THE WORLD COURT AT ONE HUNDRED: SOME CURSORY REMARKS AT A CENTENARY

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Over the past two years, the world has been too enmeshed in a pandemic to pay attention to anniversaries. Man was neither at liberty, nor in the mood to celebrate festive ceremonies. Many students of international law will have failed to notice a historic juncture in the progress of the discipline. Until, that is, during the week of the anniversary in question the harsh reality of war in Europe cynically negated the seeming self-evidence of the peaceful settlement of disputes in the area, thus to remind man of the continued vulnerability of the law. On 26 February 2022, Ukraine instituted proceedings against the Russian Federation and requested the International Court of Justice (ICJ, also popularly known as the World Court) to determine provisional measures of protection with a view to preventing an imminent genocide. The predicament stresses the critical pertinence of the World Court and of that delicate debate regarding the Court's compulsory jurisdiction. This article critically reviews the rationale and early record of one of mankind's

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dearest aspirations, thus to underpin the unrelenting challenge of warranting the law's critical intervention in world affairs.

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The commemoration of the centenary of the World Court can be linked to two pivotal moments. On 16 December 1920 the First Assembly of the League of Nations assembled at Geneva and adopted the Statute of the World Court. On 15 February 1922 the First Bench of the Permanent Court of International Justice (PCIJ, likewise known as the World Court) was installed at The Hague. Three more closely related events may be recalled. On 18 April 1946 the successor to the interwar Court, the International Court of Justice (ICJ), was installed. In 2021 that Court, far too busy with cases to pause for a *siste viator*, passed an impressive milestone. To suggest the viability of the institution, by then its record had tripled the total span of years allotted to its predecessor. This in itself must count as an accomplishment for the discipline.

Two other highlights are drawing near. The first touches the founding 150 years ago – and within a few weeks and a few miles from each other - of two crucial research institutes and think-tanks in the field, the *Institut de droit international* (IDI) and the *International Law Association* (ILA). The parallel efforts of these two bodies to develop the discipline, albeit from varying perspectives and along different trajectories, were critical assets in defining the rationale of the World Court. The second landmark was the ceremonial opening, on *quatorze juillet* 1923, of the center of research and legal education that still proudly holds its own as one of the most providential initiatives in the *Oeuvre de La H*aye. From the first, the Hague Academy of International Law provided judges and arbitrators at The Hague with the opportunity to test their views in critical exchange with "the next generation". This article explores the genesis, rationale, and early accomplishments of the World Court (1870-1946).

The Legacy of an Idea

Two intellectual riddles fascinated Hugo Grotius (1583-1645) throughout his life. The first touched the ambiguity of the human being, the inner conflict of man's selfish and social natures. The second concerned man's wanderings through his social history and

the role set apart for the law in the process.[1] Time and again in legal and literary tracts, the Dutchman sketched the *Divisio Rerum*, the gradual break up of unity and universality.[2] He amply reasoned how intensifying human intercourse generated such concepts as private possessions or boundaries. Throughout he insisted on the asset of human solidarity and urged ethical normativity. It was the underpinning for his elaborate, some would say rather artificial, hierarchy of legal sources that, at the age of twenty-one, apparently preoccupied him to the point of taking it for the unlikely impetus of a plea in defence of, truth be told, a case of buccaneering.[3]

The sad experience of constant conflict and the progressive breakdown of unity on all planes of private and public relations, up to man's fickle ties with his Creator, must have contributed to fostering the lofty ideals of harmony and unity mankind has forever entertained. It may have nurtured his intuitive perception of a sublime celestial harmony as imagined in the Music of the Spheres. Plato sketched its origins and rationale,[4] Pythagoras famously sought to decipher its ideal code in numbers,[5] while Cicero's friend Scipio imagined its political implementation in his dreams.[6] Caught in the conception of concentric circles, it inspired speculation on the corresponding challenge on all planes – from the family father, to the shepherd, to the man of State – to reach out for the ideal. Harsh experience, if anything, kept reminding man of the urgency and cogency of the ambition.

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1 A major source, clearly, is Hugo Grotius, *De Jure Belli ac Pacis* (1625), Prolegomena §§ 1-28. Grotius' double ambition can easily be traced throughout his works covering many disciplines.

2 On the pertinence of Grotius' literary works for the interpretation of his legal and political tenets see Eyffinger, in *The Cambridge Companion to Hugo Grotius*, ed. R. Lesaffer and J. E. Nyman (2021), pp. 293-314.

3 Hugo Grotius, *De Jure Praedae* (written 1604-1606, first published 1868).

4 Plato, *Timaeus* (c. 360 B.C.).

5 On Pythagoras (c. 570-495 B.C.) and Pythagoreanism see Christoph Riedweg, *Pythagoras: His Life, Teaching, and Influence* (2008); Leonid Zhmud, *Pythagoras and the Early Pythagoreans* (2012).

6 Cicero, *Somnium Scipionis*, in *De Republica,* Bk. 6, §§ 9-29.

Realism vs. Idealism

One tends to present the two spheres of the lofty ideal and grim reality as worlds apart, per definition, as outer poles doomed never to meet. But then, there is this wondrous interplay of the two spheres, of this "unreal" world of man's high aspirations and his sobering factual record, which reminds one of the process of communicating vessels. It strikes one as a lesson of history that the Rule of Law would forever seem to gain the most from instances of acute crisis in the Realm of Might. The rivalry for the Spice Isles pitched Grotius against John Selden (1584-1654).[7] The atrocities perpetrated in the Indies triggered Bartolomé de las Casas' (1484-1566) first humanitarian advocacy at Valladolid (1550).[8] The shambles of the Wars of Religion set the law free from its straight-jacket of moral theology. The Napoleonic Wars sparkled the Peace Movement. Dunant's eye-witness experience with the casualties of war brought about the Red Cross codes.[9] The Crimean War (1853-1856) kindled the initiative in Paris to curb privateering.[10] The Austrian-Prussian contest of 1866 inspired Bertha von Suttner and hence generated Alfred Nobel's initiative.[11] The first conflict of the Industrial Age, the Franco-Prussian War of 1870-71 triggered the

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[7] Hugo Grotius, *Mare Liberum* (1609); John Selden, *Mare Clausum* (1635).

[8] The dispute on the treatment of the American indigenous peoples between Bartolomé de las Casas, a Dominican priest and humanist in the tradition of the School of Salamanca, and the theologian Juan Ginés de Sepulvéda (1494-1573) took place in Valladolid (1550-1551). At stake was the reaction of Christianity to the cannibalism and human sacrifices in the Americas.

[9] The Swiss businessman Henry Dunant (1828-1910), eyewitness to the battle of Solferino (1859) between France and Austria, founded the Red Cross Movement for humanitarian relief. It inspired the Red Cross Conventions (1864, 1868, 1906, 1929), the predecessors of the Geneva Conventions of 1949.

[10] The Declaration of Paris (1856) on Maritime Law concluded the Crimean War (1853-1856).

[11] In 1889 peace activist Bertha von Suttner (1843-1914) first published her epochal *Die Waffen Nieder!* She inspired the industrialist and inventor of dynamite, Alfred Nobel (1833-1896) to fund the Nobel Peace Prize (1902).

Institut and the ILA, the Conference of Brussels (1874),[12] and the *Oxford Manual* (1880).[13] The blatant abuse of the law by Russia and Japan in 1904-05 made the Powers agree to regulate that last domain of perfect licence, Naval War, in the Laws of The Hague (1907).[14] As if to put down the seal of history, the epitome of the process was reached in the wake of the war that was meant to put an end to all warfare. It took a military conflict on a global scale to effectuate, in proportional response one may say, the long-lived ideal of World Organization and the substitution of the gratuitous procedure of arbitration with the stern verdict of a standing global judiciary.

War, and remorse as its steady corollary, were time and again instrumental in putting mankind back on track to remind it of its loftier aspirations. As consistent, therefore, and as recurrent as conflict has been the tenacious ambition to improve the human condition. It is the pilot light that, against all odds, has forever been kept burning amidst the gore of the centuries. But then, man's ambivalent nature rarely disavows itself, even in his more enlightened moments. Bids for peace were rarely wholly unselfish or free from hidden agendas. Examples are mankind's bids to achieve the ultimate dream, to attain perpetual peace through world organization.

The Notion of a League and Court

Wilson's vision for a League of Nations was a major landmark in world history. But the dream was not exactly original. The Princeton don stood on the square shoulders of generations of moral philosophers and political commentators. The concept of supranational organization as a prerequisite for peace secured a foothold in Europe in the time of Dante Alighieri (c. 1265-1321), when the progressive fragmentation of power in the medieval hierarchy generated a longing to restore the former unity of the

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[12] The Brussels Declaration on the Laws and Customs of War (1874) was initiated by Emperor Alexander II of Russia (1855-1881).

[13] Institut de droit international, *Annuaire,* V (1881-1882); Rapport Session Oxford: *Manuel des lois de la guerre sur terre*; Rapporteur Gustave Moynier.

[14] Hague Conventions VI-XIII on Naval War (1907).

Roman Empire.[15] A wealth of fascinating projects were crystalized in the League of Nations Covenant half a millennium later. Few of these projects were exclusively idealistic. To that extent, the censure of "unworldliness" so often levied intriguingly misses the point.

Perhaps the first documented bid, an impressive scheme for a League of Nations proposed by Pierre Dubois (c. 1255-after 1321) from 1306 is symptomatic of the genre.[16] It featured all the ingredients of its late successor: a Council of Princes and a Court of Justice. It even explicitly ordained the proscription of war that was embodied in the 1928 Kellogg-Briand Pact. In bestowing primacy on the Papacy, it corresponds to the claim Leo XIII (1810-1903) laid down in 1899 on the eve of the Hague Peace Conference.[17] Dubois' ultimate goal was to muster a common stand against the infidel and to recapture the Holy Land. And as a counsellor to Philippe IV (1268-1314), he never lost sight of French interests against the Hapsburg Emperor. Much the same can be said of the schemes developed by Marsilius of Padua (c. 1270-c. 1342) and Honoré Bovet (c. 1340-c. 1410) in the thirteenth century.[18]

A century and a half later, Bohemian King George Poděbrady (1420-1470) put his project for a Permanent Council and Federal Tribunal under the high patronage of French Louis XI (1423-1483).[19] Cardinal Thomas Wolsey (1473-1530) proposed a subtle scheme for a European Union intended to thwart the Papacy.[20] The Permanent Assembly of Ambassadors in Venice and the standing

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[15] In his *De Monarchia* (1313) Dante Alighieri commented on the religious and secular powers of his day and age.

[16] Dubois wrote a treatise on the recovery of the Holy Land, *De Recuperatione Terrae Sanctae* (1306)

[17] In 1885 Pope Leo XIII (1878-1903), at Count Bismarck's invitation, settled the dispute of the *Carolines Islands* (Germany vs. Spain). In 1893 he claimed the Presidency of an International Arbitral Tribunal, as *summus arbiter gentium* in the tradition of the medieval papacy. In 1899 he monitored a dispute between Argentina and Brazil.

[18] The reference is to Marsilius of Padova, *Defensor Pacis* (1324) and Honoré Bovet, *Arbre des batailles* (c. 1386).

[19] Georg Poděbrady, King of Bohemia (1458-1471), in 1462 proclaimed a plan for a universal peace organization.

[20] Cardinal Wolsey in *The Treaty of London* (1518) projected a review of European politics which included a non-aggression pact.

arbitral panels Emeric de Crucé (1590-1648) projected in the midst of the Thirty Years' War were preconditioned by the prior satisfaction of France's territorial claims, and intentionally sought to perpetuate these power relations.[21] Maximilien de Béthune, Duke of Sully (1560-1641) outlined an ingenious *Grand Dessein* for a Council of Fifteen Powers on an egalitarian basis; he likewise sought to erode Hapsburg primacy and cleverly facilitated all territorial claims by stipulating the expulsion of the Turks from Europe.[22]

The project for Perpetual Peace which Charles Irénée Castel, Abbé de St. Pierre (1658-1743), launched in the days of the Peace of Utrecht (1713) had many merits, readily appreciated by Gottfried Wilhelm Leibniz (1646-1716), David Hume (1757-1838), Jonathan Swift (1667-1745), and Jean-Jacques Rousseau (1712-1778).[23] In the composition of the supreme Council of its Federation it foresaw Permanent Members and a system of rotation for membership of the Small Powers, thus anticipating the conundrum that baffled the delegates of forty-five Powers in 1907. Its reliance on arbitration and sanctions to help execute awards likewise sounds fairly modern. By the same token, and to remain on the safe side, the venerable Abbé based eternal peace on perpetuating the *status quo*, thus warranting the primacy of France. Even the *Diet* (1693) of William Penn (1644-1718), an altogether enlightened project and the first to expand its sphere beyond the strictly European zone, in heralding peace took economic considerations for a criterion, thus foremost serving the Anglo-Saxon perspective.[24] In short, peace was abused for the promotion of self-interest long before Emperor Nicholas II (1868-1918) proclaimed his *Rescript* of 1898 to secure a moratorium: *reculer pour mieux sauter*.

Political bias, one must conclude, is virtually inevitable in this less than perfect world. In the case of the World Court the ulterior motive would seem obvious. The foremost prerequisite for its decisive implementation, let alone the execution of the judgements

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21 Emeric de Crucé, *Nouveau Cynée* (1623).

22 Maxilimilien de Béthune, Duc de Sully, *Le Grand Dessein de Henry IV* (c.1615).

23 Charles Irénée Castel, Abbé de Saint-Pierre, *Projet pour rendre la paix perpétuelle en Europe* (1713). See also Jean-Jacques Rousseau, *Extrait du Projet de Saint Pierre* (1761).

24 William Penn, *An Essay Toward the Present and Future Peace of Europe* (1693).

of the Bench, is sound political backing. This dilemma preoccupied the legendary Advisory Committee of Jurists (ACJ) in 1920 in its efforts to strike a balance between the perhaps unwise insistence of the small powers on their equality before the law and the laconic reliance of the Great Powers on political realities. Without their political backing any Court would be toothless. In what they called a reasonable *quid pro quo,* they claimed a permanent seat on the Bench.

The Burden of History

As observed above, the ideal and the real relate somewhat like communicating vessels. The most pertinent calls for the ideal are raised in moments of acute crisis. Not surprisingly, therefore, the world that gave rise to the heyday of speculation was the early sixteenth century. The discovery of a New World, the moral eclipse of the Church, and the political *deconfiture* of the Hapsburg Empire, in short, the total breakdown of all former norms and parameters, entailed a crisis that uprooted all social spheres and came to a head in the Wars of Religion. Sadly, the riddle was never solved. Ideological deadlock and progressive social fragmentation might have been checked with the help of an overarching concept of general validity and universal applicability. Ironically, in the years leading up to Westphalia (1648) such a concept was effectively advanced in measured intellectual response to comprehensive crisis. Hugo Grotius (1583-1645) offered a manual for interstate practice on the basis of the Rule of Law that was tailor-made for the occasion.[25] It was the sublimation of all legal norms and moral guidelines of history. It might have functioned the way Justinian's Code had stamped (post-) classical times. The creation of the League of Nations and the World Court three centuries later was identified as the "Hour of Grotius".[26] In 1925, the *membres* of the research body that was central to their constitution, the *Institut* put a silver wreath on the Grotius tomb in Delft.[27]

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[25] Hugo Grotius, *De Jure Belli ac Pacis* (1625). The treatise was soon rendered in many tongues.

[26] See Cornelis van Vollenhoven, "Het Boek van 1625", in *Verspreide Geschriften* (1934-1935), I, p. 225.

[27] Institut de droit international, *Annuaire* 32 (1925), pp. 455ff., *Discours de Baron Edouard Descamps à Delft*.

It was not the path chosen. With the eclipse of moral authority and political unity, the former vertical hierarchy was replaced by a horizontal constellation of egalitarian States. The quest for new parameters intensified the sustainable discourse on political theory. The discourse is of signal interest here inasmuch as it advanced the perception of the State as the *perfectissima societas.* This model has ever since been taken as the ultimate criterion. In other words, Western thought on international governance never developed *in abstracto*. The dialogue was conditioned by historical precedent and stamped by this paramount perspective. The concept of State interest determined the idiom and the feasibility of implementation of any supranational structure.

Moral Normativity

One aspect of the discourse on the theory of the State has perhaps remained underexposed. The dialogue revealed the same dichotomy of perspective and bifurcation from the angles of realism and idealism we observed above. Side by side with the observation of facts and the analysis of practical experience ran the aspiration to verify how matters ought to be and to impose a moral normativity. Next to the line that runs from Carneades (215-128 BC) to Macchiavelli and from Thomas Hobbes (1588-1679) to Hans J. Morgenthau (1904-1980)[28] feature tracts that retrace their pedigree to Plato's Grotto and Tale of Atlantis and run all the way to Immanuel Kant (1724-1804). To bring it to the point, Macchiavelli, *Il Principe* (1515), Desiderius Erasmus (1466-1536), *Institutio Principis* (1516), and Thomas More (1478-1535), *Utopia* (1516) all date from the same years that saw Martin Luther (1483-1546) nail down his theses at Wittenberg (1517).

In the amalgam of tracts on the best State model, form of Constitution, or qualifications for rulers, and amidst *Fürstenspiegel* such as Erasmus' *Institutio* or Hugo Grotius' *De Studio Politico* (1626),[29] one easily misinterprets the role and objective of the so-called utopian genre. The immediate impulse for the genre was

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[28] Grotius deemed the sceptic philosopher Carneades (214-128 B.C.) the prototype and father of this line of thought; See Grotius DJBP, *Prolegomena* §§ 5, 6, 16-18.

[29] Grotius' tract from 1615 was a pragmatic scheme developed on behalf of the French diplomat Benjamin Aubéry du Maurier (1566-1636).

"real" and topical: the records of Christopher Columbus (1451-1506) and Amerigo Vespucci (1451-1512) of their journeys to the Spice Isles, which sketched distant commonwealths of an entirely different species.[30] Its durable success the literary genre likewise owed to harsh reality. Its covering garb of remoteness and non-commitment offered these authors the political latitude indirectly to censure a world steeped in stern absolutism. Far from being "unreal" and the vehicle of open-ended speculation on an ideal commonwealth, the genre was effectively the epitome of socio-political censure. The genius of Erasmus, who coined the term, sharpened the perception: the ideal world (*eu-topos*) was nowhere to be found (*ou-topos*). Samuel Butler (1835-1902) in *Erewhon* (1872) and William Morris (1834-1896) in *News From Nowhere* (1890) echoed the claim three centuries later.

The utopian genre inspired some masterminds to tracts of lasting value. They situated their ideal commonwealths in jungles, in Australia, or in subterranean caves (as in Plato's grotto). Or they hailed an obscure abbey, like François Rabelais (1483/94-1553); a remote island like Harrington; a society on the Moon or the Sun, like Cyrano de Bergerac (1619-1655); or the Land of the Lilliputians, like Swift.[31] But the authors never agreed on the true parameters of the ideal society. Children of their times, their minds were caught in what preoccupied their society, the dilemma of freedom and discipline. Risen from the cauldron of civil unrest, the first concern of rulers all around them was to implant their unchallenged authority within their realm (*cuius regio*-principle).

In the world of Humanism the utopian genre had a fitting literary counterpart. Pursuant to Aristotle's theory and Euripides' interpretation of tragedy as the mirror of the human condition,[32] the Scot George Buchanan (1506-1582) censured Thomas More's

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[30] Amerigo Vespucci's negative appraisal of the indigenous world in his *Mundus Novus* (1503) was in stark contrast to Christophorus Columbus' *Journal* (1492).

[31] The references are to François Rabelais, *L'Abbaye de Thélème* (1534); James Harrington *Oceana* (1656); Cyrano de Bergerac, *Empires de la Lune* (1657), *Empires du Soleil* (1662); Jonathan Swift *Gulliver's Travels* (1726).

[32] In his *Poetica* (335 B.C.) Aristoteles developed the theory of purification (*katharsis*). Euripides was called the philosopher-playwright for his moral axioms (*rhemata*), which Hugo Grotius took for model in his

beheading in his play on John the Baptist (*Baptistes*, c. 1550).[33] In his Latin drama on *Adam's Exile* (1601) that allegedly stood model for Milton, Grotius frontally tackled issues of predestination and the Lord's Grace. Thirty-five years later, in his play on Joseph, the viceroy of Egypt (*Sophompaneas*, 1635) he sketched the Ideal Prince as "The Living Law".[34]

The Idol of Sovereignty

Over the past four centuries, truth be told, State theory was developed in an admirable process, in the end to bring to the nation-State the blessings of the profitable interaction of the legislative, executive and judiciary domains perceived by Charles de Montesquieu (1689-1755).[35] The desire to expand and optimize the realm of the Sovereign State has brought its citizenry many assets. Far less impressive, by comparison, is the record of these Nation-States in their mutual relations, and predictably so. Their greatest asset, their claim to absolute sovereignty, manifested itself on this higher plane as the formidable barrier to concord. The stubborn rejection on principle of any superior power or concept was at the roots of the never-ending interstate conflicts within what, in a euphemistic misnomer, was called the Westphalian "State System" and the so-called "anarchic" international society.

There is no inherent reason for world society to be less orderly or structured than any "system" on a lower social plane. In intellectual terms, the concept of the Commonwealth of Man was long identified. Admittedly, we owe the idea not to the world of the Greek *polis*, which upheld a strict dichotomy of the Greek Commonwealth and the outer world of Barbarism. It was, in short, not the theory of Aristotle, but his pupil's legendary campaigns

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plays and famously collected in his *Dicta Poetarum* (1623) and *Excerpta Tragicorum* (1627); see Eyffinger, in *Cambrdge Companion* (2021).

33 George Buchanan, an influential Scottish humanist and playwright, was the author of *Alcestis*, *Baptistes*, *Jephthes*, *Medea,* and in his days counted as a "monarchomach". See P. J. Ford, *George Buchanan, Prince of Poets* (1982).

34 Hugo Grotius *Adamus Exul* (1601; Dutch ed., B. L. Meulenbroek, 1970-1971) (*Dichtwerken Hugo Grotius,* Vol. I); see W. Kirkconnell, *The Celestial Cycle* (1952); For *Sophompaneas Tragoedia* (1635) see A. Eyffinger (ed.), *Poetry Hugo Grotius* (1992), I, 2.4.

35 Charles, Baron de Montesquieu, *De l'esprit des lois* (1745).

and encounter with the multinational crucible of the Subcontinent that brought the West the idea of the *oikeiosis*.[36] The acquaintance effectively reoriented Greek thought, away from ontology towards ethics and moral speculation. Through Cicero and Seneca, the aspiration entered the political realm with Marcus Aurelius.

In other words, the option at Westphalia for the "anarchic" system was a definite choice from keen calculation in the careful balancing of State interests. Censured all along, it was never seriously challenged until the political thought of the American and French Revolutions and the economic repercussions of the Industrial Revolution put its prudence and profitability in question. Enlightenment thought added another ingredient to the equation: the concepts of social development and progress. It introduced the element of "dynamism" that to then had been wholly lacking in all these projects for Councils and Courts, just like the utopian commonwealths had not just been distant in time and location, but perfectly static and timeless. Immanuel Kant, for one, eminently acknowledged the element of growth and gradual development. In his proposal for Eternal Peace and his *General Congress of Nations* (1795)[37] he recommended Montesquieu's *trias politica* for the international community and entrusted responsibility to the Peoples.

The urgency of some higher form of international understanding was actuated by the Napoleonic Wars. At Vienna, the Comte de St. Simon (1760-1825), the Godfather of Socialism suggested a European States-General of two Houses.[38] The idea of the Concert and the Holy Alliance was reciprocated on the level of private enterprise in the global ambitions of the Peace Movement. Twenty-five years later, Jeremy Bentham (1748-1832) relied on Public Opinion rather than on (military) sanctions for the execution of the judgments of his Supreme Court of Justice.[39] Among the advocates of European integration were William Ladd (1778-1842), Victor

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[36] The idea, first transferred to the West by Stoicism, was elaborated by Cicero in *De Officiis* (44 BC) , in Seneca's moral treatises (before 65 AD), and by Hierocles in his *Elements of Ethics* (before 150 AD).

[37] Immanuel Kant, *Zum ewigen Frieden* (1795).

[38] Claude Henri de Saint-Simon, *Réorganisation de la société européenne* (1814).

[39] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789) and *Plan for a Universal and Perpetual Peace (*1839).

Hugo (1802-1885) Giuseppe Mazzini (1805-1872), Caspar Bluntschli (1808-1881), and James Lorimer (1818-1890).[40]

The role of the law and the judiciary in maintaining Peace and Justice were well understood early on. Most projects for supranational Leagues and Parliaments featured a judicial component. Nonetheless, the complexities involved with the ambition only dawned on its protagonists in the perplexing discourse of fifty years that preceded the installation of the League of Nations at Geneva and the World Court at The Hague. Given the sovereign status of the Powers, any claims a League or Court advanced by their very nature infringed vested rights and interests. The delicate implementation of supranational administration, legislation, and adjudication was conditioned by the consent of the Powers. In our context, the long and chequered history of the peaceful settlement of international disputes was an uphill battle to make these States identify the mechanism with their self-interest. The keyword of the instrument of arbitration that was at the apex of the hierarchical structure of international dispute settlement up to 1900 was Freedom. It was the great merit – albeit in the short-term the undoing – of the Hague Peace Conferences to challenge this perspective and, in terms of principle and theory, cross the demarcation line towards the acceptance of a (qualified form of) compulsory adjudication. To suggest the political implications of the concept, it took a military and social clash without precedent for its hesitant implementation and the tentative installation of a qualified court of law.

Towards the Constitution of the World Court (1870-1913)

The Role of Research Bodies

With Bluntschli, the celebrated author of *Das modern Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt* (1868), we meet

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40 William Ladd, *An Essay on a Congress of Nations* (1840); Victor Hugo, *Les Etats-Unis d'Europe* (1849); Giuseppe Mazzini, *La santa allianza dei popoli* (1849); Johann Kaspar Bluntschli, *Das moderne Völkerrecht der zivilisierten Staaten, als Rechtsbuch dargestellt* (1868); James Lorimer, *The Institutes of the Law of Nations* (1882).

one of the founding fathers of the *Institut de droit international* (IDI, founded 1873). It was the first think-tank to exclusively focus on the judicial element of the equation, and not by accident. A core asset of the policy of its handpicked *membres* was to keep the world of politics at bay. It was an interesting proposition that bespoke the perspective of the continental world of academia. It was also at odds with the philosophy of its pragmatic Anglo-Saxon counterpart. The International Law Association (ILA, founded 1873) was the brainchild of Dudley Field (1805-1894), Francis Lieber (1800-1872), and the American codification and peace movements.[41] It joined legal eagles, students of political science, and captains of industry in its endeavor to turn commerce and industry into an instrument of international understanding in the great tradition of Jeremy Bentham and Richard Cobden (1804-1865), thus, in the old adage, to harness Peace as the Mother of Wealth. A major offshoot of the ILA in the mid-1890s was the *Comité Maritime International* (CMI).[42] The ILA notably made its headway in the domain of private international law.

The IDI was inspired by the Franco-Prussian conflict (1870-1871) and the spark of hope kindled by the Alabama Arbitration at Geneva (1872). It formulated three spearheads. First came the codification of the laws of war. Along the stepping-stones of the Brussels Conference (1873) and the *Oxford Manual* (1880), this ambition emanated in the Hague Conventions of 1899 and 1907. Second, and inspired by Pasquale Mancini (1817-1888) and angry young Tobias Asser (1838-1913), the IDI tackled the conflicts of law, which, twenty years later, were channelled in the series of Hague Conferences on Private International Law (1893 onwards).[43] Finally, the members sought to expand on the Alabama-experience and elaborate arbitral codes and procedures.

A merger of IDI and ILA was briefly considered, but was wrecked on the mismatch of the two blood-types. We do well

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[41] David Dudley Field published *Draft Outlines for an International Code* (1872). Francis Lieber was the author of the *Lieber Code* (1863) for the government of armies in the field, published during the American Civil War.

[42] The CMI, founded at Antwerp in 1897, was pivotal in organizing the domain of international maritime law.

[43] Dutch Tobias (T. M. C.) Asser elaborated the idea within the bosom of the IDI in competition with Italian Pasquale Mancini.

to keep this division of views in mind. The two research bodies worked along parallel lines in what proved a highly beneficial formula. Both venues were instrumental in paving the way to the World Court. From the outset, they both focused on arbitration as the cornerstone of the pacific means of dispute settlement. At The Hague in 1875, the IDI adopted a code of twenty-seven Articles on arbitral procedure, which served as blueprint for the discourse in 1899. In Zurich (1877) it tackled *compromis* clauses along with the Law of Prize in a first bid for the Draft Convention for an International Prize Court of 1907. In 1898, at The Hague, Tobias Asser provocatively addressed the political implications of arbitration in the Silver Jubilee Session of the IDI that adjourned on the very day Emperor Nicholas II (1868-1918) proclaimed his *Rescript*. The *membres* forever kept their fingers on the pulse. In 1904, the year it was awarded the Nobel Peace Prize, the IDI addressed reform of the Permanent Court of Arbitration. In 1912, it insisted on implementation of the Permanent Court of Arbitral Justice (PCAJ), first conceived in 1907, and pleaded for a Universal Arbitration Treaty.[44] For its part, at its opening session in Brussels in 1873 the ILA adopted a Resolution to champion arbitration and called for a permanent arbitral tribunal. Through its national branches it put pressure on parliaments to accept *compromis* clauses in treaties. In 1895 it adopted rules of procedure for international arbitration and drew up bluebooks on a model arbitration treaty and an international court.[45]

The above endeavors were landmarks en route to a proper understanding of the reach and restrictions of the instrument. A formidable fight awaited the protagonists in their bid to have arbitration accepted by the world of diplomacy. A mediating role in making the instrument *salonfähig* was reserved for the Inter-Parliamentary Union (IPU, founded 1889), a happy French-

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[44] Major stepping-stones were *Draft Regulation for an International Procedure* (1875); *Compromissory Clauses* (1877); *National and International Jurisdiction of Maritime Prizes* (1887); *Draft Resolution on the Permanent Court of Arbitral Justice* (1912); *Permanent Arbitration Treaties* (1920); *The Optional Clause* (1921).

[45] In 1895 the ILA published *Rules of Procedure for International Arbitration.* The document was based on preparatory work by M. H. Box, *A Model Treaty of international Arbitration* and Alessandro Corsi from Pisa, *Rules for an International Court of Arbitration*.

English joint venture. The IPU represents the major contribution of democratic institutions to the constitution of the international judiciary. In the footsteps of William Ladd's endeavors in the United States Congress in the 1830s and Richard Cobden's in London in the 1850s, the Liberal William Randal Cremer (1828-1908) and the French economist Frédéric Passy (1822-1912) met in 1888 at Paris with Members of the United States Congress to elaborate ideas for a World Parliament that had been tabled at the First Pan-American Conference in Washington that year. In 1894-1895 the IPU drew up a Draft for an International Court that served as a model for the project for the permanent court of arbitration tabled by the British Delegation at The Hague in 1899. In 1906 its Assembly adopted a Draft Convention on Compulsory Arbitration.[46]

However, the critical social achievement of the IPU was its advocacy of the Hague Peace Conferences. Reports from its discourse on Disarmament at Budapest in 1896 reputedly inspired the Russian Emperor's initiative. In 1904, at St. Louis, Missouri, it drew up a petition to President Theodore Roosevelt (1858-1919) to relaunch its sequel. In 1912 it insisted on a Third Hague Conference, in 1913 called for a League of Nations, and in 1914 drew up an impressive Draft Convention for an International Court of Law to operate alongside the PCA and an International Prize Court. The Convention was conspicuous in taking the equality of States as the criterion. It backed such concepts as the fair representation of the world's legal traditions and anticipated the institutions of deputy-judges and chambers. It allotted the Court competence in the public and private spheres alike and warranted individuals access as readily as the Powers. In 1918 it insisted on the representation of all nations and peoples in the League. In short, the original aspirations of the Poet Laureate to herald "the Parliament of Man, the Federation of the World"[47] were never abandoned, not even among parliamentarians.

Reference should be made to the partly overlapping efforts of the Peace Movement, from 1891 united in its Bureau (IPB) at Berne. In 1893, at Chicago, it drew up a Code of International Arbitration and a draft for an International Court. In 1908, at London, its

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46 On the occasion, Philip James Stanhope, 1st Baron Weardale (1847-1923), tabled a "Model Obligatory Arbitration Treaty".

47 Alfred Lord Tennyson (1809-1892), *Locksley Hall* (1842).

Congress addressed the idea of a Society of Nations. From its midst came the Lake Mohonk Arbitration Conferences (founded 1895) of Albert Smiley (1828-1912) and, in the wake of Versailles, the "International Union of the League of Nations Associations". The IPB critically commented on the Draft of the Covenant, urged the categorical renunciation of war, and suggested an international army and navy under the auspices of the League. It championed the right of self-determination and insisted on the equal distribution of world resources. Finally, it called for an International Law Court and drew up a draft for the Codification of Public International Law. Over the nineteenth century, close to two hundred arbitral awards were issued worldwide.[48] Bilateral arbitration treaties were thriving, and the overall feeling prevailed that the panacea, the Universal Obligatory Arbitration Treaty, was waiting just around the corner.

The Pertinence of the Permanent Court of Arbitration

The above is to do justice to the plethora of creative ideas advanced before the First World War and their wide social backing. For all this, the notion to have arbitral panels of jurists substitute the political formula through Heads of State – or the Papacy - was accepted with great reluctance. The Hague Peace Conferences are the verifiable benchmarks of true progress.[49]

The Tsar's rash initiative for disarmament from financial dire straits would definitely have been wrecked on the concerted opposition of the Powers, if not for the intervention of his State Counsellor, Fedor Fedorovich Martens (1845-1909), a veteran of the *Institut*, who smartly redirected the idea into that research body's

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[48] Documented in collections like Henri La Fontaine, *Pasicrisie* (1902).

[49] The Holy See posed a predicament of its own. Its futile opposition to the *Risorgimento* in 1848 had raised the "Roman Question", and by 1870 it had been forced to drop all territorial and political claims. In retribution, Leo XIII sought to revive his medieval predecessors' claim as *summus arbiter*. In 1885 he personally settled the dispute of the Carolines at Bismarck's high invitation. In 1893 the Vatican advocated the launch of a Permanent International Tribunal, drew up a Draft Code of its own, and in reply to the Tsar's initiative claimed the Presidency of the Peace Conference, which both in 1899 and 1907 gave rise to serious diplomatic embarrassment and unpleasantness.

three-pronged agenda.[50] The meetings of the celebrated *Comité d'examen* at The Hague made it perfectly clear that the indulgence of the Great Powers stopped short of obligatory procedures. The ambitious idea of a Permanent Court of Arbitration (PCA) was watered down to a Bureau headed by a Secretary-General who kept a gratuitous list of candidate-arbitrators appointed by National Groups of four. The Powers' blatant ignoring of calls for adequate finances or a proper housing for the Court provoked Andrew Carnegie's private initiative. Their reluctance to submit cases made French Baron D'Estournelles de Constant (1852-1924) turn to President Theodore Roosevelt in a plea that wondrously complied with the President's political agenda.[51]

The role and record of the PCA up to 1907, a mere four cases of rather varying pertinence, was limited, but the impact was tremendous. The potential boosted discourse. The panelists themselves suggested reform and refinement of procedure. On the surge of early optimism, commentators even turned the formula's patent shortcomings – the lack of a standing Bench, of consistency in its awards, its cumbersome procedure – to their advantage in drafting new schemes. The *Dogger Bank* incident (1904) inspired confidence in the viability of Commissions of Inquiry in moments of acute crisis. On the eve of the Second Conference, Asser and Martens had concocted the concept of a Standing Panel of Three to offer urgent redress.

In the opening days of the Conference, Foreign Offices vied in tabling propositions. By then, a major law tradition not tapped

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[50] Availing himself of the Institute's ready draft codes, Martens offered his soul mate, Tobias Asser the bait of the *Whaling and Sealing Arbitration* (Russia v. United States) and in a perfectly understood *quid pro quo* recruited the Dutchman's talents of organization and influence as State Counsel to have a reluctant Dutch Cabinet accept the role of host of the Conference. On Martens, see W. E. Butler and V. S. Ivanenko, "Biographical Sketch of F. F. Martens", in Martens, *Contemporary International Law of Civilized Peoples: General Part*, ed. & transl. W. E. Butler (2021), pp. xxviii-lviii.

[51] Roosevelt submitted two cases to be handled by the PCA at the Hague, *The Pious Fund of the Californias Case* (United States *v.* Mexico [1902-01]) and the case of *The Preferential Treatment of Claims of Blockading Powers Against Venezuel*a (Germany, Great Britain, Italy *v.* Venezuela [1903-01]).

before made its presence count. In the wake of the Pan-American debate at Rio de Janeiro (1906), an impressive contingent of Latin American republics proudly reported on its rich experience with arbitration as a remedy to the inveterate border conflicts in their rugged mountain regions. The Revision of the Convention of 1899 triggered debate on the feasibility of a Universal Arbitration Treaty, the distinction between political and legal disputes, and the reach of obligatory arbitration. Discourse on the finality and revision of the Award triggered a notorious polemic on principle between the Brazilian Ruy Barbosa (1849-1923), the American Joseph Choate (1832-1917) and F. F. Martens as to whether Peace or Justice was at the heart of their objective. The publication of Dissenting Opinions of panelists proved to be another hot cockle.

The Call for a Court of Law

The plot had thickened. But most Powers too readily accepted Germany's lead (and ensuing blame) in adamant opposition to the compulsory element under the pretext that freedom was at the heart of the arbitration formula. Thereupon, the chairman of the (First) Commission, Léon Bourgeois (1851-1925). suggested leaving well alone and create a second Court alongside the PCA to deal with strictly legal disputes on the basis of compulsory jurisdiction. The proposition met with ample backing. Choate proposed a Standing Court of Law of fifteen judges, representative of the world's great legal traditions and including the ban on national judges of Parties (*nemo judex in causa sua*). The Court might serve as Court of Appeal to National High Courts and Commissions of Inquiry.[52]

On the spot, Martens launched a counter-proposition akin to his earlier idea of a Permanent Tribunal of Three to be recruited from the PCA. To illustrate ambiguity, Belgian Auguste Beernaert (1829-1912), co-founder of the CMI in 1897, called the idea for a League and a World Court "quixotic" and "a dangerous utopia". In

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[52] Speech of Joseph H. Choate, 16 October 1907; Scott, *Proceedings 1907*, II, pp. 312-316. On Bourgeois, see Alexandre Niess and Nathalie Altinok, "Leon Bourgeois: Solidarism, Liberal Political Order, and International Justice", in P. Sean Morris (ed.), *Transforming the Politics of International Law: The Advisory Committee of Jurists and the Formation of the World Court in the League of Nations* (2022), pp. 213-235.

the end, qualified agreement was reached on a scheme jointly tabled by the United States, United Kingdom, and Germany. Thereupon Barbosa, in a legendary plea for an alternative formula, tore all harmony apart. Sensing the strong reservations with respect to adjudication, he introduced the enigmatic title "Permanent Court of Arbitral Justice" (PCAJ). A *Comité d'examen* drew up a scheme for a Court that would apply judicial means and warrant a consistency of rulings, thus giving birth to a body of law that reflected the "truly international sense of equity" to bring about a "universal spirit".

The initial idea was to turn the new Court into a Special Branch of the PCA. In the end, the idea prevailed to create a new Court altogether, composed of seventeen judges and deputy-judges of high moral quality and representative of the world's judicial systems. They were to be appointed for re-eligible terms of twelve years, so as to create an *esprit de corps* which in due time would "denationalize" them. Judges should preferably be jurists with ample experience on municipal courts, "if needs be" international legal scholars. In lengthy debates of lasting value, matters of organization, jurisdiction, and procedure were dealt with in great detail.

The exercise looked full of promise and was paralleled by a bid for an International Prize Court. However, when it came to the criteria for the election of judges, all legal genius was trapped in a *cul-de-sac*. Headed by the intransigent Barbosa, the Small Powers claimed a permanent seat on the Court on equal terms with the eight Great Powers. Endless propositions were weighed and rejected: the rotation of seats for certain periods; regional assignments; to have the nations decide by drawing lots. Following five months of intense discourse and after having been a hair's breadth removed from creating a first global judicial body, the Conference found the small Powers readier to run the risk of war with the Great than to bow to them in Court. One conclusion inevitably imposed itself: the creation of an International Court was quite a different proposition from that of National High Courts.

The discourse on the Prize Court went the same way. Over the centuries the national prize courts had built themselves a dubious reputation of bias and prejudice. The domain of law was brimming with atavisms, and the pioneers of the *Institut*, appreciating the critical urgency of reform, had tackled the issue from 1877 onwards. Headed by John Westlake (1828-1913) and August von Bulmerincq (1822-1890), they had ten years later passed a Resolution of 122

paragraphs. The first naval encounter of the Industrial Age, the Russo-Japanese War (1904-1905) not just definitely shifted the balance in the Pacific, the use of freely floating sea-mines, those demons of the deep, and both belligerents' laconic abuse of Red Cross signs and Conventions made the world's first naval power, the United Kingdom, prepare an elaborate project. At The Hague, to general surprise, Germany stole a march, tabling a highly applauded draft of thirty articles. Britain reciprocated with a draft of its own from an entirely different perspective. Three months later a Draft Convention of forty-eight articles struck a neat compromise.[53] All hurdles of procedure had been taken – quite a feat given the absence of a proper Code of Maritime Warfare – when, once more, the composition of the Court and the election of judges posed an insurmountable stumbling-block. Its final version was voted down by Barbosa.[54] Disillusion was all-pervading, and critics worldwide severely censured the failure to catch a unique opportunity.

The next year, the United Kingdom invited the nine foremost naval powers to a Naval Conference. Agreement was reached on a London Declaration,[55] and in March and June four veterans of the Hague Conference met, first in Paris, then at The Hague, to finalize the Prize Convention.[56] Seeking to kill two birds with one stone, they ambitiously entwined the agreement reached in the Draft Convention for the PCAJ. In a tactical maneuver that boomeranged, they conditioned the implementation of one Court on the other. When the British Parliament blocked the Naval Prize Law, it was the death blow to both Courts, even if in 1913 hardliners

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[53] The outcome was the *Draft Convention Relative to the Creation of a Court of Arbitral Justice* (35 Articles), dated 18 October 1907.

[54] The outcome was the *Convention Relative to the Creation of an International Prize Court* (Hague Convention XII (57 Articles + Annex), 18 October 1907.

[55] The London Conference lasted from 4 December 1908 to 26 February 1909 and was concluded with the *London Declaration Concerning the Laws of Naval War* (71 Articles). In December 1911 the British House of Lords blocked the "Naval Prize Law". Public opinion in Britain had raised strong opposition to the Declaration's terms on Blockade (Articles 33-34).

[56] In March 1910 four prominent veterans of the Hague Conference (Renault, Scott, Crowe and Kriege) met in Paris to help implement the IPC, which endeavor they concluded following a second meeting at The Hague in July 1910.

of the CMI made another brave attempt to break the deadlock. Time had run out for further discourse on a theme whose pertinence was soon dramatically demonstrated by the massive loss of tonnage and life. But then, in 1913, no such sense of fatality clouded the minds. All over the world, PrepComs were diligently anticipating the Third Hague Peace Conference scheduled for 1915 and James Brown Scott (1866-1943), Louis Renault (1843-1918), and Asser were busily addressing the installation of a Hague Academy of International Law.[57]

Paper does not blush. What seemed the final *démasqué* appeared vividly alive when, seven years later, in 1920, the Advisory Committee of Jurists (ACJ) convened at The Hague. The Committee included several Conference veterans, and they bore the intellectual legacy of The Hague and London in their minds.[58] So much so that, with hindsight, commentators have censured the Committee's work as looking backwards, rather than ahead. However, in terms of substance the global discourse at The Hague in 1907 was a veritable breakthrough that essentially paved the way to the international judiciary. What had failed, apart from agreement on the terms of the Court's jurisdiction, was the major political prerequisite, agreement on a criterion for the distribution of seats. That hindrance was swept away by the Covenant of the League and the bicameral system of Council and Assembly. When in summer 1920 the ACJ accepted its assignment to advise the Council on a Constitution for an

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[57] On the issue see Arthur Eyffinger, "T. M. C. Asser (1838-1913)", *Studies in the History of International Law*, (2019), II, Part XV, Ch. 61.3. On Scott, see Paolo Amorosa, "'Leg Over Leg, the Dog Went to Dover': James Brown Scott's Long Road to the Advisory Committee of Jurists", in Morris, note 52 above, pp. 153-170.

[58] Prominent in the debate in 1920 were Belgian Baron Edouard Descamps, the President of the ACJ, and French Léon Bourgeois, the former Chairman of the Arbitration Commissions in 1899 and 1907 and then President of the Council of the League of Nations, which commissioned the ACJ. |Pivotal to the outcome of the debate was the American representative on the ACJ, Elihu Root, who in 1907, in his capacity of Secretary of State, had initiated the idea of the PCAJ. On Root, see William G. Ross, "Elihu Root (1845-1937): Architect and Advocate of the Permanent Court of International Justice", in P. Sean Morris (ed.), *The League of Nations and the Development of International Law: A New Intellectual History of the Advisory Committee of Jurists* (2022), pp. 112-134.

International Law Court, it soon awakened to an intellectual riddle never truly appreciated in 1907, also witnessed by the name of the Court considered at the time (PCAJ). This conundrum touched the essential watershed between arbitration and adjudication.

The Various Projects for a Court (1914-1920)

Private Initiative

Hardly had the Guns of August been silenced, protest filled the air. Only by 1918, when the world had realized that *La Grande Guerre* was a distinct watershed in the history of mankind pertaining to all domains of life, public as well as private, and in political, economic and cultural terms alike, was the mental premise fulfilled and the horizons cleared for the assessment of the formidable geopolitical challenges ahead in such a comprehensive Manifesto as Wilson's *Fourteen Points Statement* of January 1918.[59] At the outbreak of war, a distinct token of change manifested itself: the rise of women's power in a tide no man was to stem.

In August 1914 women by the thousands raised their voices for peace in Kingsley Hall in London. In April-May 1915 some 1500 women representing twelve nationalities assembled in the Zoo at The Hague for a mass demonstration. Paris and Berlin boycotted the meeting, London cancelled the ferries to the Hook, but Jane Addams (1860-1935), Emily Green Balch (1867-1961), Emmeline Pankhurst (1858-1928), in The Netherlands, Aletta Jacobs (1854-1929), and in Germany, Lida Heymann (1868-1943), in hearty concord passed twenty resolutions and "Five Principles for Peace". They called on the neutral powers to mediate; urged a Hague Conference and the installation of a "Permanent International Court of Justice"; they launched a Women's League (ILPF) and an International Committee (ICWPP), then toured the world and found a willing ear at Washington. Wilson's *Fourteen Points* drew substantially from their Five Principles.[60]

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[59] Wilson outlined his *Fourteen Points Statem*ent in a speech on 8 January 1918, in an effort to put an end to the war and open peace negotiations.

[60] Eyffinger, *World Court* (2022), I, Ch. VI.8. On Anzilotti, see Francesco Salerno, "State Practice, the First World Court and Dionisio Anzilotti", in Morris, note 53 above, pp. 171-198; on Busatti, see Elisabetta Fiocchi

Throughout the war, private parties and organizations developed schemes for a postwar world. Among them were prominent jurists: Georges Scelle (1878-1961), Dionisio Anzilotti (1867-1950), Arturo Ricci-Busatti (1870-1921), Heinrich Lammasch (1853-1920), or Cornelis van Vollenhoven (1874-1933).[61] They joined hands with pacifists like Gaston Moch (1859-1935), Henri La Fontaine (1854-1943) and Paul Otlet (1868-1944), and with the Fabian Society (1915), the American League to Enforce Peace (1917), Swiss NGOs (1918), and the Société Proudhon (1918). Most projects called for a World Organization in any given form. Calls for a World Court were less frequent, and the link between the two institutions was never taken for granted.[62]

Public figures like Lord Robert Cecil (1864-1958) and General Jan Christian Smuts (1870-1950) published schemes of their own. Initially, most schemes aimed to continue the Hague Tradition in view of the intended Third Conference. Lammasch and Walther Schücking (1875-1935), the foremost Austrian and German scholars, long persisted in this line. As war lingered on, and the cultural watershed increasingly manifested itself, the notion of a fresh new start to the discredit of the impotent Hague System of arbitration prevailed. One unfortunate element in the process was the adamant opposition of the Allied and Associated Powers to have the Central Powers anywhere involved with their postwar projects. Another critical factor was Woodrow Wilson's personal antagonism to the gratuity of arbitration and his scepticism of a World Court.

Reservations Towards the Hague tradition

Versailles saw twenty-seven powers assembled, the Allied belligerents along with their "associates", these latter being the powers which, if not actively involved in warfare, had cleanly cut relations with the Central Powers. Excluded were not just these four

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Malaspina, "The Italian Jurist and Diplomat at the Advisory Committee of Jurists: Arturo Ricci Busatti (1868-1923)", in Morris, note 58 above, pp. 218-240.

61 Ibid., Ch. VI. 9-10.

62 Wilson never anticipated the idea; in the end he conceded to pressure. Elihu Root, by comparison, championed the idea of a Court, but preferably outside Wilson's politicized League.

vanquished Powers – Germany, Austria, Bulgaria and Turkey – but likewise the thirteen neutral powers. The lop-sidedness affected the legal perspective. In the agenda of the Plenary no reference was made to the avalanche of projects for a World Court. The omission was hardly coincidental. National thinktanks, the neutral powers foremost among them, had meticulously kept the world abreast of their schemes and propositions. The drafts were simply ignored.

No less remarkable were the strong reserves the founding fathers of the League entertained towards the Hague Tradition. To many critical observers, the prewar system had amply proven its inadequacy. The assessment in Paris was carried on to Geneva. In League circles a clear severance from the past and a fresh new start on a different footing was championed. As a consequence, the PCA, the world's pride over the previous two decades, was left out of the equation and its incorporation in the League System was never seriously considered.

This negative appraisal was not generally backed. One steadfast opponent was Léon Bourgeois, the President of the Council. His feelings were shared by another protagonist of the Hague Tradition, Baron Edouard Descamps (1847-1933). In June-July 1920 this Belgian jurist chaired the Advisory Commission of Jurists (ACJ). The policy of that Committee, at Descamps' instigation, was to uphold the precious arbitration tradition by creating an institutional link between the PCA and the PCIJ. In other words, from the outset, tension with respect to the preferable course to be steered was inherent to the discourse.

Prior to these matters of policy were two preliminary matters. These touched the issues whether the creation of a Court of Justice was desirable and, if so, whether this Court should be formally linked to the intended World Organization. In 1918 the British proposition for a League never referred to a Court of Law. General Smuts, in his influential draft-project never brought up the idea either. In London, Lord Robert Cecil (1864-1958) stood alone in his advocacy of a legal body, even if, at least initially, his views ran more along the lines of the prewar system and the PCA. Feelings in the United States were the same. Wilson's propositions never referred to a Court. Arrangements for a judicial component first surfaced on the American side in the draft-project for a League which Colonel

Edward Mandell House (1858-1938) tabled later that year.[63] Wilson was not impressed. Meanwhile, in France a Committee launched a project for an International Court, conditioned by an International Council that should guarantee the execution of its judgments.

In the Second Plenary of the Preliminary Peace Conference that opened on 25 January 1919 Cecil first tabled a serious proposition for a Court of Justice that would serve both as court of first instance and a court of appeal. Nine judges chosen from among the Allied and Associated Powers were to be supplemented with four judges from among the other Member-States of the League. Cecil managed to carry the idea through. The concept landed in the "compromise" scheme Wilson presented to the Plenary on 3 February 1919, the so-called Hurst-Miller Draft.[64] It served as blueprint for the Preparatory Commission of the League that sounded the feasibility of a Court.

Political Bias: The League Commission

The Commission's composition was a matter of diplomatic delicacy, but it operated smoothly. On 14 February 1919 a First Draft to the Third Plenary was tabled.[65] By then, it had assessed the Hurst-Miller Draft, the earlier French proposition (Bourgeois' brainchild), and an Italian project that featured an entirely different structure of the Court in sections. In July 1920, at The Hague, the Italian jurist on the ACJ, Arturo Ricci-Busatti (1870-1921), tabled exactly the same proposition.[66] One claim Bourgeois and Cecil had

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[63] 'Colonel' Edward M. House had for many years been Wilson's foremost adviser until in 1919 in Paris they dramatically fell out.

[64] Sir Cecil Hurst (1870-1963) would in years to come serve as Judge and President of the PCIJ. David H. Miller (1875-1961), the then United States Legal Adviser in Paris, would in 1930 head the United States delegation to the Hague Codification Conference.

[65] Wilson suggested the term "Covenant" to emphasize the historic meaning of the document. The biblical reference typified his religious nature and missionary zeal.

[66] The French proposal had been developed in 1918 and was urgently pleaded by Léon Bourgeois. The Italian concept for a Court was first submitted in Paris by Prime Minister Vittorio Emanuele Orlando (1860-1952). In its Chapter II, this proposition, which embodied "I diritti dei Popoli", addressed the concept of a Court of Justice. The plan featured some peculiar aspects of its own. Thus, Article 21 provided for the election

laid down in vain. The League Commission never accepted any reference to the PCA. An alternative concept was tabled in Berne in March 1920 by the International League of Nations Conference. Instead of an Assembly of Delegates of the Powers, it projected a veritable World Parliament of the Peoples. It was the last serious bid for this kind of approach, whose traces are found in the Preamble of the Covenant: "We, the Peoples …".

By mid-February 1919 Wilson left for New York to raise support for the Covenant. In the meantime, the League Commission obliged the Neutral Powers that had long been begging for access to present their views. In Scandinavia, Switzerland and the Netherlands perhaps the first serious discourse on a Court of Justice had been initiated in 1917.[67] On 20-21 March 1920 representatives from nine Neutral Powers discussed their projects with members of the League Commission.[68] Foremost among the demands of the neutral powers was the strict observance of the legal equality of States. An echo from 1907, it was an ominous foreboding. The Commission honored not a single amendment of the neutral powers. The days of the Concert of the Great Powers were not yet numbered. The decision boomeranged. It made the neutrals join forces, and this led to the so-called Five Powers Conference of February 1920.[69] The Five Powers Draft for a Court, which drew heavily on the discourse from 1907, was a major reference point for the ACJ in June-July that year.

By mid-March Wilson returned from Washington, a sobered visionary. The strong headwind for his plan from the Republican Party headed by Senators Lodge and Knox and epitomized in a so-called "Round Robin Resolution" of 3 March made him change

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of Sections for each case. Article 22 made unilateral applications viable through mediation of the Council of the League. In June-July 1920, within the ACJ, Italian Arturo Ricci-Busatti (1870-1921) championed the same ideas. His solitary stand on these issues would make for fierce debate.

67 Eyffinger, *World Court* (2022), I, Ch. VI.10.

68 Bourgeois, Cecil, Colonel House, Hymans, Venizelos and Vesnitch.

69 The *Five Powers Conference* took place in the Peace Palace at The Hague from 16-27 February 1920 and was attended by the three Scandinavian countries, the Netherlands, and Switzerland. It was chaired by Bernard Loder (1849-1935), who was to join the ACJ, then to be elected President of the PCIJ (1922-1924).

course.[70] In a strategic move to disarm opposition and secure support for the League at home, he called for the incorporation of the Covenant in the Peace Treaty. The move had far-reaching consequences that would haunt the League up to 1939 and seriously affect the functioning of the PCIJ. It impeded the accession of Germany to the League.

Foremost among the opinion-makers in the United States was former Secretary of State Elihu Root (1845-1937), who insisted on a speedy peace, provisional postponement of the United States adherence to the League, and the acceleration of the process for the installation of a World Court, preferably outside the politicized World Organization.[71] An expert diplomat and convincing debater, Root became one of Wilson's steadfast opponents at home but, through his prominent membership of the ACJ in 1920, and again of the Committee for Revision of the Statute at Geneva in 1929, became a major architect of the World Court.

Between mid-March and mid-April 1919, the Commission addressed the amendments the Powers had tabled in response to its Draft Covenant. Japan insisted on the equality of States. France laid down its claim for French as the Court's exclusive language. Two major resolutions were passed. In spite of keen opposition from Brussels and The Hague, Geneva was selected as seat of the League. Second, and at Wilson's instigation, a proposition tabled by France, Italy, and Colonel House was honored to the intent that the Court of Justice was to consider "any issue referred to it by the Executive Council or Body of Delegates". It foreshadowed the incorporation in the Statute of the concept of Advisory Opinions.

The proposition would forever remain controversial. Many observers called the role inappropriate for a court of law. It became

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[70] Henry Cabot Lodge (1850-1924) was the Republican candidate for the presidential elections in 1920. Philander C. Knox (1853-1921) had in previous decades served as Minister of Justice (1901-1904) and Secretary of State (1909-1913). The Resolution, adopted by 39 senators, sought to separate the Covenant of the League from the Paris Peace Treaty. Wilson objected to the proposition, calling the two documents inseparable.

[71] Elihu Root (1845-1937), Secretary of State (1905-1909) and Nobel Peace Prize Laureate (1912), headed the Carnegie Endowment for International Peace (founded 1910). Seconded by James Brown Scott, he was pivotal in the debate of the ACJ in 1920 and again of the Revision Commission that met at Geneva in 1929.

a major ground for the United States not to subscribe to the Statute, in spite of endless deliberations up to 1929. The net result of the decisions taken on the occasion was that the Court was not just facilitated by the League but effectively harnessed under its yoke. Another major issue, first tackled on the occasion, was the role of Council and Assembly respectively in the nomination and election processes of the judges of the Court. It turned into a hot cockle for the ACJ in 1920.

Meanwhile, the Central Powers had not remained passive. To point out Germany's breach from prewar obstructionism, the first democratically elected Cabinet Scheidemann (February-June 1919), unaware of the devastating terms of the Versailles Treaty, adopted a project for a League of Nations, which Walther Schücking (1895-1935) early in May tabled at the Peace Conference.[72] Germany proposed a directly elected Parliament of Man with full legislative powers. Its scheme provided for a Court with compulsory jurisdiction in all legal disputes and accessible to both public and private parties.

The project was flatly turned down by the League of Nations Commission. Soon afterwards Berlin faced the Versailles dictate. In reply, it raised an earnest plea for human solidarity and the global *Rechtsgemeinschaft* the Covenant championed. When, in response, the Allied Powers dispatched an ultimatum, Prime-Minister Philipp Scheidemann (1865-1939) stepped down amid mass demonstrations in Berlin against the *Gewaltfrieden*.[73] A prominent ideologist of the League, General Smuts, bitterly commented on the "small selfish ends" that squandered the "great human ideals".

Austria did not fare much better. Like his German counterpart (Walther Schücking), Heinrich Lammasch [74] by mid-June 1919 submitted counter-proposals to the Draft Covenant. His scheme

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[72] Walther Schücking was the author of the German proposal for a League and Court in 1919; Eyffinger, *World Court* (1922), I, Ch. VII.3.8. A prominent scholar and firm opponent of Nazism he was Judge at the PCIJ from 1930-1935.

[73] In 1919 Philipp Scheidemann (1865-1939) was briefly *Reichsministerpräsident* of the Weimar Republic.

[74] Heinrich Lammasch (1853-1920) was a veteran of the Hague Peace Conferences and a prominent arbitrator at the PCA. He was the last Prime-Minister of the Austrian Empire in 1918, member of the Austrian delegation to Paris in 1919, and attended the First Plenary of the League

provided for a court of fifteen judges and six deputy-judges, three to be challenged by parties. It stipulated compulsory jurisdiction for the World Court for all legal issues save those affecting vital interests; these were to be entrusted to arbitral panels. Lammasch impeccably identified the weak spots in Articles 12 to 14 of the Covenant that would cause so many headaches to the ACJ in 1920. The Austrian propositions were never seriously considered.[75] The Commission of the League forwarded the scheme to the Council, and the Allied Powers pledged themselves to give them serious consideration. No trace to suggest the keeping of this pledge ever surfaced. The German and Austrian schemes, sadly, played no role in the discourse, even if the authority of their authors warranted their notification among colleagues.

The Court and the League

The Covenant was adopted on 28 April 1919. It was embedded in the Peace Treaty, which was adopted on 28 June. Both documents entered into force on 10 January 1920. By then, the name of the intended Court, first adopted in the Hurst-Miller Draft, had stuck: "Permanent Court of International Justice" (PCIJ). It was perhaps an unfortunate choice, as compared to the title "International Court of Justice" (ICJ) suggested in 1907. The term "Permanent" raised cynicism in view of the fake-permanency of the PCA. In subsequent years, the two "Permanent Courts" were to be confused in common parlance the way the ICJ and ICC are being confused by the public at large in our days. Again, arguably, Justice was "International" by definition. The proposition bespoke the cavalier way the Court was toyed with by the draftsmen of the Covenant. Of greater concern, the debonair treatment of the Court's competence in Article 14 would pose endless riddles of interpretation to the ACJ.

The overall policy of the Preparatory Commission of the League calls for brief comment. Most early drafts for the Court had entrusted the election of the judges to the Assembly. The text of the Covenant, reflecting the Commission's deliberate policy, entrusted

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Assembly in 1920. On his propositions Eyffinger, *World Court* (2022), I, Ch. VII.3.9.

[75] The Treaty of Trianon, concluded without Austria's interference, put an end to the Dual Monarchy. On 20 July 1919 her Chancellor Karl Renner (1870-1950) was handed an ultimatum, which was signed on 6 August.

the creation of the Court from first to last to the Council. It left that body perfect liberty as how to execute the assignment. Again, the concept of Advisory Opinions, introduced by Lord Cecil and Colonel House but dropped in the Draft Covenant, was reintroduced by the Commission. It secured the integral link of Court and League. We now see the consequences of the political intrigue. Wilson had aimed at a World Organization without a Court. Cecil had insisted on a Court. Elihu Root championed a Court outside the political cauldron of the League. The League Commission intentionally integrated the Court and obliged the Council, rather than the Assembly, and both with regard to the elections and the competence of the Court.

As observed above, Wilson, for political reasons of his own and to keep the United States aboard, had the Covenant of the League embedded in the Peace Treaty. It was a mismatch in combining two incompatible ideologies. The idealism of the *Fourteen Points* and including concepts like the self-determination of the Nations frontally clashed with Clemenceau's dictate of revenge, which sought by peace to consolidate the spoils of war. The *mésalliance* caused much of the trauma of the interwar period – to end in the repetition of war. The above predicaments likewise dictated the agenda of the PCIJ. One dismal outcome of the hybrid construction was that the Central Powers and the two ascending World Powers, the United States and the USSR, were left beyond the pale. It complicated the modalities of the Powers' access to the Court.

It also affected the constitution of its Statute. That venture was undertaken in 1920, and its success was lop-sided. On one hand, it was facilitated by the structure of the World Organization. In the philosophy of the bicameral Council and Assembly the formula attained the all too precarious balance between the Great and Small Powers, in a bid to neutralize their *de jure* equality and *de facto* inequality. The process was also handicapped by the encapsulation of the Court in the League and by the insertion of its Covenant in the Peace Treaties of Paris.

The Advisory Committee of Jurists (ACJ)

Major Predicaments

The following does not aspire at a comprehensive review of the work of the ACJ.[76] Rather we address the overall atmosphere and political backdrop of its exercise and highlight some legal, institutional, and personal predicaments. At the request of the Commission of the League, Secretary-General Sir Eric James Drummond (1876-1951) had submitted a provisional listing of nine candidates for a Committee that might assist the Council in its assignment to constitute the Court.[77] He also volunteered an expert Secretariat to assist the ACJ. The move proved critical to the success of the undertaking. Drummond had an expert eye for talent. Dionisio Anzilotti (1876-1950) and Åke Hammarskjöld (1893-1937) would guide the ACJ through many dire straits and in later years make a lasting impact on the Court, the Italian as Judge and President,[78] the Swedish jurist-administrator as the long-time Registrar of the PCIJ.[79]

The Council saw fit to modify the list and extend the membership to twelve. As no less than six candidates turned down the invitation, substitutes were called in. In the end, the Committee was reduced to ten, and intentionally so. Members were equally divided from among the five Great Powers and the small. This begged the question as to their status. Were they chosen for their competence and in a private capacity, or rather as representatives of their nations? The issue was formally left in the balance, but the opening sessions of the ACJ in June, when the Committee's Rules of Procedure were addressed, dramatically actuated the issue.

The fascinating discourse on the Statute of the Court in 1920 bespoke some sobering realities of international affairs. We open our review with these predicaments, as they were conclusive for the

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[76] For a recent full account see Morris, note 53 above; Morris, note 58 above; Eyffinger, *World Court* (1922), I, Ch. X-XXI.

[77] Eyffinger, *World Court* (1922), I, Ch. VIII.1.

[78] Dionisio Anzilotti was Judge of the PCIJ (1922-1946) and its President from 1928-1930.

[79] Åke Hammarskjöld was Registrar of the PCIJ from 1922-1936. He was elected Judge on 8 October 1936, then passed away on 7 July 1937.

final outcome of the undertaking. For all the progress the discipline had made over the previous fifty years, international lawyers were invited to contribute to the constitution of the World Court in an advisory capacity only. The move boomeranged. This bolstered the ACJ in its Draft Statute to opt for vesting the World Court with compulsory jurisdiction. It seemed a logical and timely move. *Nemo iudex in sua causa* read the old slogan, and parties should not be granted a say in the constitution of a true court of law. Moreover, at The Hague in 1907 the concept of "compulsory arbitration" (itself a *contradictio in terminis* as some would hold) had been accepted on principle.

Two members of the ACJ, Mineitciro Adatci (1869-1934) from Japan and Ricci-Busatti, felt less confident. They never relied on the political feasibility of compulsory jurisdiction. Perhaps unwisely ignored by their colleagues, they proved right. It took the Council of the League a single meeting to blow up that bubble and point out the quintessential distinction of the municipal and international domains of law. It was a sober awakening for most members of the Committee, the discipline as such, and the world at large. In subsequent months, the critical move was challenged in the Assembly, but the decision was never reversed. In other words, the ACJ had, all along, deliberated on false premises.

It came in the aftermath of thirty-five sessions and six weeks of strenuous discourse in the Japanese Room of the Peace Palace at The Hague. The consequences were dramatic. By taking the compulsory element out of the equation, the Draft Statute lost its precious balance. The inconsistency of the text has critically affected the status of international adjudication to the present. It has also burdened the appraisal of the Committee policy by later commentators, all the more so as, perhaps unwisely, the Committee had never anticipated the Council's rejection by projecting an alternative route. The outcome is to be deeply regretted, but in the final appraisal was never in the hands of these ten jurists.

The Role of Politics

The above was part and parcel of the exercise of the Committee. Politics and hidden agendas asserted themselves from first to last. Headed by Woodrow Wilson, the political scientist who disliked the legal approach, both at the Paris Peace Conference and at the headquarters of the League at Geneva reservations with respect to

the Hague Tradition and the PCA were many. As noted above, this incited a counter-move, possibly inspired by Léon Bourgeois but definitely raised at The Hague by Baron Descamps, the President of the ACJ, in his efforts to institutionally link the PCA to the intended PCIJ.[80] The effort was successful, and to the present day the National Groups of the PCA are at the source of the nomination process of judges of the ICJ. The anomaly of involving an organ not institutionally linked to the League in the nomination of judges for a Court that was to serve as the judicial branch of the World Organization also served as another device to help bridge the gap between the clashing interests and inveterate rivalries of the two political bodies of Council and Assembly.

By the time the ACJ was installed, some vital issues with regard to the future role and record of the Court had long been settled. The most pertinent, with hindsight, was the dual role the Court was to be allotted in its relation to the Powers and the World Organization. The Bench was to settle disputes on legal questions between States, but was likewise authorized to render advice to the political bodies of the League on all legal problems these bodies might face. It was one way to bring the Court under the political yoke. Jurists kept

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[80] In the early meetings of the ACJ, Descamps took his colleagues by surprise when he introduced a comprehensive "General Office of International Justice" in a heavily censured tripartite structure made up of a reformed PCA, a High Court of International Justice (HCIJ), and a Permanent Tribunal of International Justice (PTIJ). The High Court was to be composed of one Councillor for each State, to be chosen by co-optation by the National Groups of the PCA. It would be competent to deal with disputes the Council and Assembly might submit on account of their exceptional gravity, such as crimes against the universal law of nations. This criminal law aspect soon got the upper hand in the discourse. The third component, the PTIJ, was to be chosen by the Members of the High Court and to be representative of all main juridical systems of the world. It would be competent to hear all cases, and was to be divided into Chambers. What Descamps had in mind was to constitute an integral link between the PCA (and "The Hague Tradition') and the new Court to be established under the auspices of the League. The idea ran counter to all propositions tabled in Paris and at Geneva. It dominated the discourse on the nomination and election of the PCIJ; it accounts for the procedure with holds good to the present day. On Descamps, see Frederik Dhondt, "Edouard Descamps (1847-1933): From 'Negative Neutrality' to 'Positive Pacigerate'", in Morris, note 58 above, pp. 156-179.

protesting – and rightly so from their perspective and experience in the municipal sphere – that the function was alien and inappropriate to a court of law. The Draft Statute the ACJ submitted to the Council in August 1920, did not devote a single paragraph to this matter. Its understanding and acceptance were left implicit. The Covenant made provision for two formulas for the peaceful settlement of disputes: the binding adjudication of legal issues by the Court, next to the conciliatory intervention by the Council in all disputes of a predominantly political nature.[81] Seen from this perspective, the direct link of the political and legal bodies could be interpreted as another endeavor to strengthen the formula.

To prove the feasibility of the concept of Advisory Opinions in the international arena, this branch of the Court's role is being applied with success to the present day. Even so, from the outset its insertion posed a major setback. Throughout the interwar period it was the major stumbling-block for the United States Senate to subscribe to the Protocol of Signature of the Court. Suspicions were never silenced that the device was intended to make compulsory jurisdiction enter by the side-entrance. It soon appeared that blood was thicker than water. Within a matter of years, the advisory procedure was, by agreement of all parties, increasingly assimilated to the adjudicative formula, thus to strengthen the judicial functioning of the Court. As early as 1925, the adjustment was formalized in the Rules of Court, and even allowed national judges to operate in advisory proceedings.[82] From 1930, with the installation of the Second Bench, the Court joined together its former separate Series (A and B) of publications of Judgments and Opinions (A/B).[83]

Clashing Legal Traditions

The above extra-legal aspects set aside, probably far more disconcerting, if not downright embarrassing to these ten eminent

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[81] As provided in Articles 12 to 14 of the Covenant.

[82] Article 4, *Revised Rules of Court* (1926). This first set of Revised Rules, which affected nearly half of the seventy-five Articles, entered into force 31 July 1926, with a further minor amendment adopted in September 1927.

[83] Series A 1-24 (1923-1930); Series B 1-18 (1922-1930); Series A/B 41-80 (1931-1940).

jurists in the course of their deliberations was their baffling experience wherever they touched strictly legal principles. As they found out to their discomfort, indeed to the detriment of personal relations, whatever issue they tackled and whether they discussed the organization, jurisdiction, or procedure of the Court, or the qualifications, number, and status of judges, their views differed to the extreme even on the most basic aspects. Only thanks to a major effort at compromise did they in the end carry their project into safe harbor. It tells us that, full fifty years from the opening of the discourse in 1873, no consensus had been attained within the discipline on its major principles or axioms. Discord stretched beyond personal tenets or national predilections. The discrepancy also reflected a legacy of centuries, and notably so the incompatibilities of the Civil Law and the Common Law perspective on the role of the discipline and the judiciary.

As will be recalled, the quest for the Court had opened within two research bodies. The two blood-types had been at loggerheads from the outset. The *Institut* was the attempt of the continental world of academia to organize and develop the law *in abstracto*, and keep all outer spheres of influence, high politics foremost among them, out. The ILA represented the pragmatic Anglo-Saxon approach, which sought to link the world of lawyers, parliamentarians, and captains of industry and blossomed in a wealth of national affiliations. Both bodies had kept the implementation of the Court high on their agendas throughout the decades.

In 1920, the two blood-types met on the ACJ, where Elihu Root, James Brown Scott, Lord Phillimore (1845-1929), and Mineiciro Adatci compared notes with Baron Edouard Descamps, Albert de Lapradelle (1871-1955), Arturo Ricci-Busatti, Bernard Loder, Rafael Altamira (1866-1951), and Francis Hagerup (1853-1921). It was a troubling experience. Astonishingly, inasmuch as most members of the Committee were veterans of these research institutes and the Hague Peace Conferences, nothing apparently had prepared them for the intellectual clash that awaited them at The Hague.

To highlight just two *Elements*, the dichotomy manifested itself in the discourse on the qualifications of aspirant-judges.[84] The

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[84] The discourse came to a head in the 20th Meeting of the ACJ, on 9 July 1920. For all their conflicting views on the comparative role of judicial

status and functioning of their law courts made exponents of the Common Law insist on the experience of national judges, whereas their continental colleagues, on the whole, preferred the expertise of international scholarship. The deliberations got stuck in endless debate on the comparative value of the municipal and international, judicial, and doctrinal *Elements*. Qualified agreement was finally reached in the joint insistence on the high moral qualifications of candidates.

Halfway during the sessions, a *rapporteur* was appointed to prepare a Report to enlighten the Council on the overall philosophy that had inspired the Draft Statute. As James Brown Scott, who attended the meetings in his capacity of secretary and legal counsel to Elihu Root observed, the idea of rapporteur was unknown to the Anglo-Saxon world. Understandably, the role was allotted to the French member, Albert Geouffre de Lapradelle, as the official text had to be in French.[85] Lord Phillimore had his doubts from the first, which were soon reaffirmed. The Report of some sixty pages had distinct merits, and even modest literary pretensions. But then, in its philosophy, volume, and florid language it was a world apart from the English approach, which the British jurist had encompassed in a compact skeleton draft. The cultural gap was never bridged, to the persistent discomfort throughout, and in subsequent years sadly resurfaced on the bench of the PCIJ and on the drafting committees that drew up its judgments and opinions.

Four Stages of Discourse

Having dealt with the issues of political strife and the clash of legal cultures, we turn to the organization of the discourse. In its thirty-five meetings the Committee went through four distinct stages. A preliminary discourse on principle touched the legacy of the Hague Peace Conferences, the pertinence of the concept of the equality of States, and the quintessential differences between the

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experience or academic acumen, and whether preferably in the national or international domains, all members of the ACJ agreed on the requirement of high moral qualifications for the aspirant-judges.

[85] De Lapradelle was appointed on 5 July, in the 16th Meeting. His Report was reviewed in the 32nd-34th Meetings, on 23-24 July. On de Lapradelle, see Toni Selkala, "Forgetting Albert Geouffre de Lapradelle (1871-1955)", in Morris, note 58 above, pp. 135-155.

procedures of arbitration and adjudication.[86] Its findings determined the subsequent inquiry into the best formula for the nomination and election of judges. It produced stormy sessions that prompted various competing schemes, produced by Baron Descamps, Elihu Root and Lord Phillimore, and Ricci-Busatti, on top of minor drafts and amendments tabled by Bernard Loder and Mineitciro Adatci. The second stage concerned the comparative analysis of these divergent schemes and the tactical manoeuvring in quest of a proper basis for the Draft Statute.

In the end, the Anglo-Saxon scheme prevailed (the so-called Root-Phillimore Draft). A full week was spent on an elaborate search for harmony.[87] This stage comprised the most fundamental exchange of views on all aspects of organization and jurisdiction. Thereafter, the compilation of findings was entrusted to a Drafting Committee of Four and its outcome submitted to a collective review in two successive readings. This Third Stage saw what was mostly a repetition of arguments, but it invited the restatement of positions and the refinement of texts. Above all, it instilled in all participants the urgent need for compromise. The Fourth Stage covered the verification of the final Draft of the Statute, the voting, and the discussion of the Report de Lapradelle had drawn up.

This is not the place for a detailed review of the particular tenets advanced by the members of the ACJ, but some consistent (obstructive) *Elements* in their exchange of views may be highlighted. It dawned on the Committee that, in spite of all lofty academic aspirations of the *Institut*, more than any legal intricacies the right assessment of political considerations was critical to the success of their enterprise. This became apparent in their first fierce encounter in their opening meetings. They agreed on one point, that the nomination and election procedure of judges was at the heart of their quest.[88] Inevitably, they stumbled upon the riddle of the distribution of seats between the Great and Small Powers, and the representation of civilizations and legal traditions. As we have seen, the conundrums had preoccupied the minds in 1907 and had ended in perfect deadlock. As before, some Committee members insisted on the equality of States before the law, whereas the representatives

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86 The discourse took up the 3rd-6th meetings, from 18-22 June.

87 Covering the 7th-15th meetings, from 23 June up to 3 July.

88 Notably so in the 4th-5th Meetings on 19 and 21 June.

of the Great Powers argued that the permanency of their seats on the Bench was the prerequisite to their indispensable support in the execution of the Court's judgments. Without teeth, the Court was doomed.

Private Parties

Another matter of principle preoccupied the Committee. On the basis of their experience with the dismal opening years of the PCA in 1900, all commentators without exception anticipated a "slow start" for the Permanent Court of International Justice (PCIJ). The prediction was belied from the first day. From sincere concern and as another bandage to help out the Court through its expected early dire straits it was (among other propositions) suggested that the Bench might address the wealth of outstanding minority questions. This triggered a discourse on principle. All members save one were adamant that an "Inter-National" Court should exclusively address disputes between sovereign States. However, Loder interpreted Article 14 of the Covenant as entitling the Court to give access to private persons as well, and likewise to organizations or supranational institutions, the League itself being a foremost case in point. It was tantamount to adding two planes to the Court's jurisdiction.[89] Loder, bound to be the Court's First President (1921-1924) was recalcitrant and outspoken. His views never made any headway, but the call, never lost, only grew more pertinent as time went by. In 1920, it instilled disillusion that the League was not, as its first apostles had preached, the long-awaited Organization of the Peoples, but had been waylaid into an Organization of States.

Legal Complexities Involved

Another matter of organization of the discourse caused the Committee headaches. To its discomfort, it was struck by the recalcitrant complexity of the substance-matter. Many *Elements* were closely interrelated and could not be separated. The conundrum overwhelmed the ill-prepared Committee. The Minutes of meetings

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[89] In the 24th Meeting on 14 July. On Loder, see Freya Baetens and Veronica Lavista, "Where is Your Tribunal? Bernard Loder (1849-1935)", in Morris, note 58 above, pp. 195-217.

reveal a chaotic discourse without much head or tail. The term of office of judges was a case in point. Whereas some members favored life-terms, the great majority preferred restrained terms of six to fifteen years, with or without the option of re-election.[90] This, in turn, affected matters of salaries and pensions, as another means to secure the interest of the most qualified jurists for the (short-term) position.[91] It likewise involved matters of incompatibilities. Could judges hold on to their law firms or lucrative positions as barristers? Some members strictly excluded all secondary functions, others only (national or international) political connections, whereas others held that one should not deprive the national domain of law of first-rate jurists in favour of a mostly idling Bench at The Hague. All judges should be deemed qualified who were acceptable as such to Parties.[92]

Personal Friction

We turn to the personal element. The discourse of the Committee went through many narrows and dire straits. The uncommonly stormy sessions (rightly rarely reflected in the Minutes) soon undermined personal relations. At different stages, Francis Hagerup, Bernard Loder, and First Secretary Dionisio Anzilotti seriously considered resignation. In his regular reports to Geneva Assistant Secretary Hammarskjöld voiced his growing frustration in ever more explicit terms.[93] It all began in the opening sessions with the different perceptions of Members as to their own status, whether they attended in their quality of expert jurists or as representatives of their countries. But they likewise quarrelled over the agenda, their official language, their working method, and whether they should consider the numerous earlier bids that had been laid down in the (Draft) Hague Conventions of 1907 and the projects tabled

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90 In the 8th, 16th, and 20th Meetings, on 24 June, 5 July and 9 July.

91 Notably so in the 22nd Meeting, on 12 July.

92 In the 8th, 18th, and 20th Meetings, on 24 June, 7 July, and 9 July respectively.

93 See O. Spiermann, "The 1920 Advisory Committee of Jurists and the Statute of the PCIJ", *British Year Book of International Law*, LXXIII (2002), pp. 187-260; and Eyffinger, *World Court* (2022), I, Ch. XI.6.

by private parties, research centers, and the Great and Small Powers over the previous five years.[94]

One consistent element of unrest was the way Baron Edouard Descamps interpreted his role as President. Rather than acting as the *primus inter pares* in the Anglo-Saxon tradition, he insisted on being in firm control and having things his way. Within a matter of days, he had made himself two formidable opponents in Elihu Root and Lord Phillimore. The most devastating incident, which did much to erode his authority, came in the opening week when he dismissed the detailed Agenda the Legal Secretariat at Geneva had tabled, then without prior notice to catapult on the Committee his vast project for what he called the "General Office of International Justice".

It was an ambitious proposition that comprised of three Courts, an International Criminal Court foremost among them. His overwhelmed and wrong-footed colleagues were stung and pointed out that the ambition went well beyond, and actually militated against the assignment the Council had given them. Truth be told, the idea was in line with calls for the adjudication of war criminals, notably so *Der Kaiser* who had been given shelter in the Netherlands. It was, therefore, not exactly a courteous move towards the host country, or towards Loder who, on behalf of his Government, had drawn up the formal response in disregard of the urgent call of the Allied Powers for adjudication or extradition of Wilhelm II. In his submission Loder had made a (formally legitimate) appeal to the principle of *nulla poena sine lege* – which was never properly understood by the public at large.[95] Moreover, Norwegian Francis Hagerup was well-known for his adamant stand against an international criminal court.[96]

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[94] Notably so in the 2nd Meeting on 17 June and in the 5th and 6th Meetings, on 21-22 June.

[95] On 10 November 1918 Wilhelm II crossed the Dutch border and was received in exile. He abdicated on 28 November. The Allied Powers repeatedly called for Wilhelm's extradition. For two years, the Dutch Government ignored the requests to the resentment of French Prime Minister, Georges Clemenceau (1841-1929). In 1919 a legal triumvirate headed by Bernard Loder drew up a formal reply in which it declined the calls for extradition.

[96] In the 23rd Meeting, on 13 July, Norwegian Francis Hagerup (1853-1921) declared that, should he have known of Descamps' project for a

A second major incident occurred three weeks later, when Descamps bluntly laid down another Draft for cursory approval, in which he stipulated a hierarchy of four sources of law the Court should tap when adjudicating States.[97] The high-handed presentation labored under the false premise from which the Committee worked, namely that the Court's jurisdiction was to be compulsory. Descamps suggested, in addition to conventional law, three more categories: custom, the famous "general principles", jurisprudence and doctrine. This triggered polemics which, apart from personal antagonism, made it clear that even on these fundamental issues the tenets of the members and the Powers they represented differed to the extreme. It was one argument to suggest that, in spite of fifty years of endeavors, the discipline was still ill-prepared for a comprehensive review of the kind. Numerous were the instances to confirm this uneasy feeling.

Clashing Tenets of Organization

One major challenge was to harmonize the different propositions the members tabled with regard to the Organization of the Court. It took the Committee a full week to sort out the competing drafts.[98] In the end, the pragmatic proposition jointly tabled by Root and Phillimore prevailed, if not for lack of obstruction from the President, who adamantly insisted on the prevalence of his own brainchild. A position all his own was reserved for the Committee's Italian member, Ricci-Busatti. In line with the scheme tabled by his Government in Paris in 1919 he opted for a Court that was to be recruited from the PCA and like this Court to operate on a semi-permanent basis and in three separate Sections, each with an expertise (and President) of its own. The idea clashed with the views held by his colleagues, who all insisted on a Court that was readily accessible throughout the year and strictly operated *in pleno.* Some found it hard to swallow the idea of Chambers.

Criminal Court, he would have declined membership of the ACJ. On Hagerup, see Dag Michalsen, "George Francis Hagerup (1853-1921): A Norwegian Legal Internationalist", in Morris, note 58 above, pp. 91-111.

97 In the 13th and 14th Meeting, on 1-2 July.

98 From the 16th Meeting, on 5 July, onwards.

Clashes of the kind were frequent. Thus, Altamira and Adatci insisted on the representation on principle on the Bench of the Latin American and Asian law traditions respectively.[99] Loder countered that international law was a unity and did not allow for regional ramifications. The Dutchman was likewise opposed to the distribution of seats according to continents rather than nations, the way San Francisco later successfully did in the formula for the ICJ.

Another predictably delicate issue was the institution of "national judges ad hoc".[100] *Nemo iudex in causa sua* read the steadfast rule of law worldwide. However, an international court functioned under different auspices. The PCIJ was to be established by the Powers (through the Council and Assembly). Almost by definition, therefore, the Court infringed their sovereign rights and put their prestige at risk. Accordingly, the Powers had made sure to curtail its wings. To remain on the safe side, the effect of Judgments of the Court should not reach beyond the Parties and then only with regard to that specific dispute. Under no condition should the Court be vested with a legislative role.

And there was another argument to consider. The submission of disputes to the Court was a matter left to the discretion of the sovereign Powers, who by definition did not acknowledge a higher authority. The Court was merely the recipient party, not entitled to summon disputants. Should Powers declare themselves of their own accord prepared to substitute Might for Right and throw their interests in with a bench of judges rather than opt for settlement by dint of arms, they were not too keen, by way of reward, on having to abandon all say in the matter. One could not deny these Parties the right to defend their claims *via-à-vis* a Bench that, more likely than not, was not familiar with their national law culture and social circumstance. The critical element in the end was the equal representation of Parties before the Court. With two Parties, just a single Party, or neither Party represented on the regular Bench the options were legion. Assessors, deputy-judges, or national judges could be called in. Alternatively, regular judges might step down. It was all a matter of addition or, precisely, distraction. At this stage

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[99] The issue was addressed in the 7th, 14th, 16th, and 19th Meetings, on 23 June and on 2, 5 and 8 July.

[100] The issue was amply discussed in the 7th, 23rd, and 24th Meetings, on 23 June and on 13 and 14 July.

of the discourse, it had dawned upon the members of the ACJ that the venture to create an international court posed very particular challenges of its own.

Composition of the Court

All aspects of composition of the Bench prompted polemics. The notion prevailed that, in order to be effective, the Court had to be compact. This increased the urgency of warranties for fair representation. The Members never agreed on the number of judges or the comparative distribution of seats. The idea to recruit deputy-judges was another device to secure the commitment of the smaller Powers, who hardly stood a chance of being represented on the regular Bench.[101] On another issue, opposition towards the concept of Chambers was routed under pressure of the powerful International Labour Organisation, which acted on par level with the Court within the League framework. Headstrong Albert Thomas (1878-1932) claimed representation on the Bench under threat of creating a competing Court for Labour Disputes.[102] In reply, some Members of the ACJ argued that the frequency of labor conflicts might help the Court through the narrows of its opening years. This prediction proved right.

Time Pressure

One last element seriously impaired the quality of the committee's final Draft. This was the time-factor. Most members had expected three weeks would suffice to finalize their assignment. As discussed above, Descamps' idiosyncratic approach, for all its intrinsic merits, derailed the debate from the first. Ten days underway, Anzilotti and Hammarskjöld voiced serious concerns that the Committee, for lack of purpose and direction, was getting nowhere. Around 15 July came the news that the Session of the Council in San Sebastian was planned for 30 July. The Committee inserted double meetings,

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[101] For the debate on the number of judges see the Minutes of the 7th, 16th and 19th Meetings, on 23 June and 5 and 8 July respectively. The concept of Deputy-Judges was addressed in the 7th and 16th Meetings.

[102] See the discourse of the 7th, 23rd and 24th Meetings, on 23 June and 13-14 July.

evening meetings, private meetings, all to speed up affairs.[103] Descamps, rather light-heartedly, suggested that matters of court procedure would not take up much of their time, as most issues had been amply discussed in 1907 and in later proposals.[104] He felt they would be wise to leave details for the Court to decide on. Be this as it may, the depth of research suffered from time-pressure, as the subsequent discourse in the Third Committee of the Assembly would point out. To the detriment of the legacy of the Committee, issues such as the formula for revision of the Statute were never considered at all. Ten years later, in 1930, similar time pressure impaired the work of its successor, the Committee for the Revision of the Statute. The jurists time and again allowed themselves to be wrongfooted by the world of politics.

The Sequel

On 24 July, in a succinct closing ceremony, the work of the ACJ was concluded. Apart from the Draft Statute and the Report, the texts submitted included three Recommendations. One touched upon the desirability of a Codification Conference. The second concerned President Descamps' personal request for consideration of an International Criminal Court. The third addressed the request addressed to the Council to further the speedy opening of the Hague Academy of International Law. Six months later, all three recommendations had been suppressed. Nonetheless, the Hague Academy was opened in 1923,[105] and in 1930 a first Codification Conference took place at The Hague.[106] The sustainable debate on the Criminal Court only reached its final stages at Rome in 1998. Five years later The Hague welcomed the International Criminal Court.

In this way, what may be called the first stage of the discourse was concluded. Two stages were to follow. Of a different nature, both had a serious impact on the constitution of the Court. The first

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[103] Three meetings (25th, 26th, 27th) were held on 19 July, and two Meetings on 20 July (28th, 29th), 23 July (32nd, 33rd), and on 24 July (34th and Closing Session).

[104] In. the 15th Meeting, on 3 July.

[105] On 14 July, the French national holiday.

[106] From 16-27 February 1930.

concerned the brief, but incisive discourse in the Council in August and October. The second was the elaborate exchange of views on no less than three levels within the Assembly in November-December 1920. We briefly review these assessments.

The Discourse in the Council

Composition and Reach

The 8th Session of the Council at San Sebastian (30 July-5 August) was chaired by omni-present Léon Bourgeois, the brilliant advocate of Arbitration and "Father of the League", who from 1899 onwards had given guidance to virtually all committees the implementation of international courts had been entrusted to. Bourgeois praised the elegant solution the ACJ had arrived at with respect to the processes of nomination and election of judges. He called the inclusion of national judges open to argument. The bastion of the Great Powers, in which the permanent members, the four Great Powers (British Empire, France, Italy, and Japan) had a double representation and the non-permanent members (Belgium, Brazil, Greece, and Spain) a single delegate, then listened to the explanatory note of the Committee's Rapporteur, De Lapradelle.

Perhaps the most interesting aspect was the composition of the Council. Next to politicians and administrators like Drummond, Arthur James Balfour (1848-1930), Tommaso Tittoni (1855-1931) and Paul Hymans three lawyers of the League attended the meeting, Dionisio Anzilotti, Åke Hammarskjöld, and Joost Van Hamel (1880-1964),[107] who all three had been intimately involved with drafting the Statute by the ACJ. Also present were two standing members of that ACJ, Lord Phillimore and Albert De Lapradelle, and two other acknowledged jurists, from France, Henri Fromageot (1854-1949), and from Italy, Carlo Fadda (1853-1931), who had

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[107] Joost van Hamel was Head of the Legal Secretariat of the League and a prominent adviser to the Dutch Government before he became the League High Commissioner for Danzig (1926-1929). In later years, he was judge on the Special Court for War Trials (1945-1950) in the Netherlands and for many years headed the Dutch branch of ILA, the Netherlands International Law Association (KNVIR).

been among the jurists originally selected for the ACJ.[108] In other words, the voice of the law was given a ready hearing.

The Council strictly kept to its primary competence. It never entered into legal detail, but addressed the implications of the Draft Statute from two perspectives: compliance with the Covenant (Articles 12-14) and its political consequences. As we have seen, the single, but critical resolution the Council passed was to suppress the formula of compulsory jurisdiction of the Court. Tittoni, from Italy, called the Committee's proposition to bring a State before the Court without its prior consent wholly inacceptable. The attending jurists proved unable to change the dramatic outcome of the session.

In subsequent months, the members of the League had ample time to table their reactions and submit emendations. Most incisive were the amendments proposed by Italy and the United Kingdom.[109] The judgement at the Quirinal had been severe. Rome disagreed with at least two dozen articles of the Draft. It rejected the inclusion of deputy-judges, the concept of compulsory jurisdiction, and the hierarchy of the rules of law to be applied. It questioned the procedure of advisory opinions and wished to see the publication of dissenting opinions suppressed as impairing the authority of the Court.

Reaction of the Powers

The United Kingdom, through Arthur James Balfour, rejected the Draft as such, inasmuch as it reached beyond the Covenant (Article 14). London did not accept the quasi-legislative role for the Court, rejected compulsory jurisdiction, questioned the formula of advisory opinions, insisted on assessors in cases of minorities and labor cases, denied the Court all retroactive competence, and did not accept the exclusive status of French as official language of the Court. The latter objection inevitably prompted a renewed request

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[108] Henri Fromageot was counsel before the PCIJ before he was elected regular judge (1929-1945). Carlo Fadda was a Roman and civil law expert from Cagliari, whose nomination for the ACJ remains a mystery. At the instigation of Dionisio Anzilotti, he was in a last-minute move replaced by Arturo Ricci-Busatti. On Lord Phillimore, see Morris, "The Judicial Churchman for Peace: Walter George Frank Phillimore (1845-1929)", in Morris, note 58 above, pp. 180-194.

[109] Eyffinger, *World Court* (2022), I, Ch. XXII.3.

for reconsideration of the position of the Spanish language. This, in turn led to Léon Bourgeois' formal protest and eventual abstention from the voting. Meanwhile, Norway, Francis Hagerup's nation, questioned the nomination procedure through the PCA. Sweden was opposed to the nomination of nationals and the concept of national judges. To suggest the complexity of the debate, various amendments were at odds with each other or of a contradictory tendency, the appraisal of dissenting opinions being a signal case in point.

In October 1920, assembled in Brussels, the Council integrated all amendments on the basis of a draft-consensus drawn up by Anzilotti, Van Hamel, and Sir Cecil Hurst, reputedly one of the early advocates of the Court in Britain. The Draft addressed such varying issues as the relations of the Court to the Council and Assembly; the Court's competence in matters of Prize Law; the concept of intervention by Third Parties; issues of salaries and pensions. The Council passed some far-reaching resolutions. The concept of compulsory jurisdiction was eliminated on formal grounds as incompatible with the philosophy of the Covenant (Articles 12-14); a clear hierarchy of sources of law was established; the concept of dissenting opinions was refurbished; last, the binding effect of the Court's judgments was confined to the Parties and for that case exclusively. It bespoke the apprehension of the Great Powers lest judgments might be interpreted as justifying, as it was phrased, "ulterior conclusions".[110]

To conclude, Greek Dimitrios Caclamanos (1872-1949) drew up two separate reports concerning languages and with respect to the three *Voeux* or Recommendations the ACJ had tabled. He also submitted a fourth Recommendation of his own, to have the intended diplomatic Codification Conference address the issue of the Court's compulsory jurisdiction. The Greek's conclusions were competent tactical manoeuvres to postpone acute crisis.[111] All these issues were again tabled within the Assembly in December. By then, a range of other Powers had submitted further amendments. Most pertinent were the serious reservations voiced by the ILO. The Council incorporated all suggestions for modifications and on 23 October adopted its Revised Draft Statute. On 28 October it

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110 Ibid., Ch. XXII.4.

111 Ibid., Ch. XXII.6

dispatched this text along with the Bourgeois Report for review in its First Annual Session of the Assembly.

The Debate in the Third Committee of the League[112]

Assembled Legal Expertise

On the day it opened its Session, on 15 November, the Plenary of the First Assembly delegated the issue of the Constitution of the Court to its Third Committee, created precisely for that purpose. It invited an impressive review of all relevant items. The Committee was made up of the representatives of the thirty-six Member-States of the League. Its Chairman, Léon Bourgeois, was seconded by Dionisio Anzilotti, the former Secretary of the ACJ and later Judge and President (1928-1930) of the PCIJ, and the Committee's Reporter, Francis Hagerup.

In its midst the Committee counted no less than five former Members of the ACJ: Raoul Fernandes,[113] Francis Hagerup, Bernard Loder, and the "recalcitrant" Mineitciro Adatci and Arturo Ricci-Busatti. Two of them, Adatci and Loder were bound to join the PCIJ and preside over its Bench in the next two decades. (Loder 1922-1924; Adatci 1931-1933). They were joined on the Committee by three other future Presidents of the Court, Max Huber (Switzerland, 1925-1927), Sir Cecil Hurst (UK, 1934-1936), and Bodislaw Winiarski (Poland, 1961-1964), along with the future judges Henri Fromageot (France, 1929-1942)), Dimitru Negulesco (Romania, deputy-judge 1922-1930 and judge 1931-1942), and Francesco Urrutia (Colombia, 1931-1942). Also involved was Nicolas Politis (1872-1942), a man who was to frequent the courtroom at The Hague in various capacities.

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[112] Ibid., Ch. XXIII and XXV.

[113] When Clovis Bevilaqua (1859-1944) announced that he could not make it to The Hague in June, his compatriot Raoul Fernandes (1877-1968) replaced him, first as assessor, later as regular member. His role in the debate within the Assembly in December 1920 was pivotal: he was the author of the Optional Clause. On Fernandes, see Arthur Roberto Capella Giannattasio, "National Political Ideologies and International Legal Practices: Raul Fernandes (1877-1968)", in Morris, note 58 above, pp. 39-73.

Two British veterans of the debate in Paris in 1918-1919 likewise joined the discourse: Arthur Balfour and Lord Robert Cecil. All the legal know-how and political expertise acquired over the previous decade was put into a discourse that covered a full month and was carried on at three levels. The venue warranted the reassessment of the delicate subject-matter from all quarters of world society. November-December 1920 saw the final, critical debate on the Court before the election of its first Bench in September 1921, and decided on all matters of its organization and competence.

The Third Committee convened ten times between 17 November and 16 December. In the opening meeting Bourgeois emphasized the central role of the Court in the League System and the prudence required in the consultations of the Committee. He recalled that the Council had only addressed the political implications of the project and had deliberately left the legal intricacies of the work of the ACJ to their Committee. He emphasized the urgency of five items: the compulsory jurisdiction of the Court; the right of intervention; national judges; the appointment of judges; salaries. He pointed out that the Council had turned down the proposed compulsory jurisdiction of the Court as an unwelcome amendment to the Covenant and had effectively dealt with the issues of salaries. He recommended a preliminary discourse of the subject-matter in general terms, prior to the appointment of an expert Sub-Committee to proceed on an in-depth research of the legal intricacies and ulterior consequences of the Revised Draft Statute.

Compulsory Jurisdiction[114]

The preliminary debate clearly manifested the foremost points of interest and concern of the delegates. Three issues (the right of intervention; national judges; salaries) were never tabled. The issue of compulsory jurisdiction occupied their minds. The first to take the floor was Francis Hagerup. He apologized for the "perhaps less than perfect" work of the ACJ and, in turn, insisted on prudence in their deliberations. He exemplified this by referring to the Power absent from the deliberations, the United States, and the delicate position of Elihu Root. Hagerup distanced himself from the Council's major

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[114] Eyffinger, *World Court* (2022), I, Ch. XXIII.4.

findings with regard to the Court's jurisdiction. Adatci promptly countered this censure, observing that progress came step by step.

Politis observed that the dilemmas in matters of composition and jurisdiction of the Court were anything but new. He insisted on the wisdom of the Council Resolution. In the subsequent discourse the delegate from Panama countered that the decision to drop the compulsory element might strike the public at large as a severe disillusion, whereas it probably cared little for the eventual revision of the Covenant. Two other issues were tabled. Various delegates (Romania's Negulesco among them) questioned the wisdom and fairness of nominations through the PCA. Max Huber (1874-1960) introduced an element that had never been seriously considered before: how the Statute was to be adopted. He could think of two options, by Assembly Resolution or by means of a ratified international convention. It was to be an intriguing debate in subsequent weeks.

In the third meeting of the Committee the Latin American delegations, headed by Argentina and Brazil, made another serious bid to salvage the concept of compulsory jurisdiction. As Fernandes argued, the Council interpretation of the Covenant was open to argument and the inadequate and vague text of Article 14 had to be amended anyway. The Council's apprehension lest the Court might invade its territory was unjustified. The provinces were clear-cut: the Council sought for the conciliation of political issues, whereas the Court applied strictly juridical considerations to legal disputes. Competition was excluded.

The delegate of Panama then pierced the veil. The Council had advanced three arguments against compulsory jurisdiction. First, as requiring modification of the Covenant. But at a later stage, the Council had modified the Covenant anyway to oblige the United States. Second, it had argued that compulsory jurisdiction undermined the free choice of the Powers to settle disputes through the Council, the PCA, or the PCIJ. To counter this argument, he suggested modifying the Statute (Article 33) to the extent that compulsory jurisdiction by the PCIJ was the last resort, only to be called in once Parties had conclusively failed to agree on the two alternative options of Council or PCA. Likewise, emendation of Article 34 of the Statute would neatly deal with the last of the Council's objections, that Powers could not be expected to submit all issues of international law to the PCIJ. A formal motion was tabled to implement Panama's amendments.

Lord Robert Cecil almost single-handedly countered the propositions in a stand which anticipated his position three weeks later in the Plenary, when the Latin American Republics jointly made a last desperate effort as the true protagonists of the principle. As the British diplomat argued, issues of vital interests constituted the watershed no major Power would willingly traverse under present conditions. As the Court's Judgments were enforceable, disputes regarding vital interests had to be excluded from its competence and to be entrusted to the Council, whose Decisions were of a mere recommendatory nature. One should await the Court's organic growth and increasing repute before pushing its competence any further.

The Role of the Covenant

At that stage, the Portuguese Vice-President, Affonso Da Costa (1871-1937), forcefully intervened. The way the ACJ had interpreted the text of the Covenant was perfectly legitimate and, if not so, the text of the Covenant had to be adjusted to comply with the Committee interpretation. The foremost objective of the League was to prevent war, and the only warrant was by substituting Bismarck's philosophy with the Rule of Law. He urged Bourgeois, the "champion of international justice", to try and persuade the Members of the Council.

By then, Loder had learned his lesson well. As he intervened, compulsory jurisdiction, admittedly, touched the critical step forward in international affairs. Given the prevailing separation of minds, they would do wise to bide their time rather than lose everything. In another tactical move, Bourgeois suggested provisionally entrusting the issue to their Sub-Committee. This called for renewed protest from Hagerup, who resented the Council position, recalled the discourse and deadlock within the ACJ, and did not believe the Sub-Committee would succeed any better: the critical bottleneck was the Council.

In the fourth meeting Francisco Urrutia (1870-1950), on behalf of Colombia rekindled the debate, insisting that the position of the ACJ did in no way infringe the Covenant. He called for a compromise in the interest of peace and to appease public opinion. A Belgian, Henri La Fontaine (1854-1943), stated that the two idols of sovereignty and unanimity were in the way of progress. Justice should be made sovereign. Compulsory jurisdiction was the only

means to break the vicious circle that had brought them the World War. The Covenant still bore the imprint of the fetishes of vital interests and honor. In his perception, the imperative wording of Article 12 with regard to the PCA presented true progress. Article 14 ran counter to this, in making the PCIJ dependent on the consent of Parties. It was illogical, the Belgian delegate convincingly argued, to settle minor disputes in a compulsory way and then not to apply the formula to major disputes that might result in war. World public opinion would applaud the Court's compulsory competence.

This invited reaction from Sir Cecil Hurst. As he read the Covenant, the drafters of that document never had compulsory jurisdiction in mind. As 1907 had shown the world, general agreement on the issue was beyond reach. The way ahead was through bilateral agreements between the Powers. La Fontaine reacted sharply. Article 13 of the Covenant effectively introduced compulsory jurisdiction. Moreover, the formula Hurst proposed would require 1,580 treaties of the kind between the Powers. The nearly two hundred treaties of the kind concluded between 1907 and 1919 had invited the call for a General Treaty as implemented in the formula of the Court. La Fontaine was an expert on the issue. In the end, Bourgeois felt compelled to adjourn the stormy discourse.

The Constitution of the Court[115]

Meanwhile, further to Max Huber's request, Anzilotti and Van Hamel on behalf of the Secretariat of the League had tabled propositions for the proper form of the Constitution.[116] Both jurists championed the concept of a Convention. It raised concerted opposition from within the Third Committee. Most Members felt that the issue came within the exclusive competence of the Assembly. It invited heated polemics, in which Adatci and Ricci-Busatti stood deadlocked, and the same was true for Huber and Fernandes. Hagerup concluded that, just as within their Committee, the Assembly would never reach unanimity in the matter. He therefore recommended a Convention. The discourse only confirmed the dilemma of the ACJ, that the world's most prominent international jurists entertained widely diverging tenets with respect

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115 Ibid., Ch. XXIII.5.

116 Ibid., Ch. XXIV.

to even the most fundamental aspects of the Statute and the Court. The foregoing tells us how controversial the issue of compulsory jurisdiction was at that late stage of the deliberations.

The Discourse Within the Sub-Committee

Composition

The next meeting of the Committee was on 8 December 1920. In the interval the Sub-Committee held ten meetings, in which all outstanding issues were addressed. Its composition was impressive. It was agreed within the Third Committee that half of the Sub-Committee was to be made up of former members of the ACJ (Adatci, Fernandes, Hagerup, Loder, Ricci-Busatti). In other words, a fair representation of the ACJ was given a second chance to verify its findings in a constructive exchange of thought with some of the most interested jurists and diplomats. Although these former members of the ACJ now operated explicitly as the representatives of their nations, it soon appeared that, in most cases, the personal and national points of view overlapped.

The other members of the Sub-Committee, handpicked by the Secretariat of the League, were Max Huber, Henri Fromageot, Sir Cecil Hurst, Nicolas Politis, and a Canadian, Charles Doherty (1855-1931).[117] The expertise of the Sub-Committee was never in doubt. Hagerup was appointed chairman and summoned his colleagues to the Hotel National for an article-by-article review of the Statute on the basis of the nearly sixty amendments the Powers had tabled. The exchange of views was highly enlightening in the repetition of clashes. If anything, it confirmed that the dilemmas faced by the ACJ had hardly been a matter of accident.

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[117] Charles Doherty was a Canadian Queen's Counsel (1887) from McGill. He was Canadian delegate to Versailles and to the League Assembly at Geneva (1920-1922). On Politis, see Marilena Papadaki, "Creating Traditions of International Justice: The Case of Nicolas Politis", in Morris, note 53 above, pp. 199-212.

The Organization of the Court[118]

The Sub-Committee first turned to the organization of the Court. Hurst triggered a prolonged debate when he raised the issue of the position of Non-Signatory Powers to the Hague Conventions in the nomination of the Bench. Ricci-Busatti rekindled his nation's opposition to the concept of deputy-judges, which called for Huber's proposition to split up the Court in three divisions with distinct competence of its own, as in the Swiss Federal Court. As Hagerup pointed out, the ACJ had likewise tossed with the idea. Britain wished to reduce the number of judges to nine, a proposition the Small Powers found inacceptable, and questioned the Joint Conference formula in the election procedure, by which six delegates, three from Council and Assembly each, would seek breaking deadlock.[119]

London also proposed having the substitute-judges serve a full term of nine years of their own, rather than the remainder of the term of the judge they replaced. Huber as forcefully backed the idea as Ricci-Busatti militated against the concept from fear of minimizing the chances of the small powers ever to be represented on the Bench. It triggered another clash of legal and political arguments on the value of the continuity of jurisprudence as compared to the asset of the regular refreshment of the Bench. A similar dichotomy of views was at the roots of the debate on incompatibilities.

Friction was only actuated by the diverging law traditions. To Fromageot's irritation, Huber bluntly voiced the view that the debate was virtually moot, as the Court in its opening years would be mostly idle. The Subcommittee once again turned down an Argentinian proposal to distribute the seats on the Court over the continents: Hagerup, Loder, and Adatci raised joint protest. A major part of the meetings was taken up by the debate on the interrelation of PCIJ and ILO, and the claim its assertive Director, Albert Thomas, had laid down. Just as the ACJ, the Sub-Committee felt little empathy for Thomas' demands. Still, what was at stake was the unity of international jurisdiction. The Subcommittee agreed on the need for additional technical expertise, but differed on the

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118 Eyffinger, *World Court* (2022), I, Ch. XXIV.3.

119 Ibid., Ch. XVIII.1.6; First deliberations in the 17th Meeting of the ACJ, on 6 July.

method, whether through additional judges, assessors, experts, or a specialized Chamber.[120]

Court Procedure

The Sub-Committee then turned to court procedure. Once again, the Spanish-speaking members, headed this time by Fernandes, called for the inclusion of their mother-tongue among the official languages of the Court. When Fromageot insisted on French, Ricci-Busatti countered that interpreters were needed anyway and could as well serve any language. The amendment was rejected. Thereupon Hurst objected to the Draft Scheme's bias to Civil Law practice of putting constraints on the summoning of experts and witnesses, and in vain recommended the livelier Common Law practice. Change would come measure by measure. Only in 1930, with the entrance of the Second Bench, were judges given latitude to at least directly question Parties and interrogate expert-witnesses. On 29 November Argentina tabled a remarkable amendment aiming at the immediate and definite suppression of the PCA. Its ultimate goal was unclear, but it was rejected on two formal grounds. Such a major decision, it was argued, was up to the Contracting Parties of the Hague Conventions, not to a Committee of the League. Also, it would take the bottom from under the nomination procedure of the PCIJ.[121]

Among the other points of debate was a discourse on the pros and cons of public hearings. Openness had been controversial from the first, given the entanglement of the judicial and political spheres, and the issue had kept jurists divided. The Hague Conferences had alternately urged for privacy and openness. Fernandes called publicity a prerequisite to the monitoring of judges, whereas Hagerup held that public influence inevitably interfered with the course of justice. Fromageot was hesitant, arguing that judgments should not jeopardize the relations of the Powers; he called privacy more prudent. Hagerup was about to move along, acknowledging that the ACJ had perhaps not sufficiently investigated the issue, when Ricci-Busatti protested on principle, arguing that privacy was

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120 Ibid., Ch. XXIV.2.10. On Adatci, see Tetsuya Toyoda, "A Civilizational Pluralist and Inegalitarian: Mineichiro Adachi (1869-1934)", in Morris, note 58 above, pp. 74-90.

121 Ibid., Ch. XXIV.4.

alien to judicial procedure. He was backed by Politis, and in the voting they had their way.

Ricci-Busatti was equally adamant in his claim for the suppression of publication of dissenting opinions. Hurst drew attention to the contrasting Common and Civil Law traditions in the matter. Referring to the *North Atlantic Fisheries Coast Arbitration*,[122] he gave fair warning that dissenting opinions (as Drago's opinion at the time) risked impairing the award, indeed would put the authority of the Court at jeopardy. Fromageot agreed, advancing that judges who voted against their nation caused embarrassment. The issue of revision likewise prompted debate, much in the way it had kept Martens and Barbosa divided back in 1907.

Jurisdiction of the Court[123]

The first issue in this category, tabled in the Sixth Meeting, touched the status of minorities and private parties. The Sub-Committee adhered to the verdict of exclusion the ACJ had rendered. Hurst then tabled the position of Non-Member States. That delicate conundrum was provisionally transferred for research by a Committee of Three. The Sub-Committee then tackled compulsory jurisdiction. As Hurst argued, the Council had never dropped the concept as such, merely reduced its province of appliance. Fromageot, Loder, and Adatci agreed that Parties should either consent to the Court's jurisdiction in advance, or turn to the PCA. Ricci-Busatti did not wish to categorically exclude the interference of Parties with the Rules of Court (as in matters of revision), and this for the practical reason that this might make the Court miss out on a whole range of cases.

The Sub-Committee frontally tackled the issue on 1 December in what turned out to be a memorable meeting. Ricci-Busatti expressed his agreement with the Council position and only regretted that the ACJ had ignored his timely warnings. In an impressive address, Politis concurred, warning his colleagues not to put all at risk by exerting pressure on the Powers to accept an idea they had never embraced of their own accord. A prerequisite for implementation of

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122 *North Atlantic Coast Fisheries Arbitration* (United Kingdom, United States), 7 September 1910; RIAA, IX, pp. 167-226.

123 Eyffinger, *World Court* (2022*),* I, Ch. XXIV.5.

the formula was the absolute confidence of the Powers, the more so as they had no means to force the hand of unwilling States. Bilateral conventions were the way ahead. In the end, Hagerup gave in, as unanimity was never to be achieved.

Huber agreed; his government had never read the Covenant as justifying compulsion. As against this, Switzerland would readily back the adoption of a Convention for Compulsory Adjudication on a voluntary basis. It was a historic intervention, in line with what Huber had in private discussed with Tobias Asser back in 1907. It served as model for the Raoul Fernandes presentation of what has become known as the Optional Clause. Hurst invited Fernandes to draw up the blueprint.

The device was heavily contested from the first. Politis entertained strong reservations, whereas Fromageot held that their Inter-State Committee was not the appropriate body to discuss bilateral treaties, indeed questioned their competence to tackle the jurisdiction of the PCIJ. Adatci agreed; Article 14 of the Covenant was the alpha and omega of their competence. Fernandes convincingly countered this presentation of affairs. The Council, which itself had established the ACJ, had submitted that Committee's Draft Scheme to the Assembly and included its paragraphs on Court jurisdiction. Quite another question was whether Article 33 of the Draft Statute on the competence of the Court also covered non-juridical questions. Most members thought as much, for virtually all legal disputes had political implications. In the end, the texts of the Articles in question (Articles 33 and 34) were refined.

Other major issues preoccupied the Sub-Committee. Doherty vainly pleaded the access of dominions and colonies on equal terms with sovereign States. Hurst rejected the Argentinian proposition to grant the Court legislative powers. Judgments of the PCIJ should not be taken for precedent in the constitution of the legal system. Similar anxieties arose with regard to the forever controversial idea of the Court's competence to render Advisory Opinions. Fromageot, for one, categorically rejected the idea. The Opinions should at all times have a strictly recommendatory status, and this held good either way. The issues addressed could not be taken for *res judicata*, and the Opinions rendered were never to be held against the Court should the same question later on be submitted to the Bench in its judicial capacity. The original idea of the formula had been to have the Court speak *in abstracto*, on theoretical issues. In the active years of the Court the Opinions developed the other way around, in

a gradual process of assimilation to the judicatory function of the Court.[124]

The Harvest

On 7 December the Subcommittee reviewed the Report its Chairman, Francis Hagerup had drawn up.[125] It invited another debate on the way the Constitution of the Court should be implemented, by way of an Assembly Resolution, or rather vested in a multilateral Convention. In all, the Subcommittee showed remarkable reserve in modifying the Council draft text. Of the sixty amendments the Powers had tabled, only a handful were honored or reflected anything more than marginal textual emendations. As Hagerup informed the Full Committee on 8 December, the major changes touched the Court's dealings with labor cases and matters of transit and communications.[126]

When presenting this outcome to the Plenary, Bourgeois begged the Powers to observe similar restraint.[127] The Assembly adopted the Hurst suggestion to have the Third Committee, rather than the Plenary, discuss any amendments the new Draft Statute and Hagerup's Report might suggest to the Powers. Thereupon the Third Committee discussed the number of nominees National Groups were entitled to submit and the relation of national and foreign candidates. Some resistance proved stubborn. Colombia, through Urrutia, made a last futile bid to have the system of regional distribution of seats implemented. The Latin American world as such, in a last desperate plea, vainly advocated Spanish as an official language of the Court. La Fontaine to no avail questioned the election system on account of its risk of political bias, whereas Negulesco without success pleaded for Sections of the Court and for the right of appeal by Third Powers to judgments of the Court. As a net result, the formulas for the nomination of candidates, for incompatibilities, and for the functioning of deputy-judges were refined.

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124 Ibid., Ch. XXIV.5.2-4.
125 Ibid., Ch. XXIV.6.
126 Ibid., Ch. XXV.
127 Ibid., Ch. XXVI.1.

To conclude the discourse, two major outstanding issues were tackled. On 10 December, in an inspired address to the Third Committee, Albert Thomas tabled the claims of the ILO.[128] At long last, agreement was reached on the institute of assessors, if mainly from fear of the fragmentation of the judicature. The second issue, concerning the form the Constitution was to be given, gave rise to serious debate between Fernandes, Politis, and Huber.[129] In the end, the Sub-Committee's proposition was submitted to a Drafting Committee. Just one issue never came quite to rest, the terms of jurisdiction of the Court. Fernandes ran into a vehement dispute with Huber and Hagerup before the Latin American representatives tabled a new phraseology. It was the precursor to the last round, within the full Assembly.

When they looked back, the Members of the Third Committee found out that no less than 46 of the 62 Articles of the Draft Statute had been modified, if in refinement of phraseology rather than touching their substance. This excluded Argentina's last amendment to add an Article 63 to the Draft which called for the exclusion from the League of any Power that refused to comply with a judgment of the Court, and the imposing of sanctions should peace be put at risk. Both the Committee and the Sub-Committee had turned down the idea as constituting an amendment to the Covenant and therefore beyond their competence.

Reappraisal

It all but seemed the end of the involvement of the Third Committee. However, pursuant to the discourse in the Assembly the Committee was reactivated and in two supplementary sessions addressed the delicate issue of salaries and the three recommendations the ACJ had submitted.[130] The financial complexities of fixed salaries and daily allowances for President, Vice-President, judges, deputy-judges, and including experts and witnesses reach well beyond the province of this article. The recommendations for the International Criminal Court and for the Hague Academy were courteously turned down.

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128 Ibid., Ch. XXV.1.8.
129 Ibid., Ch. XXV.1.9.
130 Ibid., Ch. XXV.2.1-2.

However, the first recommendation, regarding the Codification Conference, gave rise to a fundamental and constructive debate in which mostly incomparable arguments were advanced. Thus, Hurst considered the idea premature and preferred waiting for the full expansion of the League and the growing repute of the Court. La Fontaine countered that public opinion simply demanded progressive codification. Politis begged to appoint a research committee. The preparatory work alone would take several years and should involve the IDI, ILA, and other research institutes to cover all legal traditions.

Questions of competence never failed to be advanced. From Portugal, Da Costa argued that it was not for the Court to fix the law it was to apply. Huber felt the idea of the Codification Conference impeded what was first and foremost the Assembly competence to draw up conventions. Politis, on the other hand, reserved this task for the Council, whereas Ricci-Busatti regarded this the prerogative of the Powers. The discourse only underscored its provisional nature and the divergent views in all matters raised. It would effectively take the discipline decades to sort out the loose ends of these preliminary exchanges. The first round of subsequent debate was opened in 1925, when France took the initiative which five years later, in the Spring of 1930, brought the Powers to The Hague for the so-called Codification Conference.

The Discourse in the Assembly[131]

Hagerup's Review

On 13 December 1920, in the 20th Plenary Session of the First Assembly in the *Salle de la Réformation* at Geneva, the curtain was raised for the last act of the comprehensive *Auseinandersetzung* of jurists and diplomats on the future role of the PCIJ. President Hymans gave the floor to Léon Bourgeois, the President of the Third Committee, to review its four weeks of discourse. The French veteran diplomat called it a historic moment. By creating an independent court of law, the League was to indissolubly link peace to justice, thus at long last to establish a peace that was real. Francis

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131 Ibid., Ch. XXVI.

Hagerup, the Reporter of the Committee, recapitulated its discourse under eight headings.[132]

As Hagerup recalled, a method of nominations and elections, on which the Conference of 1907 was wrecked, had been agreed upon on a footing of perfect equality of Council and Assembly. Political machinations had been excluded, and the freedom of delegates been warranted by a kind of plebiscite in the formula to call in the National Groups at the PCA (and their equivalents for Powers not parties to the Hague conventions) to each provide four candidates, national or foreign, to a comprehensive list of candidates. The high qualifications of these candidates, and their impartiality and independence, had been secured by the strict exclusion of tenure of political and administrative positions. Special attention had been given to specific types of disputes. Four advisory assessors had been provided for to assist the Bench, in a flexible composition, in settling labor disputes that called for extra-legal expertise. Similar devices had been developed for cases on issues of transit, navigation, and communications.

The Third Committee had found a middle way between the Advisory Committee recommendation and the Council's rejection of the concept of compulsory jurisdiction in backing the Fernandes proposition for a so-called Optional Clause, a Power's voluntary acceptance of the Court's jurisdiction *vis-à-vis* other Powers on the basis of reciprocity. The Committee had left it to the discretion of the Assembly to decide on the way the Constitution of the Court was to be implemented: by simple Resolution or by means of the ratification of a Convention. The elections of judges, the Committee trusted, might take place in the Second Plenary in 1921. The Protocol of Signature of the Court remained open for latter access, the United States foremost in everyone's mind. Hagerup recalled the Assembly of the urgency of agreement also to forestall irreparable damage to the credibility of the League.

Views of the Powers

In reply, the delegates of the Powers, in two successive Sessions on 13 December, presented all reasons of State, moral convictions, and legal tenets they could muster in an impressive

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132 Ibid., Ch. XXVI.2.

array of speeches.[133] The meetings were full of emotion and sincere pleadings and invited instances of true eloquence and deep emotion. The major issue at stake was never in doubt. The Court jurisdiction dominated the scene and the Latin American republics and neutral powers made a last, passionate stand to turn tables and by legal arguments uproot the essentially political opposition of the Great Powers to compulsory jurisdiction on the ground that time was not yet ripe for its implementation. Neither Loder's outspoken censure, nor la Fontaine's supreme eloquence could move Lord Robert Cecil. Vainly Fernandes, in an impressive analysis of the League System, maintained that it was all a misunderstanding, that the Court never posed a challenge to the Council.

Some delegates welcomed the alternative of the Optional Clause, others loathed it as the wrong course that obscured "the real thing". Three later judges – Urrutia, Negulesco, and Wellington Koo (1888-1985) – had implored the Assembly to recant when Nicolas Politis, on behalf of Greece, raised the voice of realism. Unanimity on the issue was never to be attained. It was no matter of a great majority bowing to the dictate of a meagre minority, the problem was true and real. Arthur Balfour personally settled the issue. As he argued, Britain and France had been the foremost protagonists of peace over the past twenty-five years. They had suffered the most from war and were adamant to avoid repetition. However: *Natura non facit saltus*: natural development was the way to sustainable success. Change would come in due time, in concordance with the expansion of the law.

Hagerup's Conclusions

Hagerup undertook a survey of items at issue.[134] By then, Panama had rekindled Argentina's earlier amendment with a view to entitling the Court to take coercive measures in response to the failure to execute its judgments. In line with the tenets of the Third Committee and its Sub-Committee, their Norwegian *Rapporteur* recommended reserving this coercive role for the Council as the more appropriate body and more effective policy, and one in

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133 Ibid. Ch. XXVI.3, and including the tenets and biographical sketches of all delegates.

134 Ibid. Ch. XXVI.5.

accordance with the Covenant. Cuba's last bid for the regional distribution of seats went the same way.

Hagerup, stunningly, expressed optimism with regard to compulsory jurisdiction. The concept had not so much been dropped as been turned into the voluntary device of the Optional Clause. Numerous pre-war conventions and arbitration agreements that featured the compulsory element could easily be remodelled so as to be applicable to the PCIJ. As a champion of the idea, he could live with Balfour's assessment: they were on the right path. He personally would have welcomed the adoption of the Statute by Assembly resolution. The Powers had preferred a convention. Still, inasmuch as no unanimity of ratification through the Protocol of Signature was required, he looked forward to the speedy implementation of the Court. He died three months later, well before that day dawned.

Address of Bourgeois

Bourgeois, the great advocate of compulsory jurisdiction from 1907 onwards, had the last say.[135] They should dispel mutual suspicions and vote for the Court without reserve or regrets. Unlike what was widely claimed, the present outcome was no step backwards from 1907, when "compulsion" had been agreed upon on principle. To be sure, they had not abolished war, but then, the pertinent obligation to submit the settlement of disputes to either the Council of the Court was no mean achievement. He praised the idea of the Optional Clause as a lofty moral concept.

The quintessential problem the Council had faced, Bourgeois said, was the lack of unequivocal confidence in the Court. Only time and the respect the Court would achieve could lift that barrier. Faced with the dilemma of retreat or delay, the Council had taken a third, alternative approach, to give precedence to the creation of the Court and the ratification of its Statute. He himself anticipated the speedy installation of the Court and felt certain that from its first judgment onwards the Bench would convince the world of its merit. All would come their way. The League and the Court, being living organisms, would conform to the law of all nature that imposed steady growth and development and secure the progressive increase

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135 Ibid., Ch. XXVI.6.

of confidence. A star had risen on the firmament. The feeble light of an imperfect scheme would light their way: *ubi lux, ubi jus, ibi pax.*

Towards Implementation

At President Hymans's instigation the resolutions on the Statute, the Protocol of Signature, and the Optional Clause all were adopted by unanimous acclaim.[136] By 16 December, agreement had been reached on salaries and pensions. A great work had been accomplished. One last setback awaited them. Lord Robert Cecil personally wrecked the acceptance of the recommendation on the Codification Conference. It proved to be the mere postponement of the inevitable. Nature might admittedly not work by leaps and bounds, but one could not withhold Spring! Centuries of speculation, fifty years of concerted research, and six months of intense discourse and solid resolutions had carried them to the threshold of the fulfilment of the long-cherished dream.

Pursuant to some kind reminders to the Powers so as to make them fully realize the lofty task of ratification, Secretary-General James Eric Drummond (1876-1951) by early July 1921 confidently put the process of nominations and elections in motion.[137] In the wake of the elections of September he begged the chosen fifteen gentlemen to convene at The Hague at the end of January. On 15 February 1922, in a Court Hall packed with royalties and dignitaries, the judges read their solemn declaration to honorably, faithfully, impartially, and conscientiously exercise their powers and duties.[138]

The Permanent Court of International Justice

The Court and the League

The International Climate

The role and record of the PCIJ will be briefly addressed in light of the above discourse and ambitions. Things did not quite

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136 Paul Hymans (1865-1941), of Belgium, was president of the Assembly in 1920-21, and again in 1931-32.

137 Eyffinger, *World Cou*rt (2022), II, Ch. I.

138 Ibid., Ch. II.3

turn out the way the Court's advocates had anticipated, and this outcome affected the reputation of the Court. Various reasons can be advanced to explain this turn of affairs. We begin with the disproportional influence of external and extra-legal factors. The functioning of the Court was overly conditioned by external circumstances and developments beyond its competence or control. The interwar period was among the most dramatic eras of modern history. The generation that brought the League and the Court into being had sought to emulate the shockwave of *La Grande Guerre* in the hubris of its aspirations. It never lived up to its self-imposed ambition. A mere two decades saw the world come down from the highest expectations to the nadir of despair.

The League never became the Brotherhood of Man and Alliance of the Peoples as its early advocates had hoped. It took the form of an intensely politicized organization at the whim of the powerplay of the nations. The gap between the Great and the Small was never bridged, indeed was only made more obvious by the inveterate suspicion, misgivings, and machinations in the interaction of Council and Assembly. On top of this came the inherent dichotomy of purpose, the *mésalliance* of Wilsonian visionary thought and Clemenceau's call for *revanche*, the mismatch of idealism and State reason.

Even so, by 1925, and with the Dawes Plan implemented, it all but seemed as though the League had come into its own. The Locarno treaties (1925) [139] and Briand-Kellogg Pact (1928)[140] were hailed as solid stepping-stones in a continuous process that aboded true progress. The Wall Street crash (1929), which no Young Plan (1930) could ever check, smothered all optimism. It created the overall atmosphere of depression and political tension, which along the Manchuria incident (1931), the Second Ethiopian War (1935), the occupation of the Rhineland (1936) and the Spanish Civil War

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[139] At the Locarno Conference of 5-16 October 1925, the Powers headed by Gustave Stresemann and Aristide Briand, in an atmosphere of detention agreed on treaties with regard to Germany's boundaries with Belgium and France, and on Germany's access of to the League.

[140] On 27 August 1928, in the Pact of Paris commonly named after its two major protagonists, French Aristide Briand and American Frank B. Kellogg, sixty-two Powers ambitiously declared their agreement on the ban of wars of aggression. It was a milestone on the way to the United Nations Charter, but in the short term proved tragically ineffective.

(1936-1939), to mention just some major incidents, spiralled down to Munich (1938) and the German invasion of Poland in September 1939.

Advisory Opinions

Just as the Covenant of the League was embedded in the peace treaties, the PCIJ was part and parcel of the League System. Within its reserved domain of competence, the institution might perhaps be sovereign and independent; its conditioning by the League can be illustrated in many ways. The advisory role of the Court is a case in point.[141] The formula was never uncontroversial. It was a major argument for the Senate of the United States to refuse, first in 1919, then in 1925, and finally in 1929 to give its advice and consent to ratification of the Protocol of Signature of the Statute. Early in 1929, still on the wave of optimism, and on the eve of the General Elections for the constitution of Second Bench of the Court in 1930, an Advisory Committee for the Revision of the Statute made an ill-prepared and rushed effort to have Washington reconsider its position. The endeavor prompted Elihu Root to renew his participation in the deliberations.[142]

The actual functioning of the formula of Advisory Opinions offered a second argument. The ILO, against all expectations, secured the Court a flying start by submitting five requests in rapid succession.[143] In all, close to half the cases dealt with by the Court concerned Advisory Opinions. In principle, these Opinions were to be channelled through the two political bodies of the League. Neither the League itself or its Secretary-General were entitled to submit requests. Curiously, the Assembly never availed itself of its right either. All requests were formally submitted by the Council.

From early on, the formula was heavily politicized and, under pressure of the Powers, channelled into a straight-jacket. In contradistinction to what the ACJ had in mind in 1920, no speculative issues or matters of doctrine were ever addressed. Instead, the requests were increasingly bound up with specific disputes. Only a few requests were ever initiated by the Council

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141 Eyffinger, *World Court* (2022), II, Ch. X (concept) and Ch. XIII (Position USA).

142 Ibid., Ch. XII.

143 Ibid., Ch. XXII.

of its own accord. The great majority of cases were submitted by the Powers through the intermediary of this body. In short, politics had found a roundabout way to the adjudication of disputes. It only confirmed the suspicions entertained from early on. Thus, for one thing, apprehensions were rampant, and not just in Washington, that the formula might be abused as a means to allow compulsory jurisdiction through the side-entrance.

Censure never stopped this course of proceedings. On the contrary, from 1924 onwards a process was noticeable to assimilate the Advisory Procedure to its adjudicatory counterpart. On the first occasion the Rules of Court of 1922 were adjusted, in 1925-1926, this process was formalized in the acceptance of national judges in advisory procedures.[144] Five years later, the Court itself joined its formerly separate series of publications of Judgments (A) and Opinions (B) into an integrated (A/B) series. In short, the discrepancy of substance and objective originally intended in the bipartition of the Court's role was increasingly blurred. Critical to the course of the Powers was not so much the legal issues at stake as the strategy to optimize their interests. Illustrative is the way Germany and Poland handled the numerous cases that ended up before the Court.[145] It suggests that the ordering of cases according to the form of application fails to take the hidden agendas of Parties into account. And this carries us to the role of the Powers in the Court's functioning.

The Powers and the Court[146]

The Court acquitted itself admirably in its role, within its limited powers that is. Perhaps nowhere was the discrepancy of national high courts and an international court made so poignant as in the fact that the PCIJ knew it was entirely at the mercy of the Powers. The World Court was never granted the right to initiate cases or raise legal questions of its own accord. One of the major preoccupations of the Powers in Paris and at Geneva was to prevent the Court from assuming anything remotely akin to a legislative role. To its infinite credit, the First Bench of the Court (1921-1930) made, if only in

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144 Ibid., Ch. III.
145 Ibid., Ch. XXVII-XXIX.
146 Ibid., Part. III (*Parties*), Ch. XVII-XIX.

obiter dicta, pronouncements of a wider purport, thus helping to develop the law. Censured for its efforts, the Court wisely showed more restraint in the second decade of rising international tension.

Yet another surprising development affected the Parties involved with the Court. As will be recalled, private parties and minorities were excluded from access. However, in this domain the Paris peace treaties had left troubling scars. Throughout the span of the Court's operation the Registrar was overwhelmed with urgent requests for help from desperate applicants, which reflected the inadequacy of the League System.[147] The ACJ and the Third Committee of the Assembly had taken it for granted that the tried and trusted formula of diplomatic protection would smooth out any inconveniences in this domain of law. To be sure, the device worked adequately enough to help out major firms and concession-holders.[148] However, it left the small fish, the tens of thousands of penniless, denationalized Finnish, German, Greek, and Turkish citizens out in the cold. Here the Court was perfectly helpless.[149]

One other aspect of the relations between the Powers and the Court should be highlighted. This concerns the unpredictability of those relations. The Court dealings with the Powers aptly illustrates the gap between expectations and implementation. As noted above, the widely shared anticipation of the Court's long years of idleness was belied from day one. A matter long in the balance in 1920 had been whether non-Members of the Court should be given access at all and, if so, on what terms. The peace treaties had granted a new lease on life to a former major political entity in Europe, the Polish-Lithuanian Commonwealth (1569-1795) that had first been dismembered, then suppressed pursuant to its three Partitions at the hands of Russia, Prussia, and Austria. The new Polish State that emerged in 1919 filled the vacuum left by the three eclipsed empires. Regained self-confidence and nationalism in Warsaw suggested expansionist policies. The net result was that Germany, perhaps the most controversial nation during the entire span of time of the Court's operation, became the Power that most frequently appeared before the Court, whether as applicant or defendant, and time and

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147 See Yearbooks PCIJ passim, and Eyffinger, *World Court* (2022), II, Part IV (*Cases*), Section III (*Minorities*) Introductory Note.

148 Ibid., II, Section IV (*Diplomatic Protection*), Ch. XXXII.

149 Ibid., Section III (Minorities), Ch. XXVI-XXXI.

again called in the help of the judges to redress the provocation of its authority and the discrimination against its nationals at the hand of Polish authorities, such as in Danzig, Lithuania, and Silesia.[150]

Germany was only given access in 1927 and hurriedly took its leave in 1933. But from first to last the nation was at the core of the repercussions prompted by the territorial and humanitarian implications of the peace treaties. Germany was only once represented on the Bench, by Judge Walther Schücking (1930-1935), who in 1919 had swallowed personal humiliation at Versailles, then at The Hague to his last breath withstood the dictatorial regime that in retaliation mercilessly deprived him of his status, reputation, and academic functions at home.[151]

Germany, just as Italy and Japan, was a member of the League for some span of time. No less telling was the different record of two prominent Powers that never entered the League. Russia had been the foremost leading Power in the pre-war quest for arbitration and had inspired the idea of the Peace Conferences and the Hague Court in the first place. Two decades later, the Bolshevist regime, in its universalist claims, considered itself, at least potentially, the embodiment of the League of Nations in the true sense, as representing the Assembly of Peoples. In the *Eastern Carelia Case* (1924) she voiced her disenchantment with the alternative formula of League and Court in no uncertain terms. No Soviet judge ever served on the Bench of the PCIJ.[152]

The third Power in question is perhaps the most interesting in that, as it turned out, it never subscribed to the Covenant or the Statute. By the same token, it dominatated the agenda at Geneva from first to last. The backdrop of the absence of the United States was first and foremost a matter of domestic policy and an ambivalent political legacy, the Monroe Doctrine of Splendid Isolation and the Roosevelt ambition of Policeman of the World. In the end, the visionary author of the Fourteen Points and initiator of the League was checkmated by a recalcitrant Senate. Inconsistency of foreign policy is perhaps less recommendable for a World Power than it is

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150 Ibid.,Vol. II (2022), Ch. XXVII-XXIX.

151 See notably the case referred to ibid., Ch. XXIX.6 with regard to the *Danzig Legislative Decrees* (1935). Cf. ibid., Ch. XVI. 28 (Walther Schücking).

152 Ibid., Ch. XXVI.

acceptable at the hands of a small nation. Officialdom at Geneva never despaired. Through concessions the pilot light was kept burning. These crystalized in Elihu Root's renewed prominence on the Advisory Committee for Revision of the Statute at Geneva in 1929.[153]

However, this was not the end of Washington's involvement. In the opening years of the century, Theodore Roosevelt and Carnegie had been pivotal in launching the PCA and its courthouse, the Peace Palace. Twenty years later, the generous sponsorship of the Carnegie Endowment headed by Root and Scott facilitated the Hague Academy of International Law.[154] Two former Secretaries of State (Kellogg and Hughes) were among the four American judges that served on the Benches of the PCIJ throughout the two decades, thus to warrant the steady presence of a major law tradition at The Hague. [155]

The Case-Law of the Court[156]

Socio-Political Context

The dependency of the Court on the Powers and the unpredictability of these relations were noted above. These findings can be verified with reference to the case-load of the Court. There is something peculiar about these cases. Time and again, one is positively struck by the seeming triviality of the disputes brought before the World Court: a solitary lighthouse; a closed-down railway track; a remote primary school; a crooked entrepreneur; phosphate concessions; a Greek-Orthodox convent; postal services in Danzig. The sheer insignificance of the cases would seem tantamount to scoffing the dignity of a World Court and an affront to the assembled legal genius of its Bench. First glances can be deceptive. Paradoxically, the substance-matter of the sixty odd

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153 Ibid., Ch. XIII.8

154 See the reference to Asser above, in fn. 57, and *World Court* (2022), II, Ch. V.3-4.

155 Biographical notes on the American judges in *World Court* (2022), II, Part II (*Judges*), Ch. XVI.13 (Hudson), 14 (Hughes), 16 (Kellogg), 19 (Moore).

156 Ibid., Part IV (Cases), Ch. XX-XXXII.

cases submitted to the Court in either of the two formulas best illustrates the underlying, hidden motives of the Powers.

If its founding fathers in 1920 – in a deliberate extension of the time-honored policy of the *Institut* – had contemplated the Court keeping aloof from politics, in practice the two successive Benches felt time and again caught up with legal intricacies that constituted a tiny part, and rarely the critical element, of the settlement of disputes that had much wider moral, political, and social implications. The Court, in short, never was the Ivory Tower many jurists and politicians, both for reasons of their own, had preferred it to be.

The profile and pertinence of nearly all cases lies in their wider context. Many cases were intentional political soundings by Parties. They were the tip of an iceberg, the mere symptoms of deeper trouble. They symbolized immensely higher stakes: the rival interests or the challenged prestige of the Powers; the ambiguous nationality of millions of emigrants; the racial, religious, and linguistic suppression of huge minorities; the credibility of the world's financial system. By way of example, on the second day the Germans invaded Poland, early in September 1939, her military in a well-considered move had the Polish staff of the Danzig Post Office executed.[157] One may indeed argue that the pettiness of the cases betrays the almost pathological sensitivities of these allegedly sovereign States.

What the PCIJ dealt with, and this has never truly changed over the past century, were the wandering ways that States groped and probed their way to power. Often enough, the Court merely skirted the edges of the underlying friction. Rarely did the Powers let the judges come anywhere nearer. But then, the Court readily seized the one handle it could grasp. It stood firm in keeping the Powers from dragging justice and the law along in their sordid stride. For all its efforts, there is never any misunderstanding. At the heart of the Court's challenge stood the Powers, and this had critical consequences. One should, therefore, never underestimate the pertinence of the cases. The judgements of the Court went to the heart of the power-play in Versailles at the close of World War I and touched the gist of the problematic that, twenty years later, crystallized in World War II.

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[157] For the antecedents of the case ibid., Ch. XXIX.1 and the Introductory Note to the Chapter.

The Restricted Province

The above, in a way, is tantamount to extrapolating the ambit of the Court's dealings and widens the social relevance of its Judgments and Opinions. In one respect the Court record fell short of the expectations of its protagonists and never lived up to its high aspirations. The Bench may have been a veritable World Court in terms of its composition and the universal sources and rules of law it applied, it never kept pace with these ambitions in terms of its case-law. The PCIJ was a Court of global potential that was exclusively used for healing Europe's self-inflicted wounds in World War I and at the Paris peace conferences. Apart from some ten cases that touched the implementation of global governance,[158] all cases were entangled with the major problems the world faced on its tragic course to yet another war.

These challenges were huge by all standards. At their heart were the immeasurable consequences of the eclipse of five empires that had given guidance to the world for centuries on end: the Romanov, Hapsburg, and Hohenzollern dynasties; the Islam Sultanate, the Chinese Empire. The linking up of visionary concepts with sober *raison d'état* in tackling these problems unbalanced the strategy of the League. The substitution of the philosophy of the multi-national State with the concept of national sovereignty gave rise to a range of young, ambitious States in the huge and densely populated patchwork region that ran from the Baltic to the Balkans and had been the crucible of unrest in pre-war years.

Ill-projected boundaries were drawn. Immense projects were developed, loosely monitored by League commissions and mixed arbitration tribunals, to voluntarily or forcibly migrate millions of Greeks and Turks, Germans and Poles, Lithuanians and Finns from the lands of their fathers towards new homesteads. Three major problems arose from these unwise exercises: endless boundary disputes; large-scale nationality and identity problems; finally, and worst of all, the unmanageable discrimination against huge minorities. The above conundrums accounted for a full third of all the cases the Court was invited to handle.[159] They dragged the

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158 Ibid., Section I (*International Governance*), Ch. XX-XXIII.

159 Ibid., Ch. XXIV-XXV (Boundaries, Customs) and Ch. XXVI-XXXI (Minorities). For the Baltic area see Ch. XXVI; for issues concerning

judges willy-nilly into the twilight zone of the public and private domains of the law.

A fourth, closely related predicament came as a corollary. State succession invited the reassessment of earlier concessions, sometimes to sort out legal ambiguities, but most of the times dictated by thinly veiled political motives. A typical instance was the way British authorities, in the wake of the Balfour Declaration of November 1917, coped with the (pre-war contracts for) electricity projects in Jerusalem a sharp Greek business tycoon laid claim to, with a view to favoring the (postwar) claims of his no less shrewd competitor, a Jewish Russian immigrant.[160] A fifth ingredient was the questions and disputes evolving from the questionable mandate system of the League. Tunis and Morocco were cases at hand.[161] The net result of the above was that the case-law of the Court essentially looked backwards rather than forwards and virtually exclusively touched the preoccupations of the European Powers.

One last domain of the law has to be highlighted – well understood to be at the core of the Court's functioning, the law of treaties. In hardly any case did the PCIJ fail to make some pertinent remark to help clarify the text, status, or legal nature of agreements, or touching their application or interpretation in light of international law, *travaux préparatoires*, the earlier acts or apparent intention of parties, or with respect to the obligations entailed for signatories or third parties. This held notably for the multi-faceted Paris peace treaties. Two decades of the PCIJ and an additional twenty years case-law of the ICJ amply sufficed for jurists and diplomats in 1966 to draw up one of the most impressive multilateral Conventions of the early United Nations period.[162]

Poland and Germany Ch. XXVII-XXIX; for the tensions between Greece and Bulgaria Ch. XXX; for the relations between Greece and Turkey Ch. XXXI.

160 *The Case of the Mavrommatis Concessions* (1924-1927); ibid., Ch. XXXII.1.

161 The case of the *Nationality Decrees in Tunis and Moro*cco (1923); ibid., Ch. XXI.1.

162 Ibid., Ch. XX.2

Final Appraisal

Circumstance played its part. Even under the best of circumstances the Court could never have been expected within a mere two decades, and on the basis of the variety of morsels and chunks the Parties threw at it, to have distilled a comprehensive legal system or brought about a refined maze of legal concepts. Its major, durable merits were in the less politicized field of international governance, the expansion of the system of the League and the credibility and effectivity of the ILO.[163] Not that these cases lacked social impact. The challenges the Court faced came in reply to the spread of socialism and communism, and to the troubled re-shifting of social strata in the wake of World War I, the legal position of women featuring foremost among the conundrums.

The important relevance of the PCIJ was never in the strictly legal implications of the disputes it handled. Admittedly, the Court competently helped sort out some vexsome legal nettles. But their accumulated interest had little sustainable impact outside the domain of global governance. This was never held against the judges, and was indeed of little consequence in the final appraisal. It was the wider social backdrop, the political tension, and the urgent humanitarian assets that made for the test-case whether a standing court of law could operate to the benefit of the world in the cauldron of the international arena. That test the Court passed gloriously. At San Francisco the call to abandon the idea or suppress the institution was never heard. Indeed, rather than merely continuing the scheme, the format was adjusted to ambitiously fit a new society and a truly global discourse

The Pragmatic Functioning of the Court

Sessions

One last element added to the predicaments of the Court. This concerned its Organization. It was the short-term toll the Court paid to its immediate success. From the first, the busy caseload of the Court took all parties by surprise. It was another token of the

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[163] As regards the relations between PCIJ and ILO, and the cases on the ILO see ibid., Ch. XXII.

essentially experimental phase of international adjudication. One may recall that in 1920 all sorts of devices (minority issues; minor arbitral disputes; appeals to national courts) had been suggested to possibly help the Court through its expected early years of drought. Its busy calendar was a main reason for the repeated revision of the Rules of Court that had first been drawn up in February 1922.[164]

The Sessions of the Court were a case in point. A single Annual Ordinary Session was foreseen, scheduled to open on 15 June.[165] The option was kept open to insert Extraordinary Sessions. In all, in the fifteen years up to the implementation of the Revised Statute and the last Revision of the Rules of Court in 1936 no less than twenty Extraordinary Sessions had to be summoned in addition to the fifteen Ordinary Sessions.[166] They were a challenge to judges who had arranged their lives and careers at home on the basis of an anticipated sojourn of, at the most two or three months at The Hague, and this, in turn, posed all sorts of riddles as we will see.

Housing

The rapid succession of cases and the ensuing expansion of the staff of the Court, and as of 1931 of judges, had repercussions in terms of lodgings.[167] In 1921 the administrating body of the Peace Palace, the Dutch Carnegie-Foundation (which resorted to the Foreign Ministry of the Netherlands) had carelessly invited the PCIJ without ever contacting or considering the interests of the first occupant and actual *raison d'état* of the building, the PCA. It put a strain on relations. Things grew worse when, as time went by, the PCIJ badly needed more rooms and public spaces that had been reserved for an increasingly idle PCA. It invited major reconstruction works ranging from the attic to the basement of the

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164 Ibid., Ch. III.

165 The date was chosen in tribute to the opening day of the 1907 Peace Conference.

166 No less than three Extraordinary Sessions were inserted in 1923, four in 1925, three in 1931.

167 On the Registry and Staff of the PCIJ see *World Court* (2022), II, Ch. IV.

Palace and finally prompted the tender for a new building on the grounds initially meant to accommodate the library stacks.[168]

Then another cause for unrest surfaced. When in 1923 the long-awaited courses of the Hague Academy were implemented, it transpired that the Carnegie Foundation had reserved ample housing for the newcomer in the main building. This, understandably, provoked the resentment of the cornered PCIJ and invited rumors that the League considered moving the World Court from The Hague. In the end, the Academy was banished to the new building. In all these stages, financial issues between the host government and the League strained the daily relations of all involved.[169]

The Riddle of the Quorum

It is now time to consider the personal aspect as a preface to assessing the Court as a collegiate body. The non-western Powers throughout 1920 had pressed their claim for fair representation. But from the outset the Court was embarrassed by the repeated lengthy absences of these "overseas" judges. As Henri Fromageot complained on the Revision Committee in 1929, the Winter Sessions of the Court hardly featured non-European judges. A few statistics may illustrate the above.[170]

Judge Antonio Sanchez De Bustamante y Sirven (1865-1951) missed the Preliminary Session in 1922 and, in all, missed twenty-four of the thirty-five Sessions of the Court up to his leave in 1935. Judge Epitacio Pessõa (1865-1942), who replaced Judge Barbosa in 1923, attended merely six of the sixteen Sessions until 1931. Chinese Judge Wang Chung-hui (1881-1958), who served on the first Bench as deputy-judge, was summoned in seven of the nineteen Sessions over these years to help make the quorum. On the Second Bench he served as regular judge and then attended eleven out of the sixteen Sessions. The record of the American judges is hardly better. Judge John Bassett Moore (1860-1947) missed six of the fourteen Sessions to which he was invited. Judge Frank Billings Kellogg (1856-1937) only attended three of the sixteen Sessions

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168 For the tense relations between the PCA and the Dutch Carnegie Foundation, and the cumbersome contacts of the League and the PCIJ with the Carnegie Foundation, ibid., Ch. V.

169 Ibid., Ch.V.2-4.

170 For a full survey see *World Court* (2022), II, Ch. VI.2-3.

during his term of office. No doubt, the presence of these judges was negatively affected by the lack of commitment to cases that were far beyond their sphere of expertise – or immediate interest.

The terms of home-leave these judges were entitled to exacerbated the predicament. As a consequence, the President often struggled to raise a quorum. The Installation Ceremony of the Court on 15 February 1922 was an ominous foreboding.[171] Three deputy-judges had to be called in. The problem soon became endemic. On various occasions hearings had to be unpardonably postponed for sheer lack of judges. On 13 December 1928, at the opening of the Fifteenth Session, the Court counted six regular judges and three deputies. Then a deputy-judge fell ill and hearings had to be postponed three times before, at long last, it was agreed to formally discontinue the Session. A postponement ensued of a full six months in the *Serbian Loans Case*.[172]

When the Court addressed the second phase of the lengthy *Free Zones of Upper Savoy Case*, on 23 October 1930, three of the judges who had attended the First Phase of the case proved unable to attend, whereas Judge Charles Evans Hughes (1862-1948) had resigned.[173] The Court, in other words, lacked a quorum. President Anzilotti, therefore, felt compelled to reconstitute the Court. He summoned three deputy-judges to help make up the required minimum Bench. It made the French judge *ad hoc* Eugène Dreyfus protest that the case had better be taken up afresh. In the end Parties accepted realities, also in view of the relative independence of the upcoming phase of the case from its earlier proceedings. The same predicament occurred the following year in the Third Phase of the case. The hearings scheduled for October 1931 had to be postponed to April 1932.

Not all incidents of the kind were taken lightly by Parties. The embarrassment caused constant complaints. The Powers protested they were entitled to a "consolidated" Bench – the principal difference in their perception between an arbitral panel and a standing court of law. At different stages of a case they faced a Bench in a substantially changed composition. It was one of the incitements to extend the Second Bench (1931-1939) from eleven to fifteen

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171 Ibid., Ch. II.3-4.
172 Ibid., Ch. XXXII.4.
173 Ibid., Ch. XXV.1.

judges. With two "overseas" members at most simultaneously on long-term leave, and even when making allowances for illnesses, eleven judges were virtually guaranteed and the quorum of nine seemed no longer at risk.

Role of Deputy-Judges[174]

Another inconvenience was that judges, apparently occupied with other commitments, attended just part of the proceedings or that "overseas" judges hurriedly took their leave in the (at times substantial) interval between the last sitting and the pronouncement of the Judgment or Opinion. In the *Polish Nationality Case* (1923) Judge John Bassett Moore left before the Judgment was read. He did the same in October 1927 in the *Mavrommatis Concessions Case*. On the occasion, the Brazilian judge Epitacio da Silva Pessõa likewise left before the final draft was made up, all the while submitting a Dissenting Opinion. In the *Pázmány University Case*, in December 1933, the Judges Kellogg and De Bustamante left early. The behavior was heavily censured by Parties and by decree of 17 March 1936 was formally banned. Pursuant to the Revised Rules, the names of judges who had not attended the full proceedings were stricken from the case. Also, no Statement or Opinion could be submitted in absence.

The dilemma had a major consequence: the never-anticipated importance of the institute of deputy-judges. Above we addressed the reservations entertained against the institute and the reasons for its implementation. It had been a concession on the part of the Great Powers to the demands of the small fry to increase their chances of representation on the Bench. Hardly any case before the PCIJ ever proceeded without the presence of one or more of these "junior judges", as some called them. To remain on the safe side, the institution of deputy-judge was (provisionally) retained after the expansion of the Bench up to fifteen as of 1931, for rainy days so to speak, to have spares in extreme circumstances. These deputies were never called in.

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174 Ibid., Ch.VI.3.

The Court as a Collegiate Body

Clashing Legal Views and Traditions

We turn to the work of the Court and its day-to-day functioning. In 1920 the members of the ACJ had found out to their embarrassment that they hardly attained agreement even on what were called the "axioms" or "general principles" of the law, or for that matter the sources the Court should apply. It made them easy prey for smart politicians who for decades had kept protesting that calling in the help of these "mere technicians" would only complicate affairs. Similar protests were raised against invoking the help of research institutes in the nomination of candidates for the Bench. It suggested that the wide divergence on how to interpret the law and the role of the Court were never hidden from politicians.

Above we discussed to what extent the different views on the role of the judiciary in the Civil Law and Common Law traditions played their part in these varying interpretations. They were epitomized in the Anglo-Saxon jury system, the different approach to the interrogation of experts and witnesses, and in the role of precedent. In 1920, the ACJ had given the predicament ample consideration. As in so many fields of the law, the continental and Anglo-Saxon representatives on the Committee had fallen out. They readily agreed on one point. The judges should, first and foremost, be men of high moral character. As Lord Phillimore had put it, what counted were loyalty, probity, patience, courage, and vision. Altamira had gone further: moral qualities mattered more than the professional ability in a judge. The overall feeling was that the judges should be immune to political pressure and national bias. They had to denationalize or, as Adatci once put it, to "deify" themselves. It seemed a wise perception of the Court's different conditions of operating from its national counterparts.

What were the professional qualifications they sought in these men? Hagerup considered it of the essence to recruit highly qualified judges of great experience. Lord Phillimore could not agree more. The Court should be a court of justice in the true sense. The judges should be veteran magistrates, who had held (or were considered up to par to) the highest judicial offices in their country. They should not necessarily be expert international lawyers. Rather, they ought to possess practical and theoretical abilities, in short, be learned arbitrators.

Administrators should also be accepted. But when Rafael Altamira y Crevea (1866-1951) implored that statesmen of great ability in international law should never be excluded,[175] Hagerup raised sharp protest. Governments should under no condition appoint persons not trained in the law, as was the case with the PCA. He insisted on a concise statement to that end. Administrative positions did not always require legal qualifications. Baron Descamps emphatically agreed. He wished to have administrators left out, to make sure that politicians were categorically excluded.

Thereupon Root called for judges with great judicial experience, men who were in the habit of thinking judicially and who possessed the wider vision that came with time and experience. De Lapradelle observed that in France a high judicial office, more often than not, was a political appointment that gave no guarantee of competence. He inquired whether the Committee would accept a legal expert without experience as a judge. Descamps replied in the affirmative. He insisted on the expertise of international law. Ricci-Busatti then raised another point. What they needed most, he argued, were judges with a veritable international spirit. De Lapradelle upheld his protest: experience as a national judge sufficed. Descamps disagreed: an eminent civil law expert would not necessarily be a good international judge. Experience in questions of international law was of the essence.

Fundamentally Divided Bench

The recapitulation of the above discourse is not without reason. To define the predicament was not to solve the problem, as the Court was to find out to its embarrassment. The World Court was an institution that embodied the lofty concept to make the rule of law count in international relations. It also was a college of human beings. These men had to jointly make the concept work and the ideal come true. The ambition proved difficult to implement. First, the Court was divided and as though of two minds. The clash of outlook and philosophy of the judges mirrored that within the ACJ and, as in 1920, seriously affected personal relations. The watershed

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[175] On Altamira, see Yolanda Camarra, "The Legal Conscience of a Universal Man: Rafael Altamira y Crevea (1866-1951)", in Morris, note 58 above, pp. 8-38.

was encountered in every case. The embarrassing setback opens our eyes to a captivating spectacle of trial and error, symptomatic of the experiment the Court essentially was. The judges became painfully aware of the predicament from the moment they tackled the drafting of the Rules of Court, in their Preliminary Session of February-March 1922.[176]

With the First Bench midway through its first term, two prominent Members and Presidents of the Court, Max Huber (President 1925-1927) and Dionisio Anzilotti (1928-1930) felt bound to mention the matter in public addresses.[177] Both urged *an esprit de corps* and conciliation to put an end to the endless battling. What the judges badly needed was a change of mentality, an open mind for compromise and respect for the views of colleagues. When Max Huber entered office, he implored:

> Sur l'un des vitraux de notre salle se trouve inscrit le nom de la vertu cardinale, de la *caritas* qui est patiente, qui ne s'aigrit point, qui est prête à tout croire, qui espère tout, qui supporte tout. C'est en première ligne moi qui ai besoin de faire appel à l›esprit de *caritas* de mes collègues ; les sentiments amicaux que vous m'avez toujours témoignés me donnent la certitude que je peux compter dans l'exercice de mes fonctions sur votre tolérance, sur votre bienveillance et sur votre appui.[178]

He identified two differences between national courts and the international Bench. Their colleagues in the municipal domain had an affluency of cases. The PCIJ saw few cases, but then each and every Judgment or Opinion counted in establishing the Court's repute. The PCIJ also faced specific challenges of its own, and notably so the acute impact of politics. The international judge should be aware of social relations. Finally, Huber insisted on what he saw as the two pillars of the international judicature: legal reasoning and moral justice.

Apparently, things did not change for the better. When Anzilotti opened the first Session of the Court under his Presidency, on 6 February 1928, he likewise felt the need to elaborate on the challenges the Court faced.[179] He appealed to his colleagues to create

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176 Note 170 above, Ch. II.2.
177 Ibid., Ch.XV.2-4
178 Ibid., Ch. XV.2.1
179 Ibid., Ch. XV.3; for his biography ibid., Ch. XVI.3.

an "esprit de corps" and, without further ado, called for reform to improve the Court, the quality of its Judgments and Opinions, and its prestige. It was characteristic of the Italian's position as a pillar of the institution. Anzilotti, by then, was a man of eminent experience, great learning, and undisputed authority. He was also a man of outspoken feelings. He acknowledged the high duties imposed on the Bench. Harmony was the prerequisite to success.

If Huber and Anzilotti are to be our guides, the first Bench of the PCIJ was like Mesopotamia, a land cut by two mainstreams. On one side stood the champions of civil procedure, who never saw the difference between the national and international planes and treated the Powers like suspects in their district courts. On the other end, far away, stood the connoisseurs of international relations, the expert diplomats and international lawyers who were all too susceptible to the sensibilities of the proud Powers. In confrontation were the judge and the scholar; the domestic perspective versus the global outlook. In short, what came together here, on top of two divergent legal traditions and the competition of judges and academics, was the divergent competences between courts that acted in the well-organized municipal sphere and featured clearly delineated domains of the *trias politica*, and the PCIJ that had to seek its way in the minefield of the "anarchical" international society. For all the good intentions of the framers of the Statute and the Rules, these accumulated handicaps posed major impediments to the proper functioning of the Court.

Huber's Assessment

Little of this fratricide broke out into the open, mercifully. But the friction was all too real and at the heart of the repetitive amendments made to the Rules of Court and, at a later stage, to the Statute. In Huber's final assessment the judges never struck a deal. The first ever judgment in the *SS. Wimbledon Case* had been a disaster and things never really got better. The best way perhaps to appreciate the watershed is to compare the judgments with the tenets voiced in the Separate and Dissenting Opinions. This instills in us the controversial nature of the instrument. Consistent patterns are noticeable, and the memoirs of Judge Max Huber, otherwise

jotted down half a century later, enable us to understand the real problem.[180]

By his own words, the Swiss jurist had been a reluctant candidate in 1921 and had actually stood agape at the political machinations and hidden agendas in the First General Elections. He critically reviewed the Preliminary Session of the Court in February 1922. Thus, he resented the presence of deputy-judges to fill the quorum, participate in the elections of the Presidency and Registrar, and considered their voice in the debate on the Rules of Court as an unwelcome precedent. He felt embarrassed at the overall tenor of proceedings, and notably so at the lengthy discourse on the type of robe the judges should wear and the love for spectacle and the ermine frill.

Huber linked the controversy to specific names. In the last resort these names are irrelevant. The judges in question represented the blood-types that were bound to clash. To illustrate the conundrum, within three years matters turned into a veritable power struggle. This is evident in the case of the Court's first President, Bernard Loder (1849-1935). Loder was a lawyer of high national repute. He had been on the Supreme Court from 1908 onwards. In his early days he had founded a law firm specialized in international maritime law. It was the counterpart in Rotterdam to the famous law firm of the Asser family in Amsterdam. Loder was close to Tobias and his son, Daan Asser. He joined them on the board of the Dutch Branch of the ILA and notably so in its offshoot, the *Comité International Maritime* (founded Antwerp, 1897). In the mid-1920s Loder was at the heart of the revival of Asser's *Conférences de La Haye.* He presided over its 5th and 6th) Sessions in 1925 and 1928. Within the ACJ he had made his mark on account of his advocacy of the access of private parties (as of unilateral applications) and by his opposition to the advisory role of the Court.

Loder was a man of outspoken views. He had presided over (or rather dominated) the Five Powers Conference of Neutral States in 1920.[181] Loder emphatically disliked Geneva and its

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[180] Ibid., Ch. XV.4 for a compilation of Max Huber's assessment in his *Denkwürdigkeiten* (1974; "Memorabilia"). For a biographical impression, see ibid., Ch. XVI.12.

[181] For a biographical sketch of Loder, see Freya Baetens and Veronica Lavista, in Morrison (ed.), *The League* (2022), Ch. 9, and Eyffinger, *World Court* (2022), I, Ch. XVI.17; for Van Eysinga see ibid., Ch. XVI.8.

concept of Advisory Opinions. Over the years he engaged in an irreconcilable vendetta with Van Eysinga, whom he took for an incompetent politician. Nothing he resented more than when, upon his retirement in 1930, his antagonist succeeded him on the Bench of the PCIJ. Endowed with many talents Loder, in short, was a formidable opponent. As Huber recalled, at Geneva Lord Robert Finlay (1842-1929), their *doyen d'age*, had been suggested for the Presidency of the Court. The officials of the League preferred an expert judge with some understanding of the political interests at play. They did not like the gavel in the hands of a representative of the Small Powers or an academic ideologist. In Huber's eyes, the British jurist would have made a great choice. Then the unexpected had happened. Finlay himself brought up the name of Bernard Loder as alternative. Keen as mustard, the Dutchman jumped at the opening. He was elected by a fair majority.

In Huber's estimation, it had never been a happy choice. Loder, to be sure, had been politically acceptable to all parties and boasted many qualities. He commanded both languages, was an expert judge on the domestic plane, and self-assured. On the debit side, again according to Huber, Loder hated academics and deeply mistrusted politicians. He wished to keep the worlds of politics and the law wide apart. More to the point, he was authoritative, full of temperament, and not susceptible to other points of view. He was, in a word, lacking the elasticity of mind required for the Presidency. Once his mind made up, he was persistent in pushing his views through at all costs. It recalls Scott's censure of Baron Descamps and that jurist's high-handed presidency of the ACJ. Indeed, as Huber intimated, the Dutch Foreign Minister, Herman van Karnebeek, had personally advised against Loder's candidature for the Presidency of the ACJ at the time. At all events, the Dutchman positively irritated Huber. For his part, Loder at some stage complained to Gaston Carlin in Berne that the jurist Huber had been utterly spoiled by diplomacy.

As Huber recalled, the discourse on the Rules of Court had first revealed the bipartition of minds. Along with Moore and Anzilotti, he stood against the civil procedure experts who, from their national, doctrinal backdrop insisted on the detailed definition of rules and regulations, without much understanding of international relations or of the psychology of the Powers. The gap was never bridged. Huber elaborated on the issue. The functioning of the PCIJ was dependent on the voluntary acceptance of its competence by the Powers. In practice a mere two or three dozen States at most

were concerned – and only six of them determined the veritable reach of the Court. It was a fundamental error of judgment to treat these sovereign Powers like suspects before the police judge. This was a matter of common sense. To consider the psychology of governments had nothing to do really with the "independence" of the judiciary. The agent of a Power simply was not the same as the barrister of a private party facing a civil court of law. The PCIJ had to meet the needs of the Powers to the extent that this rhymed with the basis of good justice, *viz.,* the equal treatment of Parties.

Huber soon got on intimate terms with Lord Finlay, Moore, and Anzilotti. Most times the three managed to make their views heard, except for the *Wimbledon Case,* where Huber felt they had failed to make an impact. The three of them readily agreed that the Court should never have accepted the *Eastern Carelia Case*. On the Drafting Committee of the *Tunis-Morocco Case* (1925) Huber found that most judges had in fact little inkling of the structure of the Covenant. He had an uphill fight in having his views represented in the final draft.[182] The incident was typical of the overall atmosphere in those early years. The exchange of views was chaotic, conflicting views were never harmonized, and the discourse was ineffective, the more so as only three judges commanded French or English as their mother tongue.

Huber and Anzilotti also felt that the elaborate formula of Deliberations might perhaps constitute a buffer against political infringement, but the debate among eleven jurists who represented different systems of law was tiresome and extremely time-consuming.[183] Last but not least, a collective Judgment called for compromise and never boasted the lucid reasoning and clear-cut opinion of a solitary judge. Moreover, fewer than half the judges properly understood international law. Most of them were civil procedure experts with no perception of the different conditions on the international plane. Then again, the international lawyers missed the judicial experience of a magistrate. The perennial friction and conflicting views were a considerable burden. The judges were intent on having their views prevail rather than to learn from their colleagues.

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182 Eyffinger*, World Court*, (2022), I, Ch. XV.4.3.

183 Ibid., II, Ch. XV.3 (Anzilotti); Ch. XV.4.3 (Huber).

Huber raised a last predicament. Haste was the common denominator of all Sessions, notably so in the critical stages of the Judgment. By then, most judges had booked their tickets and were ready to call it a day. Last minute changes were the order of the day. Somehow Registrar Åke Hammarskjöld managed to keep his cool and remain on top of affairs. Thanks mostly to the Swedish scholar, most Opinions and Judgments were fairly acceptable. Anzilotti once intimated to Huber that he thought it was sheer Providence. At all events, the texts were, on the whole, richer and more profound than the arbitral awards. Their reception was actually better than they deserved.

Perhaps the nadir was reached in the elections of 1924.[184] Discourse had been postponed time and again, also for the lack of interest of most judges in the position. Huber knew all too well that Loder was keen on being re-elected, but considered the Dutchman a too passionate and temperamental man for the position. He considered John Bassett Moore the most appropriate candidate, on account of his status as international jurist and his position as non-European and American. Moore consented on principle, but French Charles André Weiss (1858-1928) and Altamira had second thoughts: the first on account of Moore's American way of thought, the second from fear of an American preponderance.

Finlay had promised Anzilotti to approach Loder and advise him to step down. The British jurist, apparently, failed to convince the Dutchman. As a consequence, the Court came ill-prepared to the Elections. In fourteen successive rounds Loder and Moore each gained four votes. Midway the second day, with twenty rounds passed, the deadlock was apparent. Thereupon Moore proposed to withdraw on the condition that Loder did the same. They left the room together but never struck a deal. Loder wished his re-election with a passion. Upon his return in the room, Moore hurriedly called on Huber to volunteer his candidature. At the first vote Huber received the absolute majority. Loder felt intensely offended and actually exploded. His eyes begged Huber to decline, while Hammarskjöld and Pessõa encouraged him to accept. Huber claimed two hours adjournment. It was an uproar. The "overseas" judges had pocketed their tickets and were all set to leave. In the break, Huber met Mrs. Moore in the gardens. She sincerely hoped

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184 Ibid., Ch. XV.4.6.

her husband was spared the ordeal. By then, Huber comments, the spouses of judges had all come to hate the Dutch climate.

Altamira and Pessõa kept pleading with him, but Huber, an intuitive judge, feared that his limited rational and analytical powers might fail him in the position. In the end he accepted conditionally. The atmosphere in the Bol Room was like a mortuary. Loder took it as a personal affront to lose his crown on the very day of his 75th birthday and was fuming. Upon his election Huber was the youngest among the eleven judges, not even fifty years of age, but his Swiss, neutral background made him acceptable to both power blocks.

Shortcomings of the Discipline

Huber's statement, clearly, is coloured. Like all his colleagues, he was in his appraisal the product of his legal training and cultural backdrop. The above report, therefore, is above all instructive in demonstrating the experimental nature of the whole undertaking When, in 1907, at the stone-laying ceremony of the Peace Palace midway during the Second Hague Peace Conference, the eminent French delegate, Paul d'Etournelles de Constant, had launched the idea to have all delegations contribute raw materials or objects of art representative of their national tradition to their intended "Temple", the forty-five Powers (for once) had all readily agreed.[185] They assembled precious artefacts that stunned the world, as they would do again at Geneva twenty years later. When the Peace Palace was opened in 1913, the censure was unanimous. There was no harmony of style or unifying concept to be identified.

It was the same with the Bench of judges that assembled at The Hague ten years later. They represented the best their nations had on offer, but they hardly made a "dream team". If a "guilty party" should be designated at all, it is perhaps the discipline as such. In 1920 the ACJ, in the wake of full fifty years of research within IDI, ILA, IPU, and in spite of a wealth of doctrine, had found it difficult to achieve common ground on any issue of organization, jurisdiction, or procedure of the World Court. The discourse of six months in many assemblies and committees in 1920 apparently had

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[185] The French diplomat made his appeal on the day the foundation stone of the Peace Palace was laid in a public ceremony on 30 July 1907.

not brought the world of law any nearer to solving the dilemma or, worse, to identify the crux in the concept that was at the root of the institution they applauded *univoce*. It was left to the judges to solve the riddle and, as Huber and Anzilotti readily agreed, the key was collegiality, the willingness to open up to the legitimacy of alternative views. Legal expertise had little to do with it.

The judges in the end did identify the problem, and, to their credit, did not acquiesce in deadlock. Their acknowledgement of lacunae and the lack of efficiency accounted for their never wavering efforts to revise the Rules of Court. The speedy change in the procedure of Advisory Opinions was another clear indication of the ready adjustment to (political) realities. The fair understanding of the experimental phase of the project underlay the official request, first initiated by France as early as 1925, to revise the virtually unimpeachable Statute.

By the same token, for a fair appraisal of the full reach of the debate on the Bench during these two dramatic decades, one cannot ignore another forever questioned precept, the right of judges to publish their personal or collegial opinions of reserve or dissent.[186] From the first, fears had been voiced that these voices of dissent might impair the prestige of the Court and affect the authority of its Judgments and Opinions. However, the contrary is so. In exposing the full canvas of the discourse, the balancing act of law schools, the balance of *lex lata* and *lex ferenda*, and the progressive harmony of the discipline, these contrasting positions are of value for the interpretation of the Court's true mission.

In spite of internal frictions, the First Bench was widely praised by contemporary observers for its courage to speak up on fundamental matters of law, regardless of public sentiment. The years of promise from the Locarno treaties to the Kellogg-Briand Pact (1925-1928) were the heyday of public backing for the institution. The Second Bench, which functioned in a time-frame that had lost most of its moral, political and economic bearings, perhaps wisely ventured less on this treacherous path of confrontation of the Powers.

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[186] Eyffinger, *World Court* (2022), II, Ch. XI.6.4.

The Assessment of a Century

With seventy-five years on its balance-sheet and a stunning portfolio of cases, the relevance of the Court is never at issue. In the opening days of the hostilities with the Russian Federation during the centenary of the World Court, Ukraine lodged an application with the Court.[187] Even "Sleeping Beauty, the PCA, has entered on a second life-span and in all provinces expanded its early ambitions. Has the dream of the ancient philosophers come true at last? The short answer would read: Not Quite. Not to discredit the accomplishments of our times, the image of the Ouroboros does not quite apply and the idea has not run full circle yet. At the core of the original ambition were the concepts of the Great Commonwealth of Man and the Assembly of the Peoples. The first idea may perhaps be called man's dearest dream – but in this sphere one does perhaps best to leave well alone. The second aspiration, the representation of the Peoples, came close to being realized in 1920. Nonetheless, at the time, expert diplomats like Lord Robert Cecil were probably wise in suggesting to be patient and give the Court time to do its beneficial work. Let us, in conclusion, briefly recapitulate our steps.

The history of the World Court went through four stages. The first was the Conceptual Stage. It unrolled in an amply documented process of increasing awareness of the benefits of the institution that is retraceable over millennia. The second, Constitutional Stage was marked by the clear definition of the idea and the concerted quest for the proper formula. This process covered half a century (1870-1920). It unfolded as a corollary of the ambitious undertaking to institutionalize, codify, and organize the discipline of international law. In the latter phases of this second stage, and on the spur of World War I, the concept of the Court was matched to another venerable ideal, that of a World Organization. It was a critical choice and had far-reaching consequences.

The Third Stage concerned the Implementation of the Court (1920-1946). It only covered a quarter century. This brief but

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[187] On 26 February 2022, Ukraine instituted proceedings against the Russian Federation concerning a dispute relating to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and requested the Court to designate interim measures of protection.

dramatic span of time saw mankind, the World Organization, and the Court descend from the highest pinnacles of hope to the nadir of disillusion. Still, the ambition was never abandoned. On the contrary, in 1946 both the League and the Court were rekindled in an upgraded version. This fourth phase of Crystallization has spanned full three times the period given to the PCIJ – in uninterrupted flow. The benefits reaped by the world and the discipline have been substantial. The ICJ has brought the international judicature onto a different level. Its role and record have been pivotal to the dissemination of the formula and the experience gained has been instrumental to the constitution of the wide range of international courts and tribunals that grace our day and age.

One major process of growth may be highlighted. The Benches of the interwar period duly featured all legal traditions of the world. But this accumulated, if not necessarily concurrent, wealth of expertise was applied to political disputes and legal riddles of a limited reach. The endeavours of the PCIJ nearly exclusively addressed the self-inflicted wounds of the incorrigible European Powers. It was only in its Fourth Stage, with the coming into being of the United Nations, that the World Court, for all intents and purposes, could be said to fully reflect the original ideal of the Court to serve global ends.

Even the ICJ as we know it in our times does not quite do justice to the original ideal. That idea touched the Assembly of the Peoples. The World Court covers the globe, but not on all social levels. It facilitates the Powers, not the Peoples. It covers the public, not the private domain. As we recall, in 1920, in the constitutional phase of the Court, critical commentators saw this reduction of spheres, which at the time was a deliberate choice, as misguided, as a diluting of the ideal and a forsaking of the institution's high potential. Time has only multiplied their voices. Perhaps no development in the discipline over the past half-century has been so perplexing, challenging, and stimulating to the student of the law as the gradual transition of the global society towards a Commonwealth of Man.

In a steadily accelerating process the barriers and boundaries between the national and international planes and between the public and the private spheres are tumbling down under the pressure of accelerating global economic and ecological processes. Former parameters need reassessment. The forever cherished ideal is effectively drawing near and the high aspiration of ages at long last approaching its fulfillment – and this almost in spite of man.

Not sound reason, not the dawn of wisdom, not the acceptance of theory, not even growing solidarity have brought man to this crossroads. Unstoppable social processes triggered by self-interest have brought man to a juncture in time that requires the utmost from all not to put it all at jeopardy. Recent events amply demonstrate the fragility of the global canvas.

Ours, therefore, is an unfinished story. One can but speculate on the kind of reforms the international judiciary will need and will be allowed to implement by the legislative and executive powers so as to consistently cover the full canvas of needs on all social planes. It lends some urgency to the review of the first century of the World Court. Not to be caught wrongfooted once again and to be overhauled by external circumstance, the appraisal of former experience and the critical review of the wandering ways of the concept through trial and error are imperative as prerequisites to the assessment of future parameters. The first step in that process is the verification of the rationale that made the Court's pioneers embrace the concept in the first place.