A Lexical Comparison of the Statute of the PCIJ and the Statute of the ICJ

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I. Introduction

It is often claimed that the text of the Statutes of the two World Courts of 1920 and 1946 is almost identical. While that may be partially true, it could be interesting to delve more deeply into the subject matter and to examine what lexical changes have indeed been made. The aim of this short contribution is not to go back to the drafting history and to explain what the drafter's intention – to the extent it is ascertainable – operating the changes had been. Rather, we purport to see what potential new avenues of interpretation the 1946 wording can allow or has allowed.[1]

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1 The exercise shall resemble the one Hans Kelsen has undertaken for the text of the League of Nations Covenant, see Hans Kelsen, *Legal Technique in International Law* (Geneva Research Center 1939).

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Only the English version of the Statutes shall be compared here; the study of the French version can be left to another occasion. In carrying out this meticulous comparison, Articles 1-33 of the Statute have been set aside. The reason is that here the changes between 1920 and 1946 are considerable: the Permanent Court of International Justice (PCIJ) was not an organ of the League of Nations, but was closely linked with it; the International Court of Justice (ICJ) is styled in the Charter of the United Nations as one of the principal organs of the Organisation,[2] even if technically this statement is imprecise (it is rather the organ of the parties to the Statute, which is not identical to the membership of the United Nations [UN], as Switzerland proved up to the year 2002).[3] The substitution of the UN to the League has implied a long series of changes in these provisions, which it is not particularly useful to try to trace here. To the extent just mentioned, however, it is impossible to say that the texts of the two Statues are 'almost identical'. The rules on the functioning of the Court are to be found in Articles 34-70. These are the provisions where any changes are interesting to trace and explain, since they relate to the work of the Court. Even in this context, I have also excluded the merely cosmetic arrangements made to translate the passage from the PCIJ to the ICJ, e. g. the substitution of the word 'Council' by the word 'Security Council' in Article 35 of the Statute.

It must also be emphasised that the Statute of the PCIJ has been revised[4] and that here its last version, the one of 1936,[5] has been taken as the basis of comparison. By contrast, the Statute of the ICJ has not undergone any change in wording since its adoption in 1945, which is a sign of the relative maturity the text has gained – excepting clearly the controversies existing in certain areas, such as the restriction of *locus standi* to States under Article 34 of the Statute.[6] A last introductory caveat is apposite: this contribution is written for persons sufficiently familiar with the law of the ICJ; expressions will not be explained; persons unfamiliar with the subject matter might consequently have some troubles to follow the reasoning at some junctures.

2 Articles 7(1) and 92 of the UN Charter.

3 See Gaetano Morelli, *Nozioni di diritto internazionale* (7th edn, CEDAM 1967), 379-380.

4 See Fernando Correira Pereira da Silva, La réforme de la Cour permanente de Justice internationale. Le protocole de 1929 et le veto de Cuba (Recueil Sirey 1931).

5 Which can be found at PCIJ, ser. D, no. 1, 4th edn, 13 ff.

6 Pierre-Marie Dupuy and Cristina Hoss, 'Article 34', in: Andreas Zimmermann and Christian J. Tams (eds), *The Statute of the International Court of Justice, A Commentary* (3rd edn, Oxford University Press 2019), 662-683 (673 ff.).

II. Article 34 of the Statute

In Article 34 of the PCIJ Statute, the *locus standi* in para. 1 is limited to States 'or Members of the League of Nations'. This last part of the sentence, put here in quotation marks, has been suppressed. The change is more than cosmetic. It corresponds to a restriction in the capacity to seize the Court. At the time of the League, the status of some entities was controversial: were some 'States' of the Commonwealth (Dominions, Colonies) sufficiently independent to be States in the sense of international law? Article 1, para. 2, of the League Covenant allowed some such entities to be members of the League without insisting formally on their status as States.[7] This means that legally speaking the PCIJ Statute allowed some quasi-State entities to be parties to cases before the Court if and when these entities were members of the League. Article 34 of the Statute was thus not a 'States only'-clause at that time. By the demise of this special regulation under the Covenant, and the adoption of the 'States-only' approach for the Organisation's membership in the UN Charter under Articles 3-4,[8] the new Article 34 of the Statute similarly restricted the scope of access to the Court and realised the 'States only'-model. Both Courts were thus aligned on the clauses of membership of their parent organisations, respectively the League and the UN. Furthermore, paras 2 and 3 of Article 34 are new in the ICJ-version of the Statute; they had no counterpart in the PCIJ Statute.

III. Article 35 of the Statute

A similar change has been made in Article 35, para. 1, and in Article 36, para. 2: the sentence '[t]he members of the League of Nations and the States mentioned in the Annex of the Covenant' has been amended to read the 'States parties to the present Statute'. The effect of the reform is here to sever the link between the parent organisation and the Court. In the PCIJ, only the membership of the League could seize the Court, plus some States mentioned in the Annex to the Covenant (the issue turned here mainly around the US, non-member to the League but party to the PCIJ).[9] This may seem paradox-

7 See Nigel D. White, 'Article 1', in: Robert Kolb (ed.), *Commentaire sur le Pacte de la Société des Nations* (Bruylant 2015), 95-108 (95 ff.) (in English). For a discussion at the time of the League, see Cezary Berezowski, 'Les sujets non souverains du droit international', RdC 65 (1938), 5-84 (71 ff.).

8 Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations* (4th edn, Martinus Nijhoff Publishers 2010), 29 ff.

9 See Manley O. Hudson, The Permanent Court of International Justice, 1920-1942, A Treatise (Macmillian 1943), 216-217.

ical when considering that the PCIJ was not an organ of the League, contrary to the ICJ which is an organ of the United Nations.[10] In the latter, however, the Statute is kept separate from the Charter and can be acceded to by a State non-member of the UN, as was the case of Switzerland in 1946. This reform broadened the access to the new Court rather than restricting it, as was the case of the reform under Article 34. In addition to the States parties to the Statute, other States can also be parties to proceedings at the ICJ under the conditions of Article 35, para. 2. The situation under the new Statute is thus three-layered: parties to proceedings at the ICJ can be the States members of the UN; further States parties to the Statute; and finally other States under the conditions of Article 35, para. 2. By contrast, the situation was two-layered under the PCIJ Statute: parties to proceedings at the Court could be the States members of the League or listed in the Annex, as well as other States under the conditions of Article 35, para. 2.

Another change in Article 35, para. 3, reflects a modification which was also adopted for a series of other provisions: i. e. Article 39, at paras 1-3 and Article 61, para. 2 as well as Article 62, para. 2. In Article 35, para. 3, the terms 'will fix' have been changed into 'shall fix'. In Article 39, the term 'will' has repeatedly been changed into 'shall'. In Article 61, para. 2, the term 'will' becomes 'shall' and in Article 62, para. 2, the term 'will be' has been changed into 'shall be'. The shift was intended to emphasise that the Court is not free to perform a certain act (since the term 'will' could be interpreted as meaning 'should' or 'may') but that it is bound to exercise a certain power. For example, Article 61, para. 2, related to proceedings for revision of judgments, now reads that these proceedings 'shall be opened by a judgment of the Court expressly recording the existence of the new fact […]'. The process is thereby made clearly mandatory. The term 'will' could have led one to think that the Court's discretion could play a role in the subject matter, even if the most natural interpretation of the term 'will' in such contexts is manifestly tantamount to 'shall'. Article 62, para. 2, now reads that the Court shall decide upon the request for intervention. The formulation shows that the point was to make clear that this power is not for the parties: 'it shall be the Court to decide upon this request'. In a sense, Article 36, para. 6, applied by analogy, or the general principle at its bottom, would have yielded the same result. However, the new version of the Statute makes that clear and strengthens the principle of *compétence de la compétence*. In short terms, this lexical change has reinforced the mandatory nature of some rules at the ICJ. This is in line with the nature of the Court as a judicial organ. An executive organ must be left a series of discretions in order to function correctly; a Court of

10 See Articles 7(1) and 92 of the UN Charter.

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Justice should conversely enjoy discretion only in limited areas, since discretion invariably means that policy considerations step into the administration of the law.

IV. Article 36 of the Statute

In Article 36, dealing with the consensual competence of the Court, a change was made in para. 1 through the addition of the words 'in the Charter of the UN' ('The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force'). The jurisdiction of the Court may thus now flow from treaties or conventions in force (which is lexically a pleonasm, a convention being a multilateral treaty), or also from the Charter of the UN. Under the old Statute, the competence could result only from treaties or conventions binding the States allowed to seize the Court. In a superficial sense, this change may be only cosmetic. The Charter of the UN is itself a convention in force. Thus, it may be argued, there is no true addition to the terms of the old Statute. However, this summary conclusion is not warranted. The addition may create far-reaching effects and considerably enlarge the scope of jurisdiction of the Court. At first sight, i. e. when looking into the primary rules exposed in the Charter, there is no additional basis of jurisdiction for the ICJ. In particular, Article 36, para. 3, of the UN Charter is not additional basis of jurisdiction: it merely allows the Security Council (or the General Assembly under its general powers[11]) to recommend to the parties to settle their dispute by referring it to the ICJ. The parties may act thereupon and seize the Court; if they do so, they will have to use available jurisdictional titles or to give their consent anew, e. g. by concluding a special agreement or by seizing the Court on some idiosyncratic form of consent.[12] The essential point is that Article 36, para. 3 of the Charter does not automatically establish the jurisdiction of the Court; it may only trigger the action of the parties to the dispute under additional consensual titles. The same must be said of Article 96 of the Charter: some organs of the UN and affiliated organisations may well seize the Court, but only under the advisory proceedings; this is not the contentious jurisdiction Article 36 of the Statute deals with. The overall result under the primary rules is therefore that no provision under the Charter creates an autonomous title of jurisdiction of

11 Articles 10 and 14 of the UN Charter.

12 The *Corfu Channel* case provided an example of this: ICJ, *Corfu Channel Case* (UK v. Albania), preliminary objection, judgment of 25 March 1948, ICJ Reports 1948, 25 ff.

the ICJ for a contentious case. The conclusion could thus be that the adjunction of the mentioned phrase in Article 36, para. 1, has no legal effect under the Charter as it stands today (but that could change in case of a modification of the Charter; the clause would thus for the moment be an anticipation of a possible *lex ferenda*). If one however takes account of the secondary or derived law under the Charter, notably the binding resolutions of the Security Council under Chapter VII of the Charter, the picture could change. It is then technically possible to argue that the Security Council could indirectly create a 'title' of access to the Court: it could not establish the jurisdiction of the ICJ in its resolutions, but it could enjoin with binding effect that the parties settle a dispute through the ICJ. A State seizing the Court and invoking as a basis of jurisdiction the binding resolution could therefore have established the competence of the ICJ under Article 36, para. 1, of the Statute through the phrase 'specially provided for in the Charter of the United Nations'. Whether such an interpretation is ever adopted remains to be seen. The word 'specially' may arouse doubts: does it refer exclusively to the primary rules of the Charter, requiring an explicit provision (which is inexistent in the Charter as it stands) and does it thereby preclude reference to the secondary law of the resolutions? That may be so. But it can also be claimed that the word 'specially' pre-existed in the PCIJ Statute and that it referred at that time to the treaties and conventions in force; and that it should be read under the new Statute to continue to refer only to those, even if the words 'Charter of the United Nations' have been inserted after the word 'specially' and thus seem to be governed by it. However that may be, legal doctrine[13] has envisaged the possibility that the Security Council (SC) could act in the way described and provide some new basis for the Court's jurisdiction under Article 36, para. 1, or alternatively suspend some jurisdictional title by enjoining the parties not to use it for a certain time. In this latter hypothesis, the question then remains: would that be a bar to the Court's jurisdiction or perhaps rather a ground of inadmissibility?

Another change has been made in Article 36, para. 2. The old version read complicatedly that an optional clause could be deposited 'either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment'. The first part of the sentence reproduces the ordinary law of treaties, while the second opens a timeframe beyond the shores of conclusion of some treaty. The new Statute just reads that the optional declaration can be

13 See Christian Tomuschat, 'Article 36', in: Andreas Zimmermann and Christian J. Tams (eds), *The Statute of the International Court of Justice, A Commentary* (3rd edn, Oxford University Press 2019), 712-798 (747-748); Robert Kolb, *The International Court of Justice* (Bloomsbury / Hart 2013), 393-395.

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deposited 'at any time'. This change takes account of the fact that the old rule was inconsistent. Either the timeframe is limited to the moment of ratification or accession of a treaty (as is in principle the case for reservations, unless the parties all agree to a later reservation or do at least not object to it); if something can be done later, the text should say simply 'at any time'. Since the latter rule ('any time') encompasses the former ('at the time of signing or ratifying'), there is no need to state explicitly that a declaration can be deposited *also* at the former moment.

We may further notice that paras 4-5 of Article 36 are new. This is particularly manifest for the fifth paragraph, which deals with the passage of the optional declarations from the PCIJ to the new Court and poses the principle of the greatest possible continuity. The same is true for Article 37. Its PCIJ version referred to the treaties concluded between the drafting of the Covenant of the League and the creation of the PCIJ, when the existence and final name of the new judicial institution could not yet be known.[14] The provision thus recited that '[w]hen a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such a tribunal'. In 1945, there was the further issue of the treaties in force (e. g. with compromissory clauses) referring to the PCIJ, which now disappeared. These also had to be referred to the new Court. This issue was added to the new Article 37: 'Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice'. This is a clause of institutional substitution which calls for no further comment here.[15]

V. Article 38 of the Statute

In Article 38 of the Statute, dealing with the applicable law, an important adjunction was made in the new Statute under para. 1 through the words 'whose [the Court's] function is to determine in accordance with international law such disputes as submitted to it'. This phrase smoothened to some extent the old debate as to whether Article 38 was a codification of the

14 See Article 14 of the League Covenant: Frederick Pollock, *The League of Nations* (The Lawbook Exchange Ltd. 1920), 139 ff.

15 This is not to ignore the many interpretive difficulties which have been raised by Articles 36, para. 5, and to a lesser extent 37 of the Statute; see Andreas Zimmermann and Christian J. Tams (eds), *The Statute of the International Court of Justice, A Commentary* (3rd edn, Oxford University Press 2019), 777-779, 799 ff.

sources of international law, or whether it was a special set of applicable law for the settlement of disputes by the Court (the debate was particularly strong for the general principles of law under no. 3 of para. 1 PCIJ Statute and now letter c of para. 1 under the ICJ Statute[16]). The insertion made in 1945 tilted the balance more firmly towards the interpretation that Article 38 reflects the general sources of international law ('in accordance with international law')[17] and that thus the Court does not administer some special applicable law for the settlement of disputes, but the general law applicable to States also outside the Court.[18] This reform, coupled with the general scope of competence of the Court – a competence not limited to any particular subject matter – further accentuated the ascent of the ICJ to some status of a 'World Court' of international law, whatever that term may exactly mean. From this perspective as from others, its nature and function were further differentiated from the ones of arbitral tribunals, whose competence is limited to some particular dispute or disputes and whose applicable law is in most cases more narrowly tailored to some specific sources (e. g. some treaty).

VI. Article 40 of the Statute

In Article 40, relating to application of requests to the Court, in para. 1, second sentence, the word 'contesting' before 'parties' was suppressed, and thereafter the word 'must' was turned into 'shall'. The change is mainly cosmetic in nature. The word 'must' was turned into 'shall' in order to maintain the unity in the Statute's vocabulary, so as not to arouse doubts on the sense of a word in a particular sentence (and to exclude potential *a contrario* interpretations). The word 'contesting' was considered superfluous, as the 'contesting parties' are simply the parties. On the other hand, it could

16 Some authors indeed claimed that the general principles clause did not reflect general international law but was a special authorisation given (only) to the ICJ to fill gaps by recourse to such principles: see for example Dionisio Anzilotti, *Corso di diritto internazionale* (Athenaeum 1928), 106-109; and Arrigo Cavaglieri, 'Règles générales du droit de la paix, RdC 26 (1929), 315-583 (323); Karl Strupp, 'Les règles générales du droit de la paix', RdC 47 (1934), 263-593 (336); Hanna Bokor-Szegö, 'Les principes généraux du droit', in: Mohammed. Bedjaoui (ed.), *Droit international: bilan et perspectives* (Pedone 1991 1), 223-230 (228).

17 See Georges Abi-Saab, 'Les sources du droit international: essai de déconstruction', in: *Le droit international dans un monde en mutation: en homenaje al profesor Eduardo Jiménez de Aréchaga* (Fundación de cultura universitaria 1994), Vol. I, 30-49 (36).

18 See Allain Pellet and Daniel Müller, 'Article 38', in: Andreas Zimmermann and Christian J. Tams (eds), *The Statute of the International Court of Justice, A Commentary* (3rd edn, Oxford University Press 2019), 819-962 (846 ff.).

be said that if the parties are not 'contesting', the case is moot for absence of a dispute. The old version could consequently be read as implicitly referring to the necessity of a dispute. But since that provision refers to the time of seizing the Court, it is not certain whether the dispute must really exist at that time in all situations. The Court does apply the *Mavrommatis*-rule[19] to cure the default if the dispute was not present at the time the case is brought to the Court by its seizing, but has crystallised later.[20] Other potential parties to the Court's proceedings are not encompassed in the scope of Article 40. This is the case mainly for a State intervening as a party under a separate jurisdictional title. Since such parties will intervene at some later stage in the proceedings, para. 1 of Article 40 is not applicable to them; it manifestly concerns only the main parties initially bringing the case to the ICJ (or the intervener when it brings its own case, which is however a separate legal act). A purely cosmetic adjunction was finally made in para. 3: the old version read that the Registrar shall notify 'any States entitled to appear before the Court', while the new version reads 'any other States entitled to appear […]'; consequently, the word 'other' was added. This adjunction is due to the fact that the first part of the provision refers to the States members of the UN, and that the word 'other' emphasises that the Registrar shall also notify the application to the other States entitled to appear at the ICJ, even if non-members of the UN.

VII. Article 41 of the Statute

In Article 41 of the Statute, relating to provisional measures of protection, the old text referred to measures taken to 'reserve the respective rights of either party', while the new version is worded 'to preserve the respective rights […]'. 'Reserve' in the old text was not meant to refer to reservations under international law. It was rather intended to 'put aside' and protect the rights of the party demanding provisional relief measures. This idea was apparently more properly expressed by the new term 'preserve'. Yet some doubts arise. Can the Court really 'preserve' the 'rights' at the provisional stage and pending the issuing of the final decision (if there is one on the merits)? Strictly speaking, rights as abstract legal positions cannot be impaired by unilateral action; it is rather their exercise or factual use which can

19 PCIJ, ser. A, no. 2 (1924), 34.

20 See ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* case (Nicaragua v. Colombia), preliminary objection, judgment of 17 March 2016, ICJ Reports 2016-I, p. 26 ff., paras 49 ff.

be put into jeopardy.[21] The PCIJ was right to state: '[…] no act on the part of the said Governments in the territory in question can have any effect whatever as regards the legal situation which the Court is called upon to define'.[22] Thus, the preservation seems to be directed to the exercise of rights (or capacity thereof) rather than to the rights themselves, or to their mere existence. In other words, it is the underlying objects of the rights which can be impaired and thus must be protected. The right itself remains unimpaired – only thus can it form the basis of a claim of responsibility in case of breach (if the right was impaired or disappeared, there would not be an internationally wrongful act). This duality of existence / exercise addresses the issue that rights as such cannot suffer irreparable damage by unilateral action, since only the exercise of the right can manifestly suffer irreparable harm. Overall, it might therefore have been better to draft the provision with the words 'preserve the capacity to exercise rights', or something along these lines. Further, the preservation or protection is afforded to 'rights', i. e. to their existence / exercise, and not merely to their *alleged* existence / exercise. The Statute does not contain the term 'alleged rights'. The rights must thus exist to some degree.[23] This is also why in its jurisprudence the Court constantly refers to the fact that the rights exist, e. g. the 'existing' diplomatic rights of the US in the hostage crisis in Tehran.[24] This is indeed also the root of the plausibility-test under provisional measures law.[25]

VIII. Article 43 of the Statute

In Article 43, relating to written and oral procedure, in para. 2, the communication shall in the new version be made 'to the Court', whereas the old version directed it 'to the judges'. The old version was inexact, since the

21 See Karin Oellers-Frahm and Andreas Zimmermann, 'Article 41', in: Andreas Zimmermann and Christian J. Tams (eds), *The Statute of the International Court of Justice, A Commentary* (3rd edn, Oxford University Press 2019), 1135-1202 (1145); Hugh Thirlway, *The Law and Procedure of the International Court of Justice* (Oxford University Press 2013), Vol. I, 940. It is therefore rather the factual use of the right which must be protected; and eventually also the protection of evidence related to these 'rights'. This can amount to a duty 'not to change the situation' prevailing at the time the case was brought to the Court with regard to its factual and legal elements: see Mehmet Semih Gemalmaz, *Provisional Measures of Protection in International Law: 1907-2010* (Legal Kitapevi 2011), 149.

22 PCIJ, Legal Status of the South-Eastern Territory of Greenland, ser. A/B, no. 48, 287.

23 Thirlway (n. 21), Vol. II, 1785.

24 ICJ, *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), judgment of 24 May 1980, 19.

25 Cameron Miles, 'Provisional Measures and the "New" Plausibility in the Jurisprudence of the International Court of Justice', BYIL 89 (2018), doi.org/10.1093/bybil/bry011, 1 ff.

States parties to a procedure do not have direct dealings with the judges. The documents are transmitted to the registry, which in turn transmits them to the judges (para. 3). The new wording is more appropriate and technically accurate. The words 'cases, counter-cases', which was also technically incorrect, has been amended to read 'memorials, counter-memorials'. It is these documents, rather than the cases, that are transmitted to the Court. The changes in Article 43 are thus both cosmetic and substantive rectifications, the latter amending errors in formulation.

IX. Article 47 of the Statute

The next amendment can be found in Article 47, para. 2. The change is not substantive. The old version read: 'These minutes [of hearings] shall be the only authentic record' while the new reads: 'These minutes alone shall be authentic'. A shorter formulation replaces the longer one. Since all minutes are recorded, the absence of the term 'record' in the new version does not imply any possibly substantive difference.

Articles 48-52 have remained unchanged.

X. Article 53 of the Statute

Some cosmetic changes have been made in Article 53 (relating to non-appearance). In para. 1, the old version read 'shall not appear' ('Whenever one of the parties shall not appear'), while the new reads 'does not appear'. The new version correctly emphasises that non-appearance is a fact, which the Court is confronted with, and which triggers some legal consequences. The old version used the term 'shall', which in the English language is more often linked with an obligation, i. e. with normative statements. The same has been done for the words 'or shall fail to defend his case', where 'shall' has been suppressed to read 'or fails […]'; furthermore, 'his claim' has been changed into 'its claim'. The latter seems to be a grammatical error rectified in 1945.

XI. Article 54 of the Statute

In Article 54, again only cosmetic moves are at stake: in para. 1, the words 'agents, advocates and counsel' have been changed into 'agents, counsel and

advocates'. This new drafting reflects the fact that States use agents and counsels at the ICJ, and more rarely advocates in the legal sense of the term. But no substantive change is implied in this modification of the order of mention.

XII. Article 55 of the Statute

In Article 55, relating to the Court's vote, in para. 1, the words 'present at the hearing' have been simplified to read 'present' ('majority of judges present'). This implies that even a judge not present at the hearing or at some hearings (e. g. because of sickness) can still participate in the final vote. He or she will have read the minutes of the hearings. In para. 2, the old version spoke of the President 'or his deputy', whereas the new version refers to the President 'or the judge who acts at his place'. Formally, there are no deputies any more at the ICJ, thus the term was logically suppressed.

XIII. Article 57 of the Statute

In Article 57, dealing with separate opinions, the term 'dissenting judges' has been replaced by 'any judge'. Thus, under the PCIJ Statute, in principle only dissenting judges could formulate a separate opinion. They remained obviously free to simply style their opinion as a 'dissenting' one, in order to fall under the purview of the rule. However, the practice of the PCIJ had since its beginnings been more generous, allowing for separate publication of any type of individual opinion expressed by a judge (through the Rules of Court of 1922, Article 71, para. 2).[26] This situation has been rightly formalised in the new version of 1945. A cosmetic change was added: the terms 'are entitled' were changed into 'shall be entitled'.

XIV. Article 61 of the Statute

In Article 61, para. 5, in the context of the revision of judgments, the sentence 'from the date of the sentence' was changed into 'from the date of the judgment'. The word sentence (*sentence* in French) corresponds to the

26 See Rainer Hofmann and Linda Karl, 'Article 57', in: Andreas Zimmermann and Christian J. Tams (eds), *The Statute of the International Court of Justice, A Commentary* (3rd edn, Oxford University Press 2019), 1528-1545 (1530).

word 'award', and is normally reserved to arbitration (except in some languages, as in Italian, 'sentenza'). The substitution with the word 'judgment' is thus appropriate when dealing with pronouncements of the ICJ.

XV. Article 62 of the Statute

In Article 62, para. 1, dealing with intervention of States with a legal interest in a proceeding's outcome, the words 'intervention by a third party' were simplified into 'intervene'. This reform emphasised the double fact that intervention under Article 62 is free-standing and that, in this context, the intervening State does not become a party to the main proceedings (but an intervention as a party remains technically possible, on a separate basis of jurisdiction applicable towards the two – or more than two – main parties). Such party-intervention is in principle not an intervention under Article 62, but a new application, leading to a new case. No precedent exists to this date. In para. 2, the words 'will be' were changed into 'shall be', in line with the general policy in this regard in 1945.

Articles 63 and 64 underwent no change.

XVI. Articles 65-68 of the Statute

The law on advisory opinions contained in Articles 65-68 of the Statute underwent a series of modifications and adjunctions. The main rule under Article 65 has been almost completely reformulated. In the old Statute, para. 1 read: 'Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or Council.' Para. 2 added: 'The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.' While para. 2 was to some extent maintained, para. 1 would be redrafted as follows: 'The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.'

This new provision replaces what were previously merely procedural points with important substantive information. Thus, the word 'may' has subsequently been relied upon by the Court to justify the discretionary

nature of its advisory jurisdiction.[27] The Court may give an opinion; hence it may also refuse to give an opinion (discretion). The term can be interpreted differently to signify an 'enabling may': the Court is *also entitled* to give advisory opinion, in addition to its ordinary contentious mission; the word 'may' here refers to that additional and unusual power for a Court of justice. Without this special enablement, the Court would not be allowed to give a mere opinion, which is devoid of legal binding force. The text of the new provision also specifies that the question asked to the Court must be legal in nature (and presumably under international law), which excludes pure questions of fact, not linked to the application of legal entitlements. The number of organs authorised to request an advisory opinion has been increased, as Article 96 of the UN Charter shows and Article 65 of the Statute now reflects.[28] In short terms, Article 65 has gained in importance since it now fixes some legal conditions in the exercise of the advisory power.

In Articles 66 and 67, institutional changes have been inserted, reflecting the transition from the League to the United Nations. In Article 66, para. 3, the terms 'the communication specified above' have now been formulated as 'the special communication referred to in paragraph 2 of this Article'. The reference is more precise, but the change is merely cosmetic. The same is true for Article 68, where a comma was changed: the comma after 'functions' was suppressed, without any change of meaning.[29]

Articles 69 and 70 on the amendment of the 1945 Statute are entirely new.

XVII. Conclusion

What can we conclude following this perusal of all the changes made in the Statute in Articles 34 to 70?

First, that the revision of the Statute in 1945 brought a significant number of small changes (quantitative level) but no important modification (qualitative level). Most of the changes are concentrated in the first part of the Statute, in Articles 1-33. They reflect the change of the overall institutional setting, from the League to the UN. In the second part, in Articles 34-70, we

27 On the whole question, see Kolb (n. 13), 1083 ff.

28 See Karin Oellers-Frahm, 'Article 96', in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte und Andreas Paulus (eds), *The Charter of the United Nations, A Commentary* (3rd edn, 2012), Vol. II, 1975-1990 (1975 ff.).

29 Sometimes a comma may have a profound legal impact: see Daniel Bardonnet, 'Marginalia: à propos de la ponctuation dans le processus interprétatif en droit international', in: René-Jean Dupuy, *Mélanges en l'honneur de Nicolas Valticos. Droit et Justice* (Pedone 1999), 37-56 (37 ff.).

observe a series of cosmetic changes, some further alterations giving rise to new opportunities in interpretation and adjunctions of new provisions, e. g. on the revision of the Statute. The picture taken as a whole is one of a modest impact and import of changes.

Second, the Statute has proven to be a solidly crafted text. It has survived the disasters of one world war and the multifaceted abrasive teeth of time. With only some minor changes in 1945, it has passed the testimony from 1920 to our times without the need of additional precisions, change or worse: revolution. The necessary adaptations were performed at the lower level through the Court's Rules and more recently the Practice Directions. Consequently, the character of the revisions of 1945 provides evidence of the solid work performed in 1920. It is true that, since the formative stage of the Court, a number of proposals called for a more or less radical reform.[30] But the Statute of 1920 has proven, at least for the time being, to be the best possible squaring of the circle between the proper Court's functioning and the insurmountable sovereignty of States.

30 See e. g. Mégalos A. Caloyanni, 'L'organisation de la Cour permanente de Justice internationale et son avenir', RdC 38 (1931), 651-816 (655 ff.).