

Part 4:
The Institutionalization of
International Adjudication

Chapter 10 Peace Through International Adjudication: The Permanent Court of International Justice and the Post-War Order

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1. Introduction

That ‘peace’ should be sought ‘through law’ is one of international law’s prominent themes. Over the centuries, the theme has been varied significantly. The post-WWI variation of the theme stands out as a particularly ambitious one. Just as after earlier upheavals, peace was sought through international treaties and territorial re-ordering. But not all was *déjà vu*; much was not in fact. Breaking with precedent, the task of preserving international peace and security was entrusted to a World Organization, the League of Nations.¹ And as part of the move to international institutions, the World Organization was quickly supplemented by a World Court, the Permanent Court of International Justice (PCIJ).

The second of these innovations is at the heart of the present contribution, which seeks to offer a bird’s eye view on the role of the World Court in the post-war attempt to ensure peace through law. The argument proceeds in two steps: section 2 revisits the circumstances of the PCIJ’s creation and assesses its relevance in the 1919 variation on the peace through law theme; section 3 outlines the experience of the court, once created. The treatment is selective and impressionistic, and it is aimed throughout at assessing whether the PCIJ’s experience has shaped future approaches to peace through law.

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1 According to the opening lines of the Covenant’s Preamble, the League was set up ‘[i]n order to promote international co-operation and to achieve international peace and security’.

2. *A New, but Modest, Beginning: Binding Dispute Resolution in the Post-war Order*

The starting point for the discussion is a new beginning. The post-war settlement, with a brief delay, resulted in the establishment of the PCIJ—a permanent world court, not part of the League's institutional structure, but linked to it in manifold ways. Article 14 of the Covenant called upon the League Council to 'formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice' and clarified the dual basis of that future court's jurisdiction: it would be

competent to hear and determine any dispute of an international character which the parties thereto submit to it [and] ... also give an advisory opinion upon any dispute or question referred to it by the [League's] Council or by the Assembly.²

The 'Council quickly got down to work':³ it set up an Advisory Committee to produce a Report, which the Council considered (and modified in significant respects) in mid-1920, and which it placed before the League Assembly in late 1920.⁴ In mid-December 1920, ten months after the Advisory Committee had been set up, the Protocol of Signature of the PCIJ Statute was adopted. Another nine months later, it entered into force; two

2 As Rosenne notes, 'When the Covenant of the League of Nations ... was being negotiated at the Paris Peace Conference of 1919, there were suggestions to include a Court amongst its organs. However, in the short time available, this idea could not be pursued. The language of Article 14 of the Covenant offered a pragmatic way out. See Shabtai Rosenne, 'Permanent Court of International Justice' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2006), para 4.

3 *ibid* para 5.

4 For a clear summary of the process see Ole Spiermann, 'Historical Introduction', in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm and Christian J Tams (eds), *The Statute of the International Court of Justice. A Commentary* (2nd edn, OUP 2012) 47, paras 6–22. The primary documents are all available via the 'PCIJ section' of the website of the International Court of Justice (<www.icj-cij.org/pcij/other-documents.php?p1=9&p2=8>); see notably (i) *Advisory Committee of Jurists, Documents presented to the Committee relating to existing plans for the establishment of a Permanent Court of International Justice, 1920*; (ii) *Advisory Committee of Jurists, Procès-verbaux, 1920*; (iii) *Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court, 1921*.

weeks later, the first generation of PCIJ judges was elected; and on 15 February 1922, the new court was inaugurated.⁵

2.1. A World Court at Last

All this was no mean feat, and not just because of the record time in which the PCIJ was established. More importantly, the League succeeded where internationalists of earlier eras had failed: many of them had argued for the establishment of an international tribunal and placed great hopes in it.⁶ Jeremy Bentham had seen access to an international court as a means of removing the need for conflict: ‘Establish a common tribunal, the necessity of war no longer follows from difference of opinion. Just or unjust, the decision of the arbiters will save the credit, the honour, of the contending party’—things were fairly straightforward in his *Plan for an Universal and Perpetual Peace*.⁷ At the Hague Peace Conferences of 1899, and more so in 1907, many delegates had fervently argued for a system of compulsory dispute settlement, and had claimed that it was time to move from institutionalized arbitration to a proper, permanent court. (A firm minority, in what Arthur Eyffinger would later describe as a ‘titanic debate’, succeeded in blocking both.⁸) Fifteen years later, the move from arbitration to adjudication was accomplished, and without anything approaching a titanic debate. The new World Court was set up quickly, and efficiently.

Unsurprisingly, many saw in this the triumph of an idea whose time had come: the culmination of a long process of establishing the rule of law, impartially administered, over states who would no longer meet on the battlefield, but in the ‘hushed calm of courtrooms’,⁹ in a palace dedicated to

5 For the record see PCIJ Rep Series D no 1, vol 1.

6 The following section draws on Christian J Tams, ‘World Peace through International Adjudication?’ in Heinz-Gerhard Justenhoven and Mary Ellen O’Connell (eds), *Peace Through Law: Can Humanity Overcome War?* (Nomos/Hart 2016) 215–54.

7 Jeremy Bentham, ‘Plan for an Universal and Perpetual Peace’ (Principles of International Law, Essay IV) in *The Works of Jeremy Bentham, Part VIII* (William Tait 1839) 552.

8 See Arthur Eyffinger, ‘A Highly Critical Moment: Role and Record of the Second Hague Peace Conference’ (2007) 54 *Netherlands International Law Review* 197, 219; and further Christian J Tams/Christelle Bouguillon, ‘La deuxième conférence de La Haye et le règlement pacifique des différends’ (2009) 113 *RGDIP* 75.

9 Stephen C Neff, *Justice Among Nations: A History of International Law* (HUP 2014) 346.

peace, the *Palais de la paix*. James Brown Scott, ever the enthusiast, was one of them; he felt that '[w]e should ... fall upon our knees and thank God that the hope of ages is in process of realization'.¹⁰ Sir Eric Drummond, the League's first Secretary-General, not otherwise known as an enthusiast, was not to be outdone. At the PCIJ's inaugural ceremony, he praised the Court's establishment as 'the greatest and ... most important creative act of the League' and noted that

there have been various well-distinguished marks in the progress of mankind. The opening of the Court is not the least of these. Indeed, we believe and hope that it will prove the greatest. After all, the ideal to which I presume all men of goodwill look forward is that not only individual nations but the whole world shall be ruled by law.¹¹

It is important to bear in mind this perspective, and to appreciate the sense of triumph and accomplishment felt by some observers at the time. It is particularly important because what Brown, Drummond and others said about the PCIJ fits well with broader perspectives on the era, which emphasizes the League's efforts to have 'the whole world ... ruled by law'.¹² Josef Kunz and many others—partly enthusiastically, increasingly critically—described the prominence of international law in a world gradually moulded by 'Geneva men' and the 'Geneva spirit': 'legal arguments were at the core of every debate', according to Kunz.¹³ The establishment of a world court nicely fits this vision of the post-war era—and it adds a further dimension: for while at Geneva, legal arguments were presented by state delegates and League officials in political and technical arenas, at The Hague they were assessed, scrutinized and tested by a court that was *solely* guided by considerations of law, that was required by Statute to apply it *impartially*, and given the power to do so with *binding force*. The World Court, in this perspective, was to give authoritative voice to the international rule of law.

10 James Brown Scott, 'The Permanent Court of International Justice' (1921) 15 AJIL 52, 55.

11 PCIJ Rep ser D no 2, 320.

12 *ibid* 320.

13 Josef L Kunz, 'Swing of the Pendulum: From Overestimation to Underestimation of International Law' (1950) 44 AJIL 135, 137.

2.2. A World Court with a Modest Brief

Not everyone shared this perspective. Where Brown, Drummond and others felt an important step had been taken, others saw a missed opportunity. This other perspective was not as prominent, and is ignored in some retrospective assessments,¹⁴ but it deserves attention too. Its focus was not on what had been created (a court), but on how that court differed from the 'hope of ages'¹⁵ of earlier generations. Two points stand out.

The first concerns the operating conditions of the new court, and it boils down to a relatively straightforward proposition.¹⁶ The system of binding dispute resolution established under the PCIJ Statute was optional, not mandatory. It was optional in two respects. For one, to participate in the new system, states had to agree to be bound by the Statute: this was obvious and inherent in the functioning of a system of law based on treaties. Things did not end there, though; the system was optional also in another, less obvious, respect. Leaving aside marginal, incidental questions, the Statute itself did not provide the Court with competence in contentious proceedings. It was an invitation to provide the Court with jurisdiction: a vessel waiting to be filled with (jurisdictional) life—life that could, as per Article 36 of the Statute, come from special agreements, treaty-based compromissory clauses or optional clause declarations.¹⁷ The Court's jurisdiction, in other words, was not compulsory, not even in the sense that it would be implicit in a state's sovereign decision to join the Statute; it was derivative.

14 See eg Rosenne, MPEPIL (n 2).

15 See Scott (n 10).

16 For more on this point see Christian J Tams, 'The Contentious Jurisdiction of the Permanent Court' in Christian J Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Brill 2013) 11, 16–21.

17 In pertinent part, Article 36 of the PCIJ Statute (which, without major change, became Article 36 of the ICJ Statute) provided as follows:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

The Members of the League of Nations and the states mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other member or state accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes.

This derivative character set the newly-established court apart from the ‘hope[s] of [earlier] ages’.¹⁸ The plans of Bentham and others, had sought to make jurisdiction compulsory, not dependent on a second ‘opt in’. Similarly, at The Hague in 1907, as noted above, it took a ‘titanic debate’¹⁹ for a minority to block plans for an obligatory system of dispute settlement. After World War 1, the titans had tired. Compulsory jurisdiction was not off the table; in fact, during the Advisory Committee debates, it was very much on it. But the Committee’s proposed draft provision that would have given the PCIJ jurisdiction, without a further opt-in, over *all* disputes that had been ‘impossible to settle ... by diplomatic means’²⁰ did not survive the Council debates.²¹ In fact, unlike in 1907, the great powers all insisted that jurisdiction would have to be based on dual consent. The post-war order, in other words, moved from arbitration to adjudication, but it did not take a ‘leap of faith’ towards compulsory jurisdiction.²²

The PCIJ differed from earlier proposals in a second, and more significant, respect: it was set up as part of an overarching re-design of the international order: a particular variation of the peace through law theme. As hinted at in the Introduction, in this variation, the PCIJ was part of a move to international institutions, and its establishment overshadowed by the more momentous creation of the League of Nations. While earlier peace plans had put courts centre stage, in the new post-war order, the PCIJ occupied a relatively modest place. For around half a century, peace through law proposals had been dominated, in David Caron’s words, by a ‘profound and widespread nineteenth-century faith [still strongly felt during Hague Peace conference, CJT] in the peacekeeping ability of an interna-

18 See Scott (n 10).

19 Eyffinger (n 8).

20 See article 33 of the Advisory Committee Draft, reproduced in Advisory Committee of Jurists, *Procès-verbaux* (n 3) 727.

21 For details see Spiermann, ‘Historical Introduction’ (n 4) paras 11–17.

22 During the inter-War era, states would once more seek to introduce compulsory arbitration or adjudication through a universal dispute settlement treaty, the (Geneva) General Act for the Pacific Settlement of International Disputes (concluded 26 September 1928, entered into force 16 August 1929) 93 LNTS 344; yet limited ratification and far-reaching reservations affected its relevance.

tional court.²³ To a powerful ‘legalist movement’²⁴—a broad church in which international lawyers would find their place alongside, pacifists, United States Secretaries of State, socialists and the Pope²⁵—international courts and tribunals were crucial instruments of world peace, and arbitration and adjudication natural ways of resolving international conflicts in a civilized world society, which would no longer need to espouse war. This was always primarily a civil society movement, which states (who would have had to endorse it) viewed with some caution. But during the roughly half-century before 1919 it had significant strength. No more than a few snapshots must suffice here, which are chosen to illustrate the movement’s diversity. The literary-minded will find in Strindberg’s *German Lieutenant* a little gem of a scene in which Lieutenant Bleichroden and his wife, during a dinner party in Vevey on Lake Geneva, witness an Englishman celebrate the *Alabama* award: In it he saw not the massive British defeat (that it had also been), but a victory of justice; ‘while a waiter placed a tray with filled champagne glasses on the table’ the Englishman expressed pride in his country which ‘ha[d] appealed to the verdict of honourable men, instead of to blood and iron. ... I wish you all many such defeats as we have had to-day, for that will teach us to be victorious.’²⁶ More traditionally inclined students of international law might turn to Westlake’s 1886 textbook, which concluded on a decidedly optimistic note: ‘[I]nternational arbitration is in the air ... It is the season to raise our hopes, and do our utmost to try what the idea of international arbitration can accomplish.’²⁷ To scholars

23 David D Caron, ‘War and International Adjudication: Reflections on the 1899 Peace Conference’ (2000) 94 *AJIL* 1, 9. For a highly accessible account of earlier peace plans see notably Mark Mazower, *Governing the World: The History of an Idea* (Penguin 2013) ch 3.

24 Terminology is not uniform. Others speak of the ‘international arbitration campaign’ or ‘movement’ (see eg Mazower, n 23, at 83), but that risks ignoring the push to move from arbitration to adjudication and ‘proper courts’.

25 Mark W Janis underlines the limited influence of trained (international) lawyers (but probably undersells the role of activists from outside the United States): given how much debate about today’s international courts has become ‘the erudite province of lawyers and judges’; he notes that ‘it is easy to suppose that it was a juridical impulse that was principally responsible for their creation. However, to a surprising extent, the international courts of today were the work of nineteenth-century American Utopians by and large untrained in law: Mark W Janis, *The American Tradition in International Law: Great Expectations 1789–1914* (OUP 2004), 95.

26 August Strindberg, *The German Lieutenant and Other Stories* (translated by Field, A C McClurg 1915) 64–65.

27 John Westlake, *International Law*, vol 1 (Cambridge 1896) 368.

of civil society movements, the proceedings of the annual Lake Mohonk conferences (annual gatherings of the faithful until 1916) provide much material: the first 1895 conference considered '[t]he feasibility of arbitration as a substitute for war ... [to have been] demonstrated.²⁸ And when looking at emerging global debates of the time, one cannot fail to notice that advocates of international legalism—Asser, Fried, Root, Cramer, the *Institut de droit international*, Theodore Roosevelt—dominated the lists of early Nobel Peace laureates;²⁹ and that at the global summits of The Hague, in 1899 and more so in 1907, binding dispute settlement was perceived to be the key to world peace. Notwithstanding setbacks, by 1914, 'the campaign for international arbitration' was 'probably the single most influential strand of internationalism'.³⁰ All this matters because, to quote again David Caron, '[internationalist] movements could have chosen other strategies to promote peace'; precisely for that reason, their 'focus on a permanent international court deserves attention'.³¹

By 1919, things had changed markedly. Arbitration, which prior to 1914 had helped resolve low- and mid-level conflicts, had proved powerless to stop a major global conflict from spiralling out of control. This was not lost on statesmen and observers, and it led to an (under-appreciated³²) reassessment of the role of international courts and tribunals. When the leaders of the Allied and Associated Powers began to design the post-war order, they viewed an international court as useful, but no longer as a central guardian of world peace. And so the PCIJ was set up in a system that 'chos[e] other strategies to promote peace'.³³ The world court was designed to operate on the margins of the new world organization, the League of Nations: not part of the League's machinery for preserving peace and barely integrated in the League collective security system. The League's

28 See 'Resolution Adopted at the First Mohonk Conference on International Arbitration' (1895), 57 *The Advocate of Peace* 181.

29 For details, short biographies, and acceptance speeches, see <www.nobelprize.org/nobel_prizes/peace/laureates> accessed 29 November 2018.

30 Mazower (n 23) 83.

31 Caron (n 23) 8.

32 For an intriguing account see Stephen Wertheim, 'The League of Nations: A Retreat from International Law?' (2012) 7 *Journal of Global History* 210. For much more on 'legalist' and 'anti-legalist' trends in the establishment of the post-WWI order see David Kennedy, 'The Move to Institutions' (1987) 8 *Cardozo Law Review* 841; condensed accounts can be found in Mazower (n 23, 119-123); and Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen* (CUP 2010) 193-195.

33 Cf Caron (n 23) 8.

founders were idealists, too, but theirs was not the idealism of the legalists. It did not centre on arbitration or adjudication but on collective decision-making within international organizations: It was not the force of law administered by impartial judges, but the strength of political action backed by public opinion that was to ensure the League's success.³⁴ If the League, in Josef Kunz' terms, 'overestimated international law', then the Covenant hid this fairly well. It 'enshrined the primacy of politics over international law institutionally within the powerful organ of the Council'³⁵ and it 'focused on the political rather than judicial settlement of disputes'.³⁶ Courts were not ruled out—they were useful if states had consented to their involvement. But nothing required them to give such consent. What the League set up was a watered-down version of Scott's 'hope of ages': a world court, yes, but one with a modest brief. Elihu Root's assessment of the Covenant reflects this second perspective. Where his long-time protégé James Scott Brown saw progress, Root was disappointed at the 'relegation' of legalist thought in new post-war order:

Nothing has been done to provide for the reestablishment and strengthening of a system of arbitration or judicial decision ... We are left with a program which rests the hope of the whole world for future peace in a government of men, and not of laws, following the dictates of expediency, and not of right.³⁷

34 Mazower (n 23) speaks of 'Woodrow Wilson's impatience with the entire legalist paradigm' (at 121).

35 von Bernstorff (n 32) 195.

36 Anthony Giustini, 'Compulsory Adjudication in International Law: The Past, The Present, and Prospects for the Future' (1985) 9 *Fordham International Law Journal* 213, 224.

37 Note by Root to Henry Cabot Lodge, 19 June 1919, cited in Wertheim (n 32) 228. See further Jonathan Zasloff, 'Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era' (2003) 78 *New York University Law Review* 239, 348–49: 'Root's legalism, however, diverged sharply from Wilsonian diplomacy, a point obscured by frequent references to Wilson's "legalism." As Root noted, neither the Versailles Treaty nor the Fourteen Points called for international legal institutions (such as a world court) or compulsory arbitration of legal disputes; indeed, Wilson rejected the legal-political distinction that served as the essential framework of Root's thinking.'

3. A Pragmatic Pioneer: the PCIJ in Operation

What did the PCIJ make of all this? And what did states make of the new world court? The quarter-century of the Court's history yields many answers, and the PCIJ's experience in many ways remains instructive. As one of a number of 'great experiments' of the inter-War era, the PCIJ was to be a pioneer, simply because it was 'the framework within which the world first experienced the development of an international judiciary'.³⁸ So it was within the PCIJ's framework that mundane questions were first addressed —yes, judges would wear robes, but not the proposed caps, which Judge Moore had felt looked 'like a miter, with gold bands around them, making us look like a cross between bishops and clowns'.³⁹—and crucial decisions taken—jurisdiction was consensualist, preliminary objections could be addressed *a limine*, jurisdictional titles would cover consequential disputes about remedies, etc.⁴⁰ Through dealing, as a first of its kind, with the mundane and crucial issues of everyday judicial life, the PCIJ set the tone: future courts could look to it and decide to follow the pioneer or take a different approach.

As regards 'peace through law' schemes, the PCIJ's experience is perhaps best seen as a process of consolidation and adjustment: of 'finding its way'⁴¹ in the new international legal order of the inter-War period and of testing out what a permanent court could bring to it. With the benefit of hindsight, two aspects stand out. First, as an agency of dispute settlement, the PCIJ filled with life the role accorded to it in the peace through law design of the post-WWI order, without stretching it all too much. Second, through its jurisprudence, the Court emerged relatively quickly as an authoritative interpreter of international law. Both aspects are taken up in the following.

38 Ole Spiermann, 'The Legacy of the Permanent Court of International Justice—on Judges and Scholars, and also on Bishops and Clowns' in Christian J Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Brill 2013) 399, 412.

39 See references in Spiermann, in Tams/Fitzmaurice (n 38), 401.

40 For much more on these legacies see Tams, in Tams/Fitzmaurice (n 16), 29–37.

41 Rosenne, MPEPIL (n 2) para 38.

3.1. Sticking to the Brief: the Court as a Dispute Settler

The first point is closely related to the opening discussion of the Court's place in the post-war order designed in 1919/1922. If the architects of that era had foreseen a limited role for international adjudication in the settlement of major conflicts, they were to be proved right. (This may be worth mentioning as in many other respects, the post-war order evolved rather differently than its architects had foreseen.) The PCIJ played no major role in major conflicts, simply because it was hardly ever asked to 'address the main political issues of the day'.⁴² However, those that it was asked to address, it typically handled competently—and through its work demonstrated the usefulness of binding dispute resolution by a standing international court. With the benefit of hindsight, the experience of the PCIJ can be summarized in three points:

(i) First, the Court had relatively few cases and not too many clients.⁴³ Over the two decades of its existence, the PCIJ addressed 33 contentious disputes (circa 1 ½ per year) and rendered twenty-seven Advisory Opinions (a little over one per year). Its *clientèle* remained decidedly European. In only four cases did non-European States appear at all, and in only one single case did a non-European state (Brazil) play a decisive role.⁴⁴ This was not principally a problem of jurisdiction. Even in the absence of automatic, compulsory jurisdiction, during the 1920s and 1930s, states regularly agreed on compromissory clauses establishing the jurisdiction of the PCIJ over specific types of disputes.⁴⁵ Many states went further and accepted the

42 Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice. The Rise of the International Judiciary* (CUP 2005) 132.

43 The following draws on Tams, in Tams/Fitzmaurice (n 16), 21–28.

44 Namely in the *Brazilian Loans*, PCIJ Rep ser A no 21. Other non-European states participating in contentious proceedings were Japan (as joint applicant in SS 'Wimbledon' PCIJ Rep ser A no 1, and *Statute of Memel*, PCIJ Rep ser AB no 47) and China (in *Denunciation of the Sino-Belgian Treaty of 2 November 1865*, PCIJ Rep ser A no 18).

45 While the precise figure is difficult to establish, estimates suggest that in the two decades of the PCIJ's existence, as many as 500 compromissory clauses were concluded, ie between twenty and twenty-five per year. To help put this figure in perspective, it is useful to compare it to developments since 1946. These in fact are revealing: the ICJ has seen roughly 300 clauses in seventy years, ie less than five per year, and few true compromissory clauses (ie those permitting for some opt-out by way of declaration) at all since the 1970s.

A list of compromissory clauses referring to the PCIJ agreed before 1932 can be found in PCIJ Series D no 6 (4th edn). After 1932, the PCIJ no longer produced a consolidated list, but included information on new clauses in the respective

Court's jurisdiction over all disputes under the so-called optional clause.⁴⁶ The PCIJ's jurisdictional potential was, in fact, enormous. But this enormous potential was never 'translated' into real cases. States decided to use the Court only exceptionally. To illustrate, of the circa 500 compromissory clauses agreed in the inter-war period, only eight were ever invoked.⁴⁷ The World Court, as became clear quickly, was to be a court for rare occasions.

(ii) Second, beyond numbers, the disputes that did come before the Court were typically not the stuff of headlines. The bulk of its case-law—occasional exceptions such as the *Customs Union* opinion⁴⁸ notwithstanding—concerned disputes of limited reach and relevance. Maritime incidents of the *Lotus* type,⁴⁹ a dispute about the property of a foreign university,⁵⁰ the competence of an international organization,⁵¹ and State interference with shipping on the River Congo⁵² were some of the themes. More than anything else though, were issues raised by the post-war settlement: from questions relating to the territorial re-ordering of Europe (as in the

Chapter X of its Annual Reports (published as Series E nos 8, 9, 10 etc). Useful data can be found in Louis B Sohn (ed), *Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928–1948* (United Nations 1949); and C Wilfred Jenks, *The Prospects of International Adjudication* (Stevens 1964) 71. A (non-exhaustive) list of compromissory clauses referring to the ICJ is available at <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4>> accessed 29 November 2018.

46 States parties to the PCIJ Statute made use of the 'option' of Article 36 (2) in large number: after a modestly successful start, the figure of states recognising the PCIJ's jurisdiction rose quickly: In 1939, of the fifty-two states parties to the Statute or otherwise entitled to appear before the PCIJ, forty had submitted an optional clause declaration; this amounted to roughly 75%. In total, the number of states that at some point submitted a declaration amounted to 45: See Shabtai Rosenne, *The Law and Practice of the International Court, 1920–2005* (The Hague 2006), 797–798; and Manley O Hudson, *International Tribunals: Past and Future* (Carnegie Endowment 1944) 76–78.

47 CW Jenks has details: see n 45, at 72–73.

48 PCIJ Rep ser AB no 41.

49 *Lotus*, PCIJ ser A no 10.

50 See the *Peter Pázmány University case*, PCIJ Rep ser A no 61.

51 See eg *Competence of the ILO to Examine Proposal for the Organization and Development of the Methods of Agricultural Production*, PCIJ Rep ser B no 3; *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer* (Advisory Opinion) [1926] PCIJ Rep ser B no 13.

52 See *Oscar Chinn (Jurisdiction)* [1934] PCIJ Rep ser AB no 63.

many Silesian cases),⁵³ to the internationalization of the Kiel canal,⁵⁴ and to rights of minorities under the post-war treaties.⁵⁵ Set up to inaugurate a new era, the Court, in practice, was mainly busy addressing the ‘follow up’ of the previous War.

None of this was, it needs to be said, the PCIJ’s fault: as all courts, it could only react to cases brought before it; and in fact, through its involvement in the matters that were brought before it, it often helped defuse tensions. But in the practice of the Court, it soon became clear that the reality of international adjudication could be quite mundane. Whereas in the debates of the late 19th and early 20th century, binding dispute resolution had been presented as an alternative to war, in the 1920s and 1930s, states saw in it a useful means of solving small-scale disputes: to adapt a phrase coined for the League, the PCIJ could perhaps be said to have dealt with the ‘small change’ of international affairs.⁵⁶

(iii) That said, third, in dealing with smaller and mid-level conflicts and questions, the Court quickly established for itself a reputation as an agency for the settlement of disputes and (through advisory opinions) the provision of legal advice to international organizations. To illustrate by reference to a random sample of issues: once the Court had decided the *Wimbledon* case, ships would be permitted to pass the Kiel canal; Mr Mavrommatis was granted new concessions after the PCIJ’s merits judgment of 1925; following the Court’s opinion on the Treaty of Lausanne Turkey did accept

53 Among them *Certain German Interests in Polish Upper Silesia* (Merits) PCIJ Rep ser A no 7; *Factory at Chorzów* PCIJ Rep ser A no 9 and PCIJ Rep ser A no 10; *Rights of Minorities in Upper Silesia*, PCIJ Rep ser A no 15; *Access to German Minority Schools in Upper Silesia* (Advisory Opinion) PCIJ Rep ser AB no 40.

54 SS ‘Wimbledon’ PCIJ Rep ser A no 1.

55 See eg *Rights of Minorities in Upper Silesia (Minority Schools)* (Judgment) PCIJ Rep ser A no 15; *Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration, Signed at Neuilly-Sur-Seine on November 27th, 1919 (Greco-Bulgarian Communities)* (Advisory Opinion), PCIJ Rep ser B no 17; *Access to German Minority Schools in Upper Silesia* (Advisory Opinion), PCIJ Rep ser AB no 40; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion), PCIJ Rep ser AB no 44; *Minority Schools in Albania* (Advisory Opinion), PCIJ Rep ser AB no 64.

56 Cf Frederick S Northedge, *The League of Nations: Its Life and Times, 1920–1946* (Leicester University Press 1986) 72.

Ole Spiermann goes further when noting (with clinical Nordic precision) that ‘[i]n the political history of the League of Nations, the Permanent Court [was] but a footnote? Spiermann, *International Legal Argument* (n 42) 132.

the Council's decision in the *Mosul* dispute; etc.⁵⁷ While many of the PCIJ's judgments were declaratory in nature, it is worth noting that in 'no case' did states 'refus[e] ... to comply with a PCIJ judgment'.⁵⁸

As regards the PCIJ's overall performance, Rosenne rightly observes that during the inter-war period, 'the value of the settlement of international disputes through an international Court of the standing of the PCIJ, whether through its contentious jurisdiction or through its advisory competence, became widely accepted in modern diplomatic practice'.⁵⁹ This acceptance was a key factor explaining the almost seamless continuation of the Court after World War II: when another generation of peacemakers began to design another post-war order, they quickly agreed that a World Court should continue to be a part of it. To quote Rosenne again,

[i]n the process of the reconstruction of organized international society following World War II, there was no serious demand to abandon the idea of a standing international judicial organ or to require any major change in its practices and procedures. The focus of attention was on the Court's place in the renewed international organization for the maintenance of international peace and security.⁶⁰

Put differently, while the organizational detail required attention, the continued existence of the Court was soon agreed. The general impression was that, while not preventing wars,⁶¹ the PCIJ had done its job as a dispute settler quite well.

The PCIJ's experience as a dispute settler can perhaps be seen as an exercise in consolidation. The Court and its clients quickly embraced the role foreseen by the peace architects of 1919. This was a more limited role than that of courts in earlier peace designs, but one that fit expectations. States and the League tended to prefer other means of dealing with major political

57 See SS 'Wimbledon' [1923] PCIJ Ser A No 1; *Mavrommatis Palestine Concessions (Merits)* PCIJ Rep ser A no 5; *Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*, PCIJ Rep ser B no 12.

58 Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (OUP 2004) 50.

59 Rosenne, MPEPIL (n 2) para 38.

60 Rosenne MPEPIL (n 2) para 38.

61 Yuval Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 EJIL 73, 80.

conflicts. But European states did make use of the new option of ‘going to court’ to solve disputes of a legal nature—not frequently, let alone lightly, but with some regularity. International organizations did so too: they relied on the Court’s advisory jurisdiction as a useful ‘in-house counsel’. By 1945, when the ICJ was established, international adjudication by an international court had been accepted as a new addition to the ‘general arsenal of diplomatic processes’⁶² for the peaceful resolution of international disputes.

3.2. ‘Gradually Moulding International Law’: the Court as an Agent of Legal Development

Not seriously in demand as a ‘war-prevention tool’,⁶³ the PCIJ soon carved out for itself other functions. ‘Debarred from *directly* acting as an important instrument of peace’,⁶⁴ it made significant indirect contributions. One of these has particular relevance: through its jurisprudence, the Court became an important ‘agent of legal development’,⁶⁵ a guide to the proper construction of international law. It did not do so over night, but in retrospect, it grew into this new role surprisingly quickly.

One reason for this swift role adjustment is that in the World Court’s case-law, international law gained a new edge: principles of law formulated in books became tangible when applied to concrete disputes with a view to solving real-life problems—and their application by a court, with binding force upon the parties, gave them ‘bite’. Of course, the PCIJ was not the first body to apply international law; arbitral tribunals had done so for decades. And yet, the creation of the Court marked a change.⁶⁶ From the

62 Rosenne MPEPIL (n 2) para 36.

63 Shany (n 61) 77.

64 Hersch Lauterpacht, *The Development of International Law by the International Court* (Praeger 1958) 5.

65 The term is borrowed from Sir Franklin Berman: see his ‘The ICJ as an Agent of Legal Development’, in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013) 9.

66 In a perceptive study, Oliver Lissitzyn noted in 1951: ‘Although the various arbitral tribunals have made a substantial contribution to the development and refinement of international law, their authority has been impaired by lack of continuity in functions, personnel and traditions the narrowness of the basis of their powers..., the differences in the personal characteristics and professional standing of the persons composing them.’ As this was so, ‘The International Court of Justice, like its predecessor, is undoubtedly a more effective instrument for the devel-

beginning, the new Court's decisions were publicly available. Individual opinions laid bare points of disagreement,⁶⁷ which were dissected in a new genre of legal writing, annual reviews of the Court's activity.⁶⁸ Most importantly, as a permanent institution, the Court could—and would—build a body of jurisprudence, case by case, and regularly referencing its earlier decisions.⁶⁹ In later Annual Reports, the Court would go out of its way to note that it 'ha[d] in practice been careful not to reverse precedents established by itself in previous judgments and opinions, and to explain apparent departures from such precedents'.⁷⁰

Wise observers had expected something like this.⁷¹ In fact, the possibility of seeing the emergence of a systematic body of case-law had been one

opment of international law than an arbitral tribunal? see Oliver Lissitzyn, *The International Court of Justice: Its Role in the Maintenance of International Peace and Security* (Carnegie Endowment 1951) 10 and 13.

67 According to Article 57 of the PCIJ Statute, 'If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges [were] entitled to deliver a separate opinion' In the PCIJ's practice, this was read expansively, to permit reasoned opinions by judges dissenting from and concurring with the majority, incl. in advisory proceedings and with respect to orders. This marked a change compared to earlier arbitral practice, notably under the 1907 Hague Convention which did not mention the possibility of dissent. Article 57 of the ICJ Statute would consolidate the PCIJ's approach. For a clear summary of developments see Rainer Hofmann and Tilman Laubner, 'Commentary to Article 57' in Zimmermann/Tomuschat/Oellers-Frahm/Tams (n 4) paras 5–11.

68 See notably the reviews by the 'chronicler of the World Court' (Manfred Lachs), Manley O Hudson, entitled the 'xth year of the World Court' in successive volumes of the *American Journal of International Law*. For Lachs' remark see his *The Teacher in International Law: Teachings and Teaching* (Martinus Nijhoff 1982) 100.

69 The practice has continued to this date, and it bridges the divide between the two incarnations of the World Court. In the words of Judge Winiarski, '[t]he present Court [ICJ] has since the beginning been conscious of the need to maintain a continuity of tradition, case law and methods of work [with the PCIJ]. ... Above all, without being bound by *stare decisis* as a principle or rule, it often seeks guidance in the body of decisions of the former Court, and the result is a remarkable unity of precedent, an important factor in the development of international law' see *ICJ Pleadings, The Temple of Preah Vibear*, vol 2, 122.

70 Third Annual Report [1926–27], PCIJ, Rep ser E no 3, 218, 226.

71 See eg. Manley O Hudson, 'The Permanent Court of International Justice and World Peace' in *The Annals of the American Academy* (1924) 122: 'It may reasonably be anticipated that the Permanent Court of International Justice will contribute to the maintenance of the world's peace ... [by] building a cumulating body of international case law.'

of the arguments supporting the move from arbitration to adjudication.⁷² But (adapting Hersch Lauterpacht's statement), 'the lawyers and statesmen who in 1920 drafted the Statute of the Court did [indeed] not fully appreciate all the possibilities, in this direction, of the activity of the Court about to be established'.⁷³ In fact, while the drafters certainly contemplated the possibility of court decisions 'gradually moulding and modifying international law',⁷⁴ they saw this with scepticism as much as anticipation: a scepticism that militated against expressly encouraging the Court 'to assure the continuity and progress of international jurisprudence based on judgments' (as proposed by Baron Descamps⁷⁵) and that led to the adoption of a firmly worded Article 59 of the Statute (precluding anything remotely resembling a doctrine of *stare decisis*).⁷⁶

Once the Court took up its work, these concerns soon gave way. This is not to say that doctrines of precedent were embraced—the Court never claimed that it could 'legislate'⁷⁷—but its jurisprudence shaped, clarified and developed important areas international law, and it did so through the means of persuasion. Once the first handful of decisions had been ren-

72 As Hersch Lauterpacht would later observe, 'the necessity of providing for a tribunal developing international law by its own decisions had been the starting-point for the attempts to establish a truly permanent international court as distinguished from the Permanent Court of Arbitration: 'The so-called Anglo-American and Continental Schools of Thought in International Law' (1931) 12 BYBIL 59.

73 Lauterpacht, *Development* (n 64) 8. Lauterpacht prefaced this by a cautious 'it may be possible that...'

74 See *Documents concerning the Action Taken by the Council of the League of Nations* (n 4), 46.

75 *Advisory Committee of Jurists, Procès-verbaux* (n 4), 373.

76 According to Article 59, '[t]he decision of the Court has no binding force except between the Parties and in respect of that particular case'. As Chester Brown observes, the inclusion of this provision 'was primarily intended to underline the opinion that the Court should not be considered to be a law-making or law-creating institution: see his Commentary to Article 59, in Zimmermann/Tomuschat/Oellers-Frahm/Tams (n 4) para 9.

Along the same lines, Léon Bourgeois, Arthur Balfour and others, during the drafting, had considered ways and means of limiting the Court's influence; Balfour felt 'there ought to be some provision by which a state can enter a protest, *not* against any particular decision arrived at by the Court, but against any ulterior conclusions to which that decision may seem to point: *Documents concerning the Action Taken by the Council of the League of Nations* (n 4), 38. No such provision was adopted.

77 Its successor would clarify that it could not: see *Nuclear Weapons*, ICJ Rep 1996, 226, para 18.

dered, commentators began to assess the Court's contribution to the development of international law.⁷⁸ Hardly a decade after the first judgment, Hersch Lauterpacht wrote about it in book-length form.⁷⁹ In the practice of the Court, the question of principle—can courts make law?—was left to a side, and the PCIJ's pronouncements were recognized as important points of reference.

To illustrate, by the late 1930s, there had emerged building blocks of a law of treaties: the lenient, non-formalist, approach to the notion of a 'treaty' in the jurisprudence of the PCIJ; gradually consolidated principles of interpretation; clear statements on treaties and third parties; pointers towards special categories of treaties, eg those establishing territorial regimes, etc. In all of these respects (and many more) a later generation of international lawyers would draw on the PCIJ's case-law when codifying the modern law of treaties.⁸⁰ Curious disputes provided the Court with an opportunity to formulate general principles of state responsibility—its autonomy from domestic law; the principle of full reparation; the conceptual hierarchy between its different modalities.⁸¹ Still obscurer cases would yield timeless pronouncements on diplomatic protection.⁸² The rather many PCIJ findings on minority rights, rendered 'without much doctrine or precedent to rely on', 'have kept their relevance' even though the League's minority protection system was wound up unceremoniously.⁸³ To these one can add holdings on expropriation, on sovereign debts, on jurisdiction

78 See William E Beckett, 'Decisions of the Permanent Court of International Justice on Points of Law and Procedure of General Application', *British Yearbook of International law* 11 (1930), 1.

79 Hersch Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (London 1934). Admittedly, it was a rather short book, subsequently much expanded to cover the early work of the ICJ: see Lauterpacht, *Development* (n 64).

80 In the words of Stephan Wittich, 'the experience of the Permanent Court ... left clear marks on the modern law of treaties': see his 'The PCIJ and the Modern International Law of Treaties' in Tams/Fitzmaurice (n 16) 89, 120.

81 For much more on this see Christian J Tams, 'Law-making in Complex Processes: The World Court and the Modern Law of State Responsibility' in Christine Chinkin and Freya Baetens (eds), *Statehood, Sovereignty and State Responsibility. Essays in Honour of James Crawford* (CUP 2014) 287, 292–296.

82 Notably the Court's state-centred interpretation of diplomatic protection claims, by which a state was 'in reality asserting its own rights': see *Mavrommatis Palestine Concessions*, PCIJ ser A no 2 (1924) 12.

83 Catherine Brölmann, 'The PCIJ and International Rights of Groups and Individuals' in Tams/Fitzmaurice (n 16) 123, 142 and 141.

—the PCIJ's jurisprudence reflected the expanding reach of international law.

The Court's holdings did not, to reiterate, have a binding effect beyond the immediate case at hand. But to state as much is to miss the essential point: the Court's jurisprudence, readily available and generally well-received,⁸⁴ became a natural point of reference for anyone seeking guidance on disputed questions of international law. It 'require[d] no doctrine of judicial precedent to explain th[e] *inevitable practice*' of 'looking to previous decisions for guidance in the solution of similar problems'.⁸⁵ Rendered in the early stages of the international legal community's 'move to institutions',⁸⁶ decades before international courts would proliferate, PCIJ decisions stood out as 'the most authoritative pronouncements on questions of international law ... that can be made while the family of nations remains as at present constituted'⁸⁷—viz lacking recognized law-interpreters and structured processes for spelling out the meaning of legal rules.

The aggregate effect of these 'authoritative pronouncements' was significant. They marked a general shift in the understanding of international law, which Ole Spiermann describes as a trend 'From *Buchrecht* to practice'.⁸⁸ From today's perspective, the point may seem almost trite, but the crucial relevance of the trend was not lost on contemporary observers. To Lord McNair, writing in the early 1960s, 'the feature of the past half-century has been the gradual transformation of international law from a book-law occasionally supplemented by treaties into a case-law constantly supplemented by treaties'.⁸⁹ In Sumner Lobingier's assessment, offered towards the end of World War II, the World Court appeared as 'The Molder of an International Law System' which (like the jurisconsults of Ancient Rome) had begun to transform international law—as yet 'little more than a mass of heterogeneous and often disputed doctrines'—'into a scientific system'.⁹⁰ Looking back, Robert Jennings would later speak of 'a change in the sources of international law [a term presumably not used in the formal,

⁸⁴ As noted above, Balfour's idea of a 'protest option' (see n 76) was not formalized.

⁸⁵ Sir Arnold Duncan McNair, *The Development of International Justice* (New York University Press 1954), 13–14 (emphasis added).

⁸⁶ See Kennedy (n 30).

⁸⁷ Beckett (n 78) 1.

⁸⁸ Spiermann, *International Legal Argument* (n 42), 23.

⁸⁹ Arnold D McNair, *The Expansion of International Law* (Magnes Press 1962) 54.

⁹⁰ Charles Sumner Lobingier, 'What of the World Court Now?' (1945) 43 Michigan Law Review 833, 855–856.

technical sense, CJT], which had already begun to be felt even in the early 1930s: international law has become a case law.⁹¹

Of course, international law is not just case-law, and certainly not in areas in which other processes of law-clarification or codification exist. In this sense, international courts do not dominate the interpretative process: international law is much more than ‘what the judges say it is’.⁹² But international courts make important contributions to the process of legal development. Their pronouncements become ‘beacons’ and ‘orientation points’⁹³ and to this date continue to be accorded a ‘truly astonishing deference’.⁹⁴ An excerpt from the fourth edition of Hall’s influential textbook illustrates how much our perception has changed: writing in 1895, Hall thought there to be ‘no place for the courts in the rough jurisprudence of the nations’.⁹⁵ Today, it is difficult to think of areas of international law that have not been shaped, in one way or the other, by international decisions. That process began in earnest with the PCIJ, and its quick acceptance and recognition in international legal discourse reflected an adjustment in the functions to be performed by international courts.

4. Concluding Thoughts

With the benefit of hindsight, it is clear that the 1919 variation of the peace through law theme has had a lasting effect. The key innovations then tried out have shaped our understanding of the task. Since 1919, ‘peace through law’ has primarily been approached as a study of ‘The problem and progress of world organization’.⁹⁶ While the League failed in its core purpose, its concept of merging, under one institutional roof, the aims of ‘achiev[ing] international peace and security’ and ‘promot[ing] international co-operation’ remains the blueprint. The idea of an international

91 Robert Y Jennings, ‘An International Lawyer Takes Stock’ (1990) 39 ICLQ 513, 519.

92 Cf Charles Evans Hughes, Speech to Chamber of Commerce, in *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* (GP Putnam’s Sons 1908) 139: ‘We are under a Constitution, but the Constitution is what the judges say it is’.

93 Sir Franklin Berman, ‘The ICJ as an Agent of Legal Development’ in Tams/Sloan (n 4) 21.

94 Daniel P O’Connell, *International Law*, vol 1 (2nd edn, Stevens 1970) 32.

95 William E Hall, *International Law* (4th edn, Clarendon 1895) 356 (his note 2).

96 Cf the sub-title of Inis L Claude’s influential study *Swords into Plowshares: The Problem and Progress of World Organization* (4th edn, Random House 1971).

rule of law authoritatively administered by permanent international courts has not gone away either; in a number of fields, it has risen to prominence. Yet in rising to prominence and relevance, international adjudication has largely remained de-coupled from war prevention. It now is relatively uncontroversial to state that ‘the hope of the peace movement of the late 19th and early 20th centuries, that international adjudication was the substitute for war, was ... ill-founded and unduly idealistic.’⁹⁷ After 1919, the maintenance of international peace and security has come to be seen primarily as a project of collective security to be pursued by an institutionalized ‘peace machinery’,⁹⁸ with courts (unlike in the legalist project) limited to some form of associated role.

International courts—and in this respect, too, decisions taken after World War I have remained influential—have adjusted to that role and filled it with life. Just as the PCIJ, so too have its successors succeeded in defusing simmering tensions through the competent handling of disputes below the level of major controversies. (The PCIJ’s successors have occasionally been asked to do more viz engaging with major controversies; but these instances have remained exceptional.) Just as importantly as the PCIJ, so too do its successors today contribute to international peace not just through the settlement of disputes, but also through their clarification and development of international law. In Yuval Shany’s apt description, generalist international courts like the PCIJ and ICJ ‘have transformed themselves from providers of heroic and life-saving emergency treatment into providers of preventive health care and quality-of-life related treatment’.⁹⁹ This transformation began with the PCIJ. In the history of binding dispute resolution, its establishment, almost a century ago, remains a watershed.

97 Stephen M Schwebel, ‘The Performance and Prospects of the World Court’ (1994) 6 *Pace International Review* 253, 257.

98 The term is Jessup’s: see Philip C Jessup, ‘A Half-Century of Efforts to Substitute Law for War’ (1960) 99 *Recueil des Cours* 1, 18.

99 Shany (n 61) 80. International courts set up in specialized fields such as regional economic integration or human rights protection have, if anything, taken the process further—to the point they are said to be ‘no longer primarily dispute-settling bodies’ but ‘have assumed two other primary functions ... : norm-advancement and regime maintenance’: *ibid*, 80–81.

