peru, the Philippines, Saudi Arabia, Syria, Turkey, Uruguay and Venezuela, Declaration by United Nations, Yearbook of the United Nations, 1946–47, 1–2.

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of the principles of the Atlantic Charter.[107] The cornerstones of the future international organization thus found broad support for the first time.

In a joint declaration on 30 October 1943, China, the USSR, the United Kingdom, and the United States formulated a more precise concept of a general international organization. In their "Four Nations Declaration on General Security", also known as the "Moscow Declaration", they declared the need to establish as soon as possible a general international organization based on the principle of the sovereign equality of all peace-loving states, open to accession by these states and dedicated to the maintenance of international peace and security.[108]

While the governments of the Allied states discussed the post-war international order at these bi- and multilateral meetings, a group of legal experts deliberated on one essential part of this post-war order: the design of the new World Court. The "Informal Inter-Allied Committee of Experts" (also known as the "London Committee") was a group of international lawyers from eleven Allied states who met in 1943 to discuss the judicial organization of the post-war international order.[109] In particular they discussed whether the PCIJ ought to continue to exist or whether the world needed a new international court instead. The future of the League of Nations was subject of the London Committee's discussions only insofar as it directly concerned the Court.[110] In its final report of 10 February 1944, the London Committee found that a "new international agreement will be needed, whether the object be to set up a new Permanent Court or merely to continue the old one in existence."[111] The basis of this agreement should be the PCIJ Statute which "has worked well and should be retained as the general structure of the future Court".[112]

107 Declaration by United Nations, Yearbook of the United Nations, 1946–47, 1.

108 Four Nations Declaration on General Security, Yearbook of the United Nations, 1946–47, 3, para. 4.

109 For an extensive account of the London Committee, see *G. Marston*, The London Committee and the Statute of the International Court of Justice, in: V. Lowe (ed.), Fifty years of the International Court of Justice, 1996, 40.

110 The London Committee's isolated focus on the World Court was the reason for the United States' non-participation, cf. Ibid., 45–46.

111 United Nations, Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, 1945, 39 Am. j. int. law S1: Supplement Official Documents, 36, para. 115.

112 Ibid., 36, para. 113.

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The London Committee criticized the PCIJ's "organic" relationship to the League of Nations, particularly its financial dependency.[113] It was believed that while there was no indication of undue influence on the judges of the PCIJ, the Court's institutional independence needed to be ensured by severing this organic connection.[114] Regarding the PCIJ's advisory jurisdiction, the London Committee voiced three points of criticism:

> "It was urged that the existence of this jurisdiction tended to encourage the use of the Court as an instrument for settling issues which were essentially of a political rather than of a legal character and that this was undesirable. Subsidiary objections were that the existence of this jurisdiction might promote a tendency to avoid the final settlement of disputes by seeking opinions, and might lead to general pronouncements of law by the Court not (or not sufficiently) related to a particular issue or set of facts."[115]

Despite these objections, the London Committee spoke out in favor of retaining the Court's advisory jurisdiction.[116] It even proposed to allow more entities to request an opinion from the Court, including "all international associations of an inter-state or inter-governmental character" as well as "any two or more States acting in concert".[117]

Individual states, however, should not be allowed to request advisory opinions as it was feared that a single state could otherwise indirectly impose a kind of compulsory jurisdiction on other states in circumvention of the principle of consensual dispute settlement.[118] However, the Committee accepted that two states acting in concert could request an advisory opinion on an inter-state dispute, even where the legal question was of particular interest to a third state.[119] This would not be problematic, the Committee found, as long as that third state had the opportunity to participate in

113 *G. Marston*, The London Committee and the Statute of the International Court of Justice, in: V. Lowe (ed.), Fifty years of the International Court of Justice, 1996, 40 (49, footnote 28).

114 United Nations, Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, 1945, 39 Am. j. int. law S1: Supplement Official Documents, 5-6, paras. 18-19.

115 Ibid., 20, para. 65.

116 Ibid., 21-22, para. 66.

117 Ibid., 40, para. 143.

118 Ibid., 22, para. 71.

119 Ibid., 23, para. 74.

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the proceedings.[120] To ensure this, it would be sufficient to maintain the procedure of notification by the Registrar of the Court.

There were two other groups of experts that examined the future of the World Court during the war: The “Inter-American Juridical Committee” in Central and South America and the “Advisory Committee on Post-War Foreign Policy” in the United States.[121] While the Inter-American Juridical Committee advocated for retaining the PCIJ as the World Court, the US Advisory Committee on Post-War Foreign Policy advocated for the creation of a new Court that would also be the organ of a new international organization.[122]

D. The creation of the International Court of Justice

The early inter-allied meetings and works of legal experts laid the groundwork for what was to come next: the creation of the legal framework that would shape the post-war international order. Three conferences would develop more concrete proposals for a new world organization and a new World Court which would culminate in the creation of the UNC and the ICJ Statute: the Dumbarton Oaks Conversations from 21 August to 28 September 1944, the meeting of the Washington Committee of Jurists from 9 to 20 April 1945, and finally the San Francisco Conference on International Organization from 25 April to 26 June 1945. All three conferences addressed the role of the Court’s advisory jurisdiction, although the focus was clearly on a variety of other issues.

I. Dumbarton Oaks Conversations (August to September 1944)

During the Dumbarton Oaks Conversations, Great Britain, the USA, the USSR, and China met to “informally” exchange views on a new world organization and the role of a new World Court within it.[123] The resulting Dum-

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120 Ibid., 23, para. 74.

121 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1, Ch. 2, § 6.

122 Ibid., Vol. 1, Ch. 2, § 6.

123 Ibid., Vol. 1, Ch. 2, § 7 The Dumbarton Oaks Conversations occurred in two phases: The Anglo-American-Soviet phase from 21 August to 28 September 1944 and the Anglo-American-Chinese phase from 28 September to 7 October 1944.

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barton Oaks Proposals contained the foundation of the United Nations, a new international organization with the aim to ensure peace and security.[124] Contrary to the London Committee's proposal to cut the link between court and organization, the International Court of Justice was meant to become one of four main organs of the United Nations.[125] Chapter VII of the Dumbarton Oaks Proposals addressed the new International Court of Justice in more detail. In addition to being a principal organ, the Court was also to be the principal judicial organ of the organization (para. 1). Its Statute, which was proposed to be either a revised version of the PCIJ Statute or a new Statute based on the PCIJ Statute (para. 3), was to be part of the Charter of the new organization (para. 2). At the Dumbarton Oaks Conference, the states thus spoke out in favor of an even closer integration of the World Court within the World Organization than was previously the case.[126]

The Dumbarton Oaks Proposals also took up the Court's advisory jurisdiction, albeit in a curious fashion. Chapter VIII Section A para. 6 read:

> "Justiciable disputes should normally be referred to the International Court of Justice. The Security Council should be empowered to refer to the Court, for advice, legal questions connected with other disputes."

Several aspects are worth noting: The Dumbarton Oaks Proposals dealt with the Court's advisory jurisdiction exclusively in the context of dispute settlement. The above-cited paragraph is located within Chapter VIII, which is entitled "Arrangements for the maintenance of international peace and security including prevention and suppression of aggression" under section A "Pacific Settlement of Disputes". According to this paragraph, the envisioned Security Council could request advisory opinions on "legal questions connected with other disputes". The Court's advisory jurisdiction under this proposal thus expressly extended to disputes. However, the paragraph listed two types of disputes, without further explaining the difference: "justiciable disputes", which should be referred to the ICJ and "other disputes". The framing of the advisory opinion procedure as a method of

124 Dumbarton Oaks Proposals, preamble, Yearbook of the United Nations, 1946–47, 4.
125 Dumbarton Oaks Proposals, Chapter IV, Paragraph 1, Yearbook of the United Nations, 1946–47, 5. The other three envisaged organs were the General Assembly, the Security Council and the Secretariat.
126 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1, Ch. 2, § 7.

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dispute settlement was later discarded at the San Francisco Conference.[127] The Dumbarton Oaks Proposals did not pick up on the proposal of the Informal Inter-Allied Committee to extend the power to request advisory opinions to two or more states acting in concert. Some highly controversial questions were left open at the Dumbarton Oaks conference, including the question whether the new Court should have compulsory jurisdiction.[128]

II. Washington Committee of Jurists (9 to 20 April 1945)

The Dumbarton Oaks Proposals developed broad stroke proposals rather than drafting a detailed constituent instrument. The next step was thus to transform the Dumbarton Oaks Proposals into a binding legal instrument which would create the new world organization and the new World Court. This was the aim for the San Francisco Conference which was scheduled to commence on 25 April 1945. In preparation for this, the United States invited other Allied states to send experts to Washington for a preparatory meeting. This "Committee of Jurists" was tasked to write a draft Statute for the new International Court of Justice based on the PCIJ Statute and the Dumbarton Oaks Proposals. The newly drafted Statute would then serve as the basis for the discussions during the San Francisco Conference.[129] From 9 to 20 April 1945, the Committee developed a draft which was a revised version of the PCIJ Statute. However, several issues that were considered too political were deferred to the San Francisco Conference.[130] These included the question of the nomination and election of the judges of the Court, the role of the Court as principal judicial organ of the United Nations, the question of whether the International Court of Justice was a continuation of the PCIJ or a new court, and whether the Court should have compulsory jurisdiction.[131]

Regarding the Court's advisory jurisdiction, the Committee of Jurists simply incorporated Articles 65 to 68 of the PCIJ Statute into the draft for

127 Ibid., Vol. 1, Ch. 5, § 60.
128 Ibid., Vol. 1, Ch. 2, § 7.
129 Ibid., Vol. 1, Ch. 2, § 8.
130 Ibid., Vol. 1, Ch. 2, § 8.
131 Ibid., Vol. 1, Ch. 2, § 8.

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the new ICJ Statute without making any substantial changes.[132] The Committee deferred the decision about which organs were entitled to request advisory opinions to the San Francisco Conference. However, it drafted the articles based on the presumption that the Security Council (UNSC) and the General Assembly (UNGA) would have this power, while other international organizations and states would not.[133]

Several states commented on the proposals made by the Washington Committee of Jurists. Guatemala, Mexico, and Norway supported the extension of the right to request advisory opinions to the UNGA,[134] the United Kingdom and Venezuela went even further and proposed an extension also to other international organizations connected to the United Nations, as well as two or more states acting in concert.[135] Norway addressed the question whether the advisory jurisdiction should extend to inter-state disputes:

> "The authority for the Security Council to request an advisory opinion of the International Court as formulated in the proposals must apply to legal questions arising out of *any dispute*. But the Security Council should have a similar authority to request an opinion of the Court also concerning legal questions unconnected with any particular dispute."[136]

During the discussions a debate erupted among the delegates whether the question of a compulsory jurisdiction of the Court rendered any debate about a liberal versus a restrictive advisory jurisdiction meaningless. The Iraqi delegate *Abass* argued that if the Court were given compulsory juris-

132 The Committee merely swapped references to the League of Nations for references to the United Nations and split some longer paragraphs into several shorter ones, United Nations, Doc. Jurists 59 G/47, Vol. 14, 564–565.

133 Washington Committee of Jurists, Doc. Jurists 86, G/73, Chapter IV; the Washington Committee of Jurists accepted the proposal to Proposal to grant the UNGA the power to request advisory opinions from the Court by 27 votes in favor and none opposed while disapproving the proposal to extend the same right to other international organizations by 16 votes to 4, Washington Committee of Jurists, Doc Jur.45; G/34 Vol. 14, p. 177, 183.

134 Committee of Jurists, Official comments, Doc Jur.1; G/1 vol. 14, 446–447.

135 Committee of Jurists, United Kingdom proposal regarding the Statute of the Permanent Court of International Justice, 10 April 1945, Doc. Jur.14; DP/4, Vol. 14, 319; Committee of Jurists, Memorandum presented by the delegation of Venezuela on basis for the organization of the International Court of Justice, 10 April 1945, Doc. Jur.16; G/12, Vol. 14, 373.

136 Committee of Jurists, Official comments, Doc Jur.1; G/1 vol. 14, 447 (emphasis added).

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diction, advisory opinions would become unnecessary, since justiciable disputes would *ipso facto* be referred to the Court.[137] The British delegate *Fitzmaurice* responded that a compulsory jurisdiction would to the contrary increase the usefulness of advisory opinions, because states could avoid litigation by referring matters to the Court's advisory procedure before they reached the stage of a dispute.[138] The question of whether the ICJ should have compulsory jurisdiction occupied much of the debates of the Washington Committee of Jurists and during the San Francisco Conference. This focus was likely one reason, why the advisory jurisdiction of the Court received only passing attention. However, the record of the discussions does not indicate any intention of the delegates at the Washington Committee of Jurists to limit the new Court's advisory jurisdiction in comparison to the PCIJ.[139]

III. San Francisco Conference (25 April to 26 June 1945)

While the Second World War drew to an end in Europe, the founding conference of the United Nations took place in San Francisco. From 25 April to 26 June 1945, 850 delegates from 50 states[140] met with the aim of adopting the Charter of the United Nations as the constituent instrument of a new international organization and a Statute of the new World Court. The drafting of the UNC took place in four Commissions, whose work was subdivided into 12 Committees and numerous Subcommittees: the task of Commission I was to define the aims and principles of the new organization, determine its main organs and create rules governing membership and the work of the General Secretariat. Commission II was responsible

137 The United Nations Committee of Jurists, Summary of eighth meeting, Doc. 45; G/34, 178.

138 The United Nations Committee of Jurists, Summary of eighth meeting, Doc. 45; G/34, 178–9.

139 So too *S. M. Schwebel*, Was the Capacity to Request an Advisory Opinion Wider in the Permanent Court of International Justice than it is in the International Court of Justice?, in: S. M. Schwebel (ed.), Justice in International Law: Selected Writings of Judge Stephen M. Schwebel, 1994, 27 (58).

140 Yearbook of the United Nations, 1946–47, 12. Poland was invited but could not send delegates as it did not have a recognized government at the time of the conference, Yearbook of the United Nations, 1946–47, 12. Poland is nevertheless considered one of the founding members of the United Nations, https://www.un.org/en/about-us/history-of-the-un/san-francisco-conference.

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for the General Assembly, Commission III for the Security Council, and Commission IV for the International Court of Justice.[141]

The San Francisco Conference brought about five important changes to the structure of the Court and its advisory jurisdiction:

First, Under pressure from the USSR and the USA, Commission IV decided against the continuation of the PCIJ and in favor of the creation of a new Court whose jurisdiction would be voluntary and thus subject to the consent of the states.[142] The idea of a compulsory international jurisdiction was explicitly rejected.

Secondly, and potentially most significantly, Article 7 para. 1 UNC establishes the ICJ as one of the six principal organs of the UN, among which there is no hierarchical order.[143] The ICJ also acts as the organization's principal judicial organ (see Article 92 UNC). The effects of this dual character of the Court, being one of the principal organs and a judicial organ at the same time, were not discussed during the conference. The reason for this might lie in the division of labor between Commission I, which dealt with the principal organs of the UN, and Commission IV, which dealt with the judicial organization.[144] This division of labor resulted in neither of the two Commissions considering in detail the interaction of the two features of the ICJ.[145] One of the most significant implications of the Court's character as an organ of the UN is that the ICJ, in exercising its judicial functions, must work towards the fulfilment of the aims of the Organization and to that effect cooperate with the other principal organs.[146] This "duty to cooperate" with other UN organs will be a guiding consideration in the Court's exercise of its advisory jurisdiction. Judge *Azevedo* emphasized this in the Court's first advisory opinion in the *Peace Treaties* case:

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141 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1, Ch. 2, § 9.

142 Ibid., Vol. 1, Ch. 2, § 10. Despite the fact that the PCIJ was discontinued, the ICJ is the PCIJ's quasi-successor. The final report of Committee IV/1 stated in this regard: "In a sense, therefore, the new Court may be looked upon as the successor to the old Court which is replaced.", Report of the Committee IV/1, 13 UNCIO 381, 383.

143 *M. Lippold*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 7, para. 10.

144 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1, Ch. 2, § 9.

145 Ibid., Vol. 1, Ch. 2, § 9.

146 *S. Rosenne*, The law and practice of the International Court, 1920-2005, 4th ed. 2006, 109.

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> “The Court, which has been raised to the status of a principal organ and thus more closely geared into the mechanism of the U.N.O., must do its utmost to co-operate with the other organs with a view to attaining the aims and principles that have been set forth.”[147]

The ICJ’s duty to cooperate implies a duty to respond to requests for advisory opinions from the other UN organs as the Court considers that giving such advisory opinions “represents its participation in the activities of the Organization, and, in principle, should not be refused”.[148] However, the Court’s duty to cooperate and correlating duty to respond is limited by the Court’s character as a judicial organ. How the Court reconciles these two elements of its character is examined below.[149]

Thirdly, the circle of entities authorized to request advisory opinions from the Court was widened to not only include the UNSC and the UNGA, but also “other organs of the United Nations and specialized agencies”. Previous proposals to allow two or more states acting in concert to request advisory opinions from the Court were rejected during the negotiations in San Francisco.[150] It was feared that such a right “would afford a means whereby the State concerned could indirectly impose a species of compulsory jurisdiction on the rest of the world”.[151]

Fourthly, all provisions on the power to request an advisory opinion from the ICJ have been consolidated in the provisions on the ICJ, instead of being distributed among the sections on the respective institutions. In earlier proposals, the provisions governing the ICJ’s advisory jurisdiction were contained in the section on the UNSC’s powers of pacific dispute settlement. During the drafting process the advisory procedure was relocated to the section on the competences of the ICJ. However, this relocation cannot be understood as a deliberate choice to restrict the ICJ from giving advisory opinions on inter-state disputes. Committee III/2, which was responsible for drafting the provisions relating to the UNSC, decided to delete any

147 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, Separate Opinion Azevedo, ICJ Reports 1950, 79 (82).

148 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (71).

149 See *infra*: § 3.

150 United Nations Conference on International Organization, Fifteenth Meeting of Committee IV/1, 30 May 1945, Doc. 685, IV/1/52, vol. 13, 232.

151 United Nations Conference on International Organization, Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice Source, Vol. 14, 22, 445.

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reference to the advisory procedure in the chapter on the UNSC not to emphasize that advisory opinions may not concern disputes but for the simple reason that “Committee IV/1 had included an adequate provision on this subject in Chapter X dealing with the International court of Justice”.[152]

And fifthly, during the drafting process, the participating states agreed upon a new wording to describe the Court’s advisory jurisdiction *ratione materiae*. In departure from the text of the League’s Covenant, which referred to any “dispute or question” (Article 14 Covenant), the newly drafted Articles 96 UNC and 65 ICJ Statute refer to “any legal question”. The significance of this change in wording will be discussed later when the legal framework of the ICJ’s advisory jurisdiction is analyzed in detail.[153]

E. Conclusions on the history of the advisory function

The ICJ – unlike the PCIJ – was created as an organ of an international organization. One of the most important consequences of this is that the ICJ has a duty to cooperate with the other UN organs.[154] This duty to cooperate finds its most concrete expression in the ICJ’s advisory jurisdiction. How the Court ought to reconcile this duty to cooperate with the other UN organs with the requirements placed on the ICJ as a judicial organ, was neither discussed at the preparatory conferences nor the San Francisco Conference. However, exactly this tension between the two characteristics of the ICJ lies at the heart of the Eastern Carelia doctrine.

152 United Nations Conference on International Organization, Twelfth meeting of Committee III/2, Doc. 992; III/2/27, p. 105. The Rapporteur of Committee III/2 further stated: “The Committee recommends that there should be no reference to advisory opinions in this Chapter in view of the fact that Committee IV/1 has proposed the inclusion in the Chapter on the International Court of Justice of an article giving the Security Council and the General Assembly the power to request an advisory opinion of the Court on any legal question.”, United Nations Conference on International Organization, Report of the Rapporteur of Committee III/2, Doc. 1027 III/2/31(1), vol. 12, 162.

153 See *infra*: § 5 Section D.V.

154 The ICJ implied such a duty to cooperate flowing from its status as an organ of the UN in its *Peace Treaties* advisory opinion when it stated that “the reply of the Court, itself an “organ of the United Nations”, represents its participation in the activities of the Organization, and, in principle, should not be refused.”, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (71).

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