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"There will be no World Court if this . . . cannot be made one and whether it is to be, in the fullest sense, a World Court, depends upon our own action." HUGHES

"Either the United States will join the World Court now established . . . or we will not be a party to any." KELLOGG

I

INTRODUCTORY

The Permanent Court of International Justice[1] was expressly provided for in the League of Nations Covenant (Article XIV) of 1919 and the "Statute" creating it was drafted by an advisory committee of the League, meeting at the Hague, and opened for signature in the following year. By 1921 the ratifications of twenty-eight states put it into effect and the Court was formally opened, with a full quorum of judges, on February 15 (Bentham's birthday) 1922. For nearly twenty years it continued to function and its sessions were suspended only by the presence of the Nazi invaders of the Netherlands.

It was more than a year from the Court's opening session before United States authorities moved toward adherence. On February 24, 1923, the Protocol of signature was transmitted to the Senate by President Coolidge with a letter from Secretary of State Hughes asking favorable action. It was nearly three years before a vote was taken and

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[1] Popularly known as the "World Court" to distinguish it from the so-called Permanent Court of Arbitration. See infra note 17.

then only after a motion to close the debate had been adopted. By a margin of seventy-six to seventeen (three not voting) the Senate on January 27, 1926, voted[2] to "advise and consent to adherence"; but embodied in its resolution five reservations[3] and three provisos. "The substance of four of the reservations had been proposed by Secretary of State Hughes" and were all accepted by "a conference of signatories of the original court protocol at Geneva in 1926"; but the Senate had added a fifth reservation of two parts, concerning "advisory opinions." The first part was accepted by the conference; "but as to the second . . . they set certain conditions."[4] The first proviso permitted "recourse to the Permanent Court . . . only by agreement thereto through general or special treaties."[5] This would have been a very serious obstacle to our government's utilization of the Court;[6] but it would not have prevented adherence from taking effect.[7]

That result might have followed from another clause precluding

[2] 67 CONG. REC. 2824-2825 (1926).

[3] This was the method which had been used successfully to reject the Versailles Treaty and the League of Nations. Former Senator James E. Watson in his book As I KNEW THEM quotes Senator Lodge as telling him, "I do not propose to beat it [the Treaty] by direct frontal attack but by the indirect method of reservations." See NEW YORK TIMES MAG., Aug. 20, 1944, 14 at 38:3.

[4] See Hudson, "The World Court—As Things Now Stand," 21 A.B.A.J. 144 at 145 (1935). The second part of Reservation 5 provided "nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest." 67 CONG. REC. 2825 (1926).

The Protocol of Sept. 14, 1929 "accepted the special conditions attached by the United States in the five reservations mentioned above to its adherence to the said protocol upon the terms and conditions set forth in the following articles. . . ." Art. 5 required the Secretary General of the League of Nations to "inform the United States of any proposal before the . . . League for obtaining an advisory opinion"; the United States Government's objection was given the force of a vote and its amicable withdrawal, in case its objection was overruled, was provided. 25 AM. J. INT. L. (Supp.) 58-61 (1931).

[5] See the Resolution, 67 CONG. REC. 2825 (1926).

[6] ". . . To accept the jurisdiction of a World Court, with the reservation that a *compromis* requiring the consent of two-thirds of the Senate must precede the submission of any dispute, would not . . . confer obligatory jurisdiction." Corbett, "World Order—An Agenda for Lawyers" 28 AM. J. INT. L. 207 at 216 (1934).

". . . Here once more was clearly presented the Senate's demand to exercise its constitutional prerogative of allowing no dispute to be referred by the Executive to the Court without an approving vote in each case by the Senate." WIGMORE, GUIDE TO AMERICAN INTERNATIONAL LAW AND PRACTICE 294-295 (1943).

". . . it is now in actual practice more difficult to secure international arbitration than . . . in the early days of our independence." MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS 86 (1924).

[7] ". . . it would seem to constitute merely a declaration of American constitutional policy." Hudson, "The United States and the Permanent Court of International Justice" 20 AM. J. INT. L. 330 at 334 (1926).

signature to the Protocol "until the powers signatory to such protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings" [8] had the sufficiency of the acceptance ever been questioned. Apparently it had not been; for the executive branch proceeded on the assumption that the Conference of Signatories accepted the "reservations and undertakings."[9]

Such being the case was it necessary to resubmit the entire question of adherence to the Senate which had voted overwhelmingly to adhere and had not required resubmission? Should not the Senate have been asked at most for a simple resolution accepting the condition, which could, (and the results indicate, would) have been voted by a majority?[10] For the requirement in the Constitution, Article III (3), is for "advice and consent . . . *to make treaties*"; and a resolution accepting a condition is hardly a "treaty." Other measures may be adopted or repealed by a majority vote and the ratification of a treaty is not impaired by the passage of a resolution purporting to interpret it.[11]

However, the State Department seems to have advised President Hoover differently; for, after waiting "a year and a day" from the date of signature, he transmitted to the Senate "for its consideration and action" the same three Protocols,[12] thereby tossing the whole question back to the Senate which, after waiting until January 29, 1935, voted fifty-two to thirty-six for the Protocols.[13]

[8] 67 CONG. REC. 2825 (1926).

[9] "On December 9, 1929, by direction of President Hoover, three Court Protocols were signed on behalf of the United States—(1) the original Protocol of Signature of December 16, 1920; (2) the United States Accession Protocol, of 1929; and (3) the 1929 Protocol on Revision of the Court's Statute." Hudson, "The World Court—As Things Now Stand," 21 A.B.A.J. 144 (1935) mentioned supra note 4.

[10] "The 1929 Protocol on American Accession constitutes an out-and-out acceptance of the first four of the Senate's reservations, and of the first half of the fifth reservation. On this point, there can be no warranted doubt. It clearly constitutes also an acceptance of the second part of the Senate's fifth reservation 'upon the terms and conditions set out,' and these terms and conditions leave the United States adequately and abundantly protected in its special position. Mr. Root has explained that the United States can at any time prevent any request for an advisory opinion from being considered by the Court. Moreover, the United States can at any time denounce the whole scheme and withdraw from supporting the Court." Id. at 145.

E.g. the resolution admitting (annexing) Texas was adopted by less than a two-thirds vote. So was the resolution annexing Hawaii. See BEARD, BASIC HISTORY OF THE UNITED STATES 189, 344(1944).

[11] Fourteen Diamond Rings v. United States, 183 U.S. 176 at 180, 22 S. Ct. 59 (1901) where such a resolution was declared "absolutely without legal significance on the question before us."

[12] 74 CONG. REC. 504 (1930); 25 AM. J. INT. L. (Supp.) 49 (1931).

[13] 79 CONG. REC. 1147 (1935).

As the yea vote was less than two-thirds, the general assumption has been that it rejected the original 1920 Protocol;[13a] but did it? Adherence, it must be remembered, had been overwhelmingly voted in 1926 and the Supreme Court had meanwhile decided in a comparable case[14] that such action, once taken, would be irrevocable. Nor did the 1935 Resolution purport to revoke that of 1926. Moreover the 1935 yea vote gave a substantial majority, (sixteen), for all three Protocols,[15] including that of 1929 which included the acceptance of conditions relating to the fifth Reservation (second part) and that alone under the 1926 vote stood between the Senate and the Conference of Signatories.

Nevertheless, the 1935 vote, under the interpretation given it by the State Department, ended, for the time being and after twelve years of effort, one of the saddest chapters in American history. Here was an opportunity which mankind had awaited from the dawn of civilization and a small minority of the Senate was able to treat it as a phase of petty "patronage."[16] And while other nations were utilizing, and profiting by the World Court ours has been compelled to "muddle through" with no better agency than the so-called "Permanent Court of International Arbitration," which is not a "court" at all in the conventional sense, as it merely provides boards of arbitration *ad hoc*.[17]

[13a] See HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 236 (1943).

[14] United States v. Smith, 286 U.S. 6, 52 S. Ct. 475 (1932). Hence the vote of Jan. 29, 1935 did not effect revocation.

[15] 79 CONG. REC. 1147 (1935).

[16] WIGMORE, GUIDE TO AMERICAN INTERNATIONAL LAW AND PRACTICE 295-296 (1943).

[17] During the decade, 1922-1932 "only three cases were referred to such tribunals, and in two of these the parties included the United States . . . the comparison [between it and the World Court] would seem to indicate beyond dispute that it is not adequate for meeting the needs of this century." Hudson, "The Permanent Court of International Justice," 2 IDAHO L. J. 22 at 26 (1932). In his latest work the same author observes that "the fact that the national groups in the Permanent Court of Arbitration were given the function of nominating candidates in the election of members of the Permanent Court of International Justice has tended to assure the continuance of the Permanent Court of Arbitration." HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 36 (1943).

But if all these groups accept the former's compulsory jurisdiction, and only a few have not, that slender ground for retaining the latter will disappear. On Feb. 24, 1944, however, the President approved the designation of Henry L. Stimson and Michael F. Doyle as members of the panel.

The Permanent Court of Arbitration "is not a deciding tribunal, but a list of names, out of which the parties in each case select, and thereby constitute the Court." OPPENHEIM, INTERNATIONAL LAW, 3d ed., § 476b (1920).

". . . there was in the decisions of the Permanent Court of Arbitration neither the necessary tradition of continuity, with the resulting advantage of relative certainty, nor the assurance that the law administered by it would be good law. There was no assurance

Meanwhile proposals have been made for a Western Hemisphere international tribunal. At the special Inter-American Conference (Buenos Aires, 1936) such proposals were all referred to the Pan-American Union. Its report was duly made but the Lima Conference went no farther than to declare an alleged intention to establish such a court. Meeting simultaneously with that conference was the Inter-American "Committee of Experts" (created by the Montevideo Conference, 1933) which considered the so-called "Mexican Peace Code" providing, *inter alia*, for "an Inter-American Court of Justice to sit in two bancs of eleven judges each, one from each American country, including Canada."[18] The Committee, however, "submitted a redraft." That such proposals have made little headway has been partly due to the desire not to interfere with the Permanent Court of International

that the decisions of the arbitrators chosen from the panel called the Permanent Court of Arbitration would serve a purpose other than that of disposing of the dispute between the parties. They did not, in a word, with sufficient authority develop and clarify international law." LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 3 (1934).

Historically this original Hague tribunal may be compared to that established under our Articles of Confederation. Indeed, the resemblance is so close, both in composition and procedure, as to suggest that the latter was the former's model:

"The United States in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority or lawful agent of any state in controversy with another, shall present a petition to congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive authority of the state in controversy and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, congress shall name three persons out of each of the united states and from the list of such persons, each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as congress shall direct, shall, in the presence of congress, be drawn out by lot and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause, shall agree in the determination." Article IX of the Articles of Confederation, July 9, 1778, HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION 536 (1941).

The case of Pennsylvania v. Connecticut (1782) involving sovereignty of the Wyoming Valley was adjudicated under this clause in 1783. See 6 AM. J. INT. L. 316 at 338 (1912).

[18] See Fenwick, "The Inter-American Conference for the Maintenance of Peace," 31 AM. J. INT. L. 201 (1937); Finch, "Eighth International Conference of American States," 34 id. 714 (1940); Borchard, "The 'Committee of Experts' at the Lima Conference," 33 id. 269 at 280 (1939).

Justice;[19] but the project is likely to encounter other objections if revived after the present conflict.[20]

II

THE WORLD COURT'S ACHIEVEMENTS, PRESENT AND PROSPECTIVE

1. *It has Functioned Efficiently and with Distinction for over a Score of Years*

a. *Consensus of Expert Opinion*

Three eminent (pre-Hitler) German publicists—Stauffenberg,[21] Lauterpacht[22] and Schwarzenberger[23]—whose opportunities and qualifications were unusual, have analyzed and appraised the Court's work

[19] At Buenos Aires "the chief division of opinion was between those who believed that an American court might command greater confidence on the part of the American Republics and might be much more readily accessible, and those who felt that the proposed court would duplicate the functions of the Permanent Court of International Justice and detract from its authority." Fenwick, "The Inter-American Conference for the Maintenance of Peace," 31 AM. J. INT. L. 201 at 209 (1937).

[20] An Inter-American Court would necessarily be created by the joint action of twenty-one states, all but one of which (the United States) are Latin American. A panel of judges which should fail to reflect this preponderance would most probably not satisfy Latin America. The Mexican proposal, e.g., would provide twenty Latin American judges and only two others; Panama with little more than half a million population and Paraguay with less than one million would have equal representation with the United States (138,000,000). That such a proposal would encounter fierce opposition from the isolationists, is evident from the debates preceding the final vote. See e.g. the speech of Senator Trammel of Florida just before the vote was taken on Jan. 29, 1935. 79 CONG. REC. 1145 (1935). Cf. reports of the closing session of The Inter-American Bar Association, Aug. 1, 1944.

[21] ". . . the vigorous way in which the Court is fulfilling this task . . . [the development of international law] clearly appears even from the few rulings we have mentioned." Stauffenberg, "What the World Court Has Done So Far," 7 TEMPLE L. REV. 315 at 328 (1933).

[22] ". . . this Permanent Court of International Justice at the Hague has—independently of its primary purpose of being the supreme instrument of peace—proved a powerful factor in developing international law." LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 24 (1934).

". . . The Court as an institution is nothing else than the spirit of its pronouncements from its very inception. It is not in the long run a permanent court so far as its composition is concerned. Members of the Court come and go. The present Court includes only a very small proportion of judges who served on the Court elected by the Assembly and Council in 1921. The permanence of the Court is a tendency and a method of approach transcending the continuity of its membership. It is comforting to know that that spirit is not divorced from the progress of international life, but that it has been an agency of its integration and development." Id. at 88.

[23] "If this survey has shewn that the Permanent Court has, practically unobserved, made an essential contribution to the development of a new branch of international law,

most favorably. A well known English writer[24] on international law finds "Permanent Court decisions," including advisory opinions, "of binding authority (in English courts) . . . in cases relating to treaties" and "of high persuasive authority in . . . questions of customary international law." Highly favorable also has been the weight of expert professional opinion on this side of the Atlantic.[25]

it has fulfilled its purpose." Schwarzenberger, "The Development of International Economic and Financial Law by the Permanent Court of International Justice," 54 JURID. REV. 21 at 99 (1942).

[24] Jenks, "The Authority in English Courts of Decisions of the Permanent Court," 20 B. Y. B. INT. L. 1 (1939), who finds the Court, including its advisory opinions, generally authoritative and controlling even over contrary expressions of the national courts.

[25] "The Permanent Court of International Justice is the culmination of a long evolution in the field of international law. Fifty-three states have become parties to the Statute, and practically all of the states of the world have conferred jurisdiction on the Court. It should be strengthened and accepted as a universal instrument for the final judgment of those disputes which lend themselves to legal settlement. More than five hundred international treaties have been concluded, providing for the Court's jurisdiction, and most of them are now in force. To preserve this vast structure of treaty law, continuity must be preserved and the Court maintained in all its authority." SHOTWELL, COMMISSION TO STUDY THE ORGANIZATION OF PEACE, 4th rep., 15 (1943).

"The extensive use which has been and is being made of the Court is at once a proof of the need for such an agency in the international affairs of our time and an indication of the contemporary estimate which is placed upon its value. . . ." Already in 10 years, the Court has made a significant contribution. Hudson, "The Permanent Court of International Justice," 2 IDAHO L. J. 26 (1932).

"All in all the World Court has decisively established itself. Indeed it is the one indisputably serviceable contribution to international order promoted by the reaction from the great [World] War [I]." Rogers, J. G., 7 ROCKY MT. L. REV. 227 (1935).

"The record . . . beginning with the resolution adopted by the New York State Bar Association in 1921, through five resolutions adopted by the American Bar Association in as many different years, . . . is an unbroken [one] of approval . . . expressed at every stage of the public discussion . . . [of] the several proposals for American participation. . . . The state bar associations of no fewer than 32 states . . . have expressed themselves, as have many local bar associations. . . ." HUDSON, IN RE THE WORLD COURT, A.B.A. Publication, 3-4 (1934).

". . . So far as can be ascertained from published reports, in all of these years no bar association in the United States has adopted a resolution opposing American support of the Court." IN RE THE WORLD COURT, A.B.A. Publication, 4 (1934), containing a list of 150 resolutions (many of which are reprinted) relating to the Court.

"In supporting the World Court . . . we lose nothing that we could otherwise preserve; . . . we enhance rather than impair our ultimate security; and we heighten the mutual confidence which rests on demonstrated respect for the essential institutions of international justice." C. E. Hughes, "The World Court as a Going Concern," 16 A.B.A. 151 at 157 (1930). Cf. Kellogg, "The World Court," 14 MINN. L. REV. 711 at 723 (1930). See also address of John W. Davis, N. J. ST. BAR ASSN. Y. B. 137 (1930-1931); Battle, "The United States and the World Court," 15 VA. L. REV. 643 (1929).

b. *Some of its Contributions to International Law and Order*

(1) *Exposition and Exegesis*

(a) *Clarification.* "The Court . . . is . . . an organ of international law," said Judge Anzilotti[26] and the former has consistently treated the latter as a legal system in the making and not as a mere collection of doctrinaire opinion.[27] And if at times, the Court has seemed to follow the "positivistic tradition,"[28] a closer analysis reveals that the "free will of states" from which international law is said to "emanate"[29] may be manifested by "usages generally accepted."[30] The Court has also been watchful to see that the field of international law is not curtailed.[31]

(b) *Canons of interpretation.* The most extensive phase of the

[26] Danzig, Legislative Decrees, 3 World Ct. Rep. 513 at 534 (Ser. A/B, No. 65, 1935). Cf. Diversion of Water from the River Meuse, 4 World Ct. Rep. 172 at 232 (Ser. A/B, No. 70, 1937) and citations.

"The very existence of the Court, when coupled with the substantial measure of obligatory jurisdiction conferred upon it, must have proved a factor of importance in maintaining the rule of law . . . the Court has consciously and, with few exceptions, consistently fulfilled its . . . function . . . the developing of international law." LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1, 2 (1934). Cf. id at 24.

[27] "For the first time in modern history there has functioned an international institution of unprecedented authority able and competent to probe the legal value of some of the traditional pretensions. In the atmosphere of diplomatic negotiations and conferences these claims are high-sounding, uncompromising, clad in the garb of the dignity of States, supported if necessary by a passage extracted from a work of a publicist. . . . Prior to the establishment of the Permanent Court there was no agency to disprove them and to show by clear and final decisions that they were one-sided, arbitrary, and contrary to law. Such an agency has necessarily been found in the Court." Id. at 104-105.

[28] Steiner, "Fundamental Conceptions of International Law in the Jurisprudence of the Permanent Court," 30 AM. J. INT. L. 414 (1936). But cf. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 82 (1934), where he says that Art. 38 of the statute "sounded the death knell of rigid positivism in international law."

[29] The S. S. Lotus, 2 World Ct. Rep. 20 (Ser. A, No. 10, 1927).

[30] Such a usage "is one generally accepted by the generality of states; not by every single State. . . . The Judgment in the *Lotus* case affords less comfort than is commonly assumed to the orthodox doctrine of State sovereignty." LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 103-104 (1934).

[31] Thus nationality is not solely a subject of domestic jurisdiction, as contended by France in its dispute with Britain over the application to British subjects of the nationality decrees of 1921, promulgated by the former in Morocco and Tunis. The Court took jurisdiction of the case as a proper subject of international law. I World Ct. Rep. 143 at 161-162 (Ser. B, No. 4, 1923).

In the Turkey-Iraq boundary case, I World Ct. Rep. 720 at 742-743 (Ser. B, No. 12, 1925), the Court declined to hold that agents of the parties litigant must be counted in order to constitute the unanimity required of the Council in calling for an advisory opinion.

Court's work thus far has been exegetical—the interpretation of public instruments and other official acts. In performing it the Court has applied, and in some instances extended, interpretative canons long used by the national tribunals. Foremost among these is the rule that the intention or design of the parties must govern;[82] but along with it, the court's work has shown, "full use can be made of another hardly less important principle . . . *res magis valeat quam pereat*"—where two constructions are possible, that will be adopted which will make the instrument most effective.[83] *Contra proferentem*—the rule that an instrument must be construed most strongly against the maker, was applied in favor of certain bondholders.[84] *Pacta in favorem tertii*—this is a canon common to both Romanesque[85] and Anglican[86] legal systems in construing agreements in which another than the immediate parties may claim a share. The Permanent Court seems to have been the first to recognize and apply it in the international field.[87]

(c) *Treaties, etc.* Treaty making, said the Court,[88] "is an attribute of . . . sovereignty," not "an abandonment" thereof and "a treaty . . . creates law as between the States which are parties to it."[89] The first

[82] International Labor Organization, 1 World Ct. Rep. 122 at 129 (Ser. B, Nos. 2 and 3, 1922); Turkey-Iraq boundary case, id. 720 at 732, 736 (Ser. B, No. 12, 1925); Danzig Courts' Jurisdiction, 2 id. 236 at 247, 249 (Ser. B, No. 15, 1928).

[83] LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 69-70, (1934).

[84] In the Matter of the Brazilian Bonds, 2 World Ct. Rep. 404 at 421 (Ser. A, No. 21, 1929).

[85] See Williston, "Contracts for the Benefit of a Third Person in the Civil Law," 16 HARV. L. REV. 43 (1902).

[86] 2 WILLISTON, CONTRACTS c. 14 (1936).

[87] The Free Zones of Upper Savoy and the District of Gex, 2 World Ct. Rep. 448 at 464-465, 479 (Ser. A/B, No. 46, 1930).

". . . The objection to *pacta in favorem tertii* is merely another expression of theory, rejected by the Court, that limitations of State sovereignty must be interpreted restrictively. It is also a manifestation of the opposition . . . [to] the possibilities of international legislation implied in the recognition of [such] *pacta* . . . [which] smooths the way for what has been called international settlements, by making possible the creation of legal rights and obligations with an effect transcending the scope of the original parties to the treaty. International settlements are incipient international legislation." LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 99-100 (1934).

But see Free Zones of Upper Savoy and the District of Gex, 2 World Ct. Rep. 448 at 469, 479-480, 547 (Ser. A., No. 22, 1929).

[88] The S. S. Wimbledon, 1 World Ct. Rep. 163 at 175 (Ser. A, No. 1, 1923). Cf. Exchange of Greek and Turkish Populations, id. 421, (Ser. B, No. 10, 1925).

[89] German Interests in Upper Silesia, 1 World Ct. Rep. 509 at 529 (Ser. A, No. 7, 1926).

"The engagement in the third paragraph is not a mere moral obligation, it is a

subject specified in the statute fixing the Court's compulsory jurisdiction is "the interpretation of a "treaty"; [40] its first official pronouncement [41] was an advisory exercise of such jurisdiction and "the bulk of . . . [its] work . . . has been devoted" thereto.[42] Nor has this been confined to treaties referred to it for interpretation.[43] The experts are quite unanimous in commending the manner in which this function has been exercised.[44]

(d) *Other Official Acts.* But treaties are not the sole subjects of exegesis by the Permanent Court. It has also exercised its jurisdiction

part of the treaty . . . by which the parties are bound." Oscar Chinn Case, 3 World Ct. Rep. 418 (Ser. A/B, No. 63, 1934).

[40] Art. 36 (a).

[41] 1 World Ct. Rep. 113 (Ser. B, No. 1, 1922).

[42] LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 80 (1934).

[43] The Court "has repeatedly expressed the opinion that it had jurisdiction to interpret treaty provisions other than those which the clause conferring jurisdiction authorized it to interpret if this was necessary for the fulfillment of its task." Id. at 59, citing Mavrommatis Palestine Concessions, Ser. A, No. 2 at p. 31 (1924) and German Interests in Polish Upper Silesia, Ser. A, No. 6 at p. 18 and No. 7 at p. 25 (1925, 1926).

[44] "The difference between treaty interpretation by national tribunals as distinguished from international courts . . . lies in the fact that seldom, if ever, do the national courts have as their litigant parties the respective contracting parties to the . . . treaty. . . . This . . . has allowed the court to construe particular clauses or provisions, in the event of doubt or indefiniteness, more liberally than is the practice of the International Court, where the strictest and finest . . . niceties of interpretative distinction are mandatory or else serious damage or inequality of rights will result to the advantage of one of the contracting powers." Graske, "Some Aspects of Treaty Interpretation in the United States—1930-1935," 10 TULANE L. REV. 246 at 257 (1936).

See also note 31 supra; Hyde, "Interpretation of Treaties by the Permanent Court of International Justice," 24 AM. J. INT. L. 1 (1930).

An early instance of liberal interpretation is found in the Court's advisory opinion No. 12, cited supra note 31, involving the Turkey-Iraq boundary where article 5 of the League of Nations Covenant, requiring "the agreement of all members represented at the meeting" for "decisions of the assembly or council," as not including the parties litigant.

But in construing the Versailles Treaty (pt. XIII) the Court gave to the term "industry" as there used a meaning broad enough to include agriculture. Re International Labor Organization, I World Ct. Rep. 122 at 135 (Ser. B, No. 2, Ser. A, No. 3, 1922).

In construing art. 2 of the Lausanne Treaty, exempting from exchange "all Greeks . . . established before Oct. 30, 1908 within . . . the . . . Prefecture of . . . Constantinople," the Court applied it to those who came from anywhere before that date with the intention to reside. Exchange of Greek and Turkish Populations, 1 World Ct. Rep. 421 at 437 (Ser. B, No. 10, 1925).

The Court declined to interpret a treaty between Russia and Finland upon the latter's sole application, the former declining to participate. Re Eastern Carelia, 1 World Ct. Rep. 190 at 205 (Ser. B, No. 5, 1923).

to construe mandates,[45] international statutes[46] and even municipal law.[47]

(2) *Assimilation of Laws*

No legal subject is more intricate nor confusing than that which is commonly given the title "Conflict of Laws."[48] What is needed in that field is an authoritative tribunal which will gradually change the "conflict" into an "assimilation" of laws. Here the Permanent Court has an unique opportunity and has already made a beginning.[49] In construing state loans it has adopted neither *lex loci contractus* nor *lex loci solutionis* as such but has worked out rules of its own.[50]

(3) *Important Doctrines Applied and Extended*

(a) *Stare Decisis.* Article 38 of the statute requires the Permanent Court to apply "(2) International custom as evidence of a general custom . . . 4. Subject to the provisions of Art. 59, judicial decisions"

[45] In a series of judgments in 1 World Ct. Rep. 293 (Ser. A, No. 2, 1924); id. 355 (Ser. A, No. 5, 1925); 2 id. 99 (Ser. A, No. 11, 1927), the Court interpreted the mandate for Palestine granted by the League of Nations to Britain in 1922 and declared that the mandatary "would be bound to recognize the Jaffa concessions, not in consequence of an obligation undertaken by [it] but in virtue of a general principle of international law." I World Ct. Rep. 293 at 314 (Ser. A, No. 2, 1924).

As to termination of Mandates see L. H. Evans, "The General Principles Governing the Termination of a Mandate," 26 AM. J. INT. L. 735 (1932).

[46] E.g., the League of Nations Covenant.

[47] See Jenks, "The Interpretation and Application of Municipal Law by the Permanent Court of International Justice," 19 B.Y.B. INT. L. 67-103 (1938).

". . . from the standpoint of International Law and the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States in the same manner as do legal decisions or administrative measures." German Interests in Polish Upper Silesia, 1 World Ct. Rep. 510 at 521 (Ser. A, No. 7, 1926). Here the Court was "certainly not called upon to interpret Polish law as such" but passed "on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention." Id. at 521.

See also *State Succession and Private Rights,* infra p. 845.

[48] "Definitions of the scope and character of the branch of law called Conflict of Laws are almost as numerous as the writers in the field." Shon, "New Bases for Solution of Conflict of Laws Problems," 55 HARV. L. REV. 978 (1942).

[49] See Steiner, "Fundamental Conceptions of International Law in the Jurisprudence of the Permanent Court," 30 AM. J. INT. L. 414 (1936).

[50] "The Court . . . can determine what this law is only by reference to the actual nature of these obligations and to the circumstances attendant upon their creation, though it may also take into account, the expressed or presumed intention of the Parties." Serbian Loans, 2 World Ct. Rep. 340 at 371 (Ser. A, No. 20, 1929) where it applied the law of the debtor state to the substance of the debt and that of the lender to "certain methods for the payment thereof"—e.g., the currency—upholding a clause requiring payment in "gold francs."

The nice distinction here shown is in striking contrast with heated discussions between schools of thought as to the "conflict of laws."

etc., which, as Lauterpacht[51] points out, include its own. Under article 59 the Court's decision "has no binding force except between the parties," etc.; but that seems to be nothing more than an equivalent of the Anglican *res adjudicata*[52] which does not preclude the use of decisions as precedents. In British prize law "the rule *stare decisis* applies"[53] and the Permanent Court has consistently and continuously followed precedent.[54] In its very first judgment,[55] enforcing article 380 of the Versailles Treaty, opening the Kiel Canal "to vessels . . . of all nations," it leaned heavily upon the usages followed by administrators of the Suez and Panama Canals.[56] Sometimes the doctrine is recognized in-

[51] LAUTERPACHT, THE DEVELONMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 5 (1934).

[52] 34 C. J. 742, § 1154.

[53] Kunz, "British Prize Cases, 1939-41," 36 AM. J. INT. L. 204 at 205 (1942).

[54] ". . . a rule of law applied as decisive by the Court in one case should, according to the principle *stare decisis*, be applied by the Court as far as possible in its subsequent decisions." Ehrlich J. in Chorzow Factory, 1 World Ct. Rep. 646 at 697 (Ser. A, No. 17, 1927).

". . . The Court follows its own decisions for the same reasons for which all courts —whether bound by the doctrine of precedent or not—do it, namely, because such decisions are a depository of legal experience to which it is convenient to adhere; because they embody what the Court thinks is the law; because respect for decisions given in the past makes for continuity and stability which are of the essence of orderly administration of justice; and because judges do not like, if they can help it, to admit that they were previously in the wrong. The cumulative effect of these factors is shown clearly by the way in which English Chancellors, administering the originally elastic and flexible equity law, have by degrees learned to recognize the authority of case law with a rigidity frequently surpassing that of the common law whose conservatism they set themselves to combat. The Court relies on its own decisions for the reason which, more than anything else, has caused the establishment of the formal doctrine of precedent in England as distinguished from the Continent of Europe, namely, the absence of a code or a generally recognized system of law which, like Roman law is an ever-present source of development. Finally, it is to be expected that in a society of States in which the opportunities for final and non-controversial statements of the law are rare, there should be a tendency to find a fixed point in the flux of phrases or mere assertions of power, and to regard judicial determinations as evidence or, what is in fact the same, as a source of international law." LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE COURT OF INTERNATIONAL JUSTICE 8 (1934).

[55] S. S. Wimbledon, 1 World Ct. Rep. 163 (Ser. A, No. 1, 1923).

"Nothing has been advanced in the course of the present proceedings calculated to alter the Courts opinion on this point." German Interests in Polish Upper Silesia, 1 World Ct. Rep. 510 at 531 (Ser. A, No. 7, 1926), referring to Advisory Opinion No. 6, id. 208 (Ser. B, No. 6, 1925).

"Following the precedent afforded by its Advisory Opinion No. 3. . . ." Greco-Turkish Agreement of December, 1926, 2 World Ct. Rep. 320 at 329 (Ser. A, No. 6, 1928).

[56] See Hoskins, "The Suez Canal as an International Waterway," 37 AM. J. INT. L. 373 (1943).

directly, as by distinguishing the instant case from previous ones [57] or by citing others which, while not, as we would say, "on all fours," nevertheless "throw light on the question." [58] With such a beginning, a lawyer trained under the Anglican system need not hesitate to cite to the World Court its own or other international law precedents nor fear that they will be disregarded.[59]

(b) *Res Adjudicata.* The Court has frequently applied the analogous, though not identical, doctrine of *res adjudicata,*[60] in accordance with the apparent intent of article 59 of the statute. In various cases [61] it has made that doctrine its *ratio decidendi.*

(c) *State Succession and Private Rights.* Pointing out that German law was "still in force in the territories ceded by Germany to Poland" the Court adjudicated the rights of settlers according to that law.[62] Where it was contended that claimant's title was not valid under German law, the Court relied on the land registery where the title was entered.[63] In two later cases [64] the Court construed and upheld Turkish concessions, incidentally passing on Ottoman Law in determining their

[57] Mavrommatis Palestine Concessions, I World Ct. Rep. 297 at 305 (Ser. A, No. 2, 1924).

[58] 3 World Ct. Rep. 107 (Ser. A/B, No. 50, 1932).

[59] ". . . the output of the court to date possesses a large degree of continuity and system and Article 59 cannot be taken to have negatived an application of Anglo-American Doctrine of *stare decisis.*" Hudson, "The Development of International Law Since the War," 22 AM. J. INT. L. 330 at 347 (1928).

[60] See note 52 supra. See the distinction between the two in Judge Ehrlich's opinion, I World Ct. Rep. 646 at 697 (Ser. A, No. 17, 1928).

[61] Polish Postal Service in Danzig, I World Ct. Rep. 440 at 459 (Ser. B, No. 11, 1925); Chorzow Factory, id. 624 at 636-638, 639, 640, 664, 692, 696, 697, 698 (Ser. A, Nos. 13, 12, 1928); Jaworzina Case (Delimitation of the Czechoslovak-Polish Frontier), id. 253 (Ser. B, No. 8, 1923). Cf. Lighthouses in Crete and Samoa, 4 World Ct. Rep. 241 at 247, 249 (Ser. A/B, No. 71, 1937); Societe Commerciale Belgique, id. 470 at 484, 485, 488 (Ser. A/B, No. 178, 1939); Saint Naoum Monastery (Yugoslavia v. Albania) I World Ct. Rep. 391, 397 (Ser. B, No. 9, 1924), where an award of a monastery to Albania by a conference of Ambassadors was upheld as *res adjudicata.*

In Minority Schools in Upper Silesia, 2 World Ct. Rep. 268 at 288-289 (Ser. A, No. 15, 1928) the Court overruled a plea of *res adjudicata.*

[62] German Settlers in Poland, I World Ct. Rep 207 at 224 (Ser. B, No. 6, 1923), where it was observed:

"The fact that there was a political purpose behind the colonization scheme cannot affect the private rights acquired under the law" and the notion was repudiated that "although the law survives, private rights acquired under it have perished. . . . Such a contention is based on no principle and is contrary to an almost universal opinion and practice." Id. at 226.

LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 97 (1934) terms this "a distinctive contribution to the law of State succession."

[63] German Settlers in Poland, I World Ct. Rep. 510 at 540 (Ser. A, No. 7, 1926).

[64] Lighthouses Case, 3 World Ct. Rep. 368 (Ser. A/B, No. 62, 1934); 4 World

validity. Magyar Law was likewise considered in another case[65] and found to support claimant's legal personality and title to lands in question.

(d) *Equity.* The statute[66] creating the Court negatively authorizes it "to decide a case *ex aequo et bono* if the parties agree." Judge Kellogg thought that this merely empowered it "to apply the principle of equity and justice in the broader signification of this latter word";[67] but the Court has more than once invoked doctrines common to the Anglican equity system.[68] In the Meuse Diversion case[69] the Court virtually applied the equitable maxim,[70] "he who seeks equity must do equity."[71] In a later case[72] "the general principle of subrogation" was recognized as regards concessions granted a Greek subject by the Turkish government in Palestine, although that principle had "always been denied by British Courts."[73] In the matter of the Serbian bonds[74] the

Ct. Rep. 241 at 248, 253 (Ser. A/B, No. 71, 1937). See also Free Zones of Upper Savoy and the District of Gex, id. at 448, 546 (Ser. A, No. 22, 1932).

". . . The Administration of Palestine would be bound to recognize the Jaffa concessions, not in consequence of an obligation undertaken by the Mandatory [Britain] but in virtue of a general principle of international law. . . ." Mavrommatis Palestine Concessions, 1 World Ct. Rep. 293 at 314 (Ser. A, No. 2, 1924). That the concessionaire was erroneously described as an Ottoman subject was not considered fatal in the absence of proof to that effect under Ottoman law.

[65] Peter Pázmány University, 3 World Ct. Rep. 315 (Ser. A/B, No. 61, 1933).

[66] Art. 38 (4).

[67] Free Zones of Upper Savoy and the District of Gex, 2 World Ct. Rep. 484 at 506 (Ser. A, No. 24, 1930).

[68] ". . . A decision *ex aequo et bono* is based on equity, and equity is a general principle . . . recognized at least by the Anglo-Saxon nations." Kelsen, "Compulsory Adjudication of International Disputes," 37 AM. J. INT. L. 397 at 406 (1943).

In the Polish-Czech boundary dispute the Court said of the delimitation Commission's power to propose modification, "since the object of this clause is one of equity it must not be interpreted in too rigid a manner." I World Ct. Rep. 253 at 275 (Ser. B, No. 8, 1923).

[69] 4 World Ct. Rep. 172 (Ser. C, No. 81, 1937).

[70] Cited by Judge Hudson in a separate concurring opinion (id. at 229-234) pointing out its Roman antecedent in the *exceptio non adempleti contractus.*

[71] "The Court cannot refrain from comparing the case of the Belgian lock with that of the Netherlands lock at Bosscheveld. Neither . . . constitutes a feeder, yet both . . . discharge their lock-water into the canal and thus take part in feeding it with water otherwise than through the treaty feeder, though without producing an excessive current in the Zuid-Willemsvaart. In these circumstances, the Court finds it difficult to admit the Netherlands are . . . warranted in complaining of the construction and operation of a lock of which they . . . set an example . . . ." II. at 196.

[72] Mavrommatis Palestine Concessions, I World Ct. Rep. 297 at 314 (Ser. A, No. 2, 1924). Cf. Lighthouses case, 3 id. 368 at 389, 397 (Ser. C, No. 74, 1931). Cf. Lighthouses in Crete and Samoa, 4 id. 241, 253-4, 265 (Ser. A/B, No. 71, 1937).

[73] LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 98 (1934).

[74] 2 World Ct. Rep. 344 (Ser. A, No. 20, 1929).

Court recognized, though it considered inapplicable, "the principle known in Anglo-Saxon law as estoppel." [75]

(4) *Other Notable Phases of its Work*

(a) *Boundary Disputes.* These have always been a fruitful source of wars, and territorial changes following World War I brought many such problems to the fore. While the Permanent Court has not yet been called upon "to trace the actual frontier line," [76] (a task for a diplomatic or legislative, rather than judicial, body) it has announced guiding principles.[77] In an advisory opinion [78] it had upheld the belated decision of a Conference of Ambassadors, providing for a delimitation which was "empowered to propose any modifications" (without fixing a time limit) of the frontier line.[79]

(b) *Fluvial and Maritime Law.* By the Versailles Treaty (Article 346) the European Commission of the Danube was reconstituted and an advisory opinion,[80] rendered on request of Rumania and three other powers, gave the Permanent Court an opportunity, not merely to confirm the commission's jurisdiction extending over the "maritime sector" of that important stream, but to render a valuable contribution to the

[75] Id. at 369. As regards the gold standard of value "the question is not what the parties actually foresaw or could foresee, but what means they selected for their protection" (id. at 366) the bonds having been authorized and issued in Serbia were deemed governed by the law of that state, "as regards the substance of the debt," though not as to the medium of payment (id. at 373). Cf. Legal Status of Eastern Greenland, 3 World Ct. Rep. 148 at 170, 184, 215 (Ser. A/B, No. 53, 1933).

"A State is estopped from relying on the non-fulfillment of an international obligation on its part." LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 83 (1934).

[76] Stauffenberg, "What the World Court Has Done So Far," 7 TEMPLE L. REV. 131 at 135 (1933).

[77] In construing art. 3, par. 2 of the Treaty of Lausanne relative to the frontier between Iraq and Turkey, 1 World Ct. Rep. 720 at 742-743 (Ser. B, No. 12, 1923) the Court made an important application of the maxim that "no one may be a judge in his own suit," holding that the unanimity required by art. V of the government for decisions by the League of Nations Council would be attained without representatives of the litigant parties.

". . . The Treaty was silent on the matter except inasmuch as it entrusted the Council with the task of laying down the frontier, which task the Court conceived as intimating that the Council's decision must be effective and not liable to stultification by the vote of one of the parties . . . it would be difficult to find a decision of the Court which is more important from the point of view either of theory or of its practical consequences," LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 48-49 (1934).

[78] Jaworzina case, 1 World Ct. Rep. 253 (Ser. B, No. 8, 1923).

[79] The decision was subjected however to modifications made some ten months later.

[80] 2 World Ct. Rep. 140 (Ser. B, No. 14, 1927).

history of navigation rights on international rivers, which "prior to 1815, . . . was not regulated by any general principle . . . and formed a subject of constant dispute."[81] Two years later the Court construed another article (331) of the same treaty, declaring five European rivers international, and confirmed the jurisdiction over one (the Oder) as extending to sections of Polish territory.[82] Under other decisions "the Meuse is an international river"[83] and the Kiel Canal "has become an international waterway."[84] An important decision[85] as to liability for collisions on the high seas was rendered, the president casting the deciding vote. Use of the Danzig port facilities for Polish war ships was denied.[86]

(c) *International Economic and Financial Law (Droit Fiscal International)*. This is one of the new international law branches of which

[81] Id. at 164 et seq.

"In order to answer the principal question . . . how far the powers of the . . . Commission extended, the Court had first to ascertain the meaning of the . . . Statute of the Danube referring to the *status quo ante*. It had been concluded that the clause was framed so as to perpetuate the divergence of views . . . between the states represented on the . . . Commission. But the Court did not accept this contention because it would amount to the continuance over the Danube system of the uncertain and precarious situation. It took the view that the clause referred to the conditions which existed . . . before the [first] World War in the contested sector, and that its effect was to maintain and confirm these conditions. Since Rumania had accepted the Statute she had equally accepted the exercise of powers by the Commission in the contested sector, if such powers were in fact exercised before the War. The Court therefore proceeded to examine the pre-war situation, and after having ascertained that the . . . Commission had in fact exercised its powers in the Galatz-Braila sector, it answered the question in the affirmative." Stauffenberg, "What Has the World Court Done So Far," 7 TEMPLE L. REV. 131 at 154 (1933).

[82] Oder Commission's Jurisdiction, 2 World Ct. Rep. 609 at 631 (Ser. A, No. 23, 1929).

The Court found it necessary to "go back to the principles governing international fluvial law in general and consider what position was adopted by the Treaty of Versailles" (id. at 627) and that "the interest of all states is in liberty of navigation in both directions (up and down stream)." Id. at 628.

[83] Meuse Water Diversion, 4 World Ct. Rep. 172 at 183 (Ser. A/B, No. 70, 1937).

[84] S. S. Wimbledon, 1 World Ct. Rep. 163 at 173 (Ser. A, No. 1, 1923).

[85] S. S. Lotus, 2 World Ct. Rep. 20 (Ser. A, No. 10, 1927). The question was whether Turkey acted contrary to international law while instituting criminal proceedings against the officer of a French vessel which, colliding with a Turkish vessel, caused the death of eight Turkish nationals. The Court said "that offences, the authors of which at the moment of commission are in the territory [vessel in this case] of another state, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially the effects, have taken place there" (id. at 38). Regina v. Keyn L. R. II Ex. Div. 63 (1877) was distinguished and attention called to "more recent English decisions" in which its doctrine "has been abandoned." (Id. at 43-44.)

[86] Use of Danzig Port, 2 World Ct. Rep. 762 (Ser. A/B, No. 43, 1931).

the Permanent Court has been laying the foundation.[87] "The usual object of a commercial convention," it has said,[88] "is to give each of the parties facilities for trade and navigation in the other's territories." Hence in construing the Saint-Germain convention the court declared the commercial equality thereby required "in itself presupposes in principle freedom of trade," with "the right—in principle unrestricted—to engage in any commercial activity" whether trade or industry, which latter was held to include the transportation business.[89] But free use of another country's waterways and port facilities for "imports and exports" would not of itself include such use by war ships[90] and a proposed customs union between a powerful state and a weak one, giving special privileges to the former, was held to infringe a treaty by which the latter undertook neither to alienate nor to compromise its independence.[91] But the World War did not release a debtor state.[92]

(5) *Procedural Contributions*

"I marvel at the simplicity, the directness, and on the whole, the expedition, of the procedure worked out at The Hague . . . I am aware

[87] "In accordance with the practice established by Lippert [*Handwörterbuch des Volkerrechts* (Berlin, 1929) III, 834] and Harms [id. 503], international economic and financial law is here understood to include all the topics relating to cases in which there is, on the one hand, a predominantly economic or financial element, and on the other a foreign or international element." Schwarzenberger, "The Development of International and Financial Law by the Permanent Court of International Justice," 54 JURID. REV. 21 at 24 (1942).

". . . Much attention is being given now to a more intelligent direction of future international investment, and proposals are under consideration for a central agency, possibly connected with a world bank, to supervise the purposes, terms and security of loans moving across national boundaries. Hitherto, the writing on this subject has had little or nothing to say about the changes and developments of international . . . law concerning the rights and duties of lenders and borrowers that must accompany such an innovation if it is to have any chance of success." Corbett, "World Order—An Agenda for Lawyers," 37 AM. J. INT. L. 207 at 209 (1943). See also W. E. Beckett, "International Law in England," 55 LAW Q. REV. 257 (1939).

[88] Eastern Greenland Case, 3 World Ct. Rep. 151 at 176 (Ser. A/B, No. 53, 1933) which ". . . dealt with issues of economic importance to Denmark and Norway . . . [whose] action . . . is a clear milestone on that road . . . [toward the pacific settlement of disputes] . . . the World Court . . . has lived up to the high hopes entertained for its usefulness." Hudson, "An Important Judgment of the World Court," 19 A.B.A.J. 423 at 425 (1933).

[89] Oscar Chinn Case, 3 World Ct. Rep. 416 at 435 (Ser. A/B, No. 63, 1934).

[90] Polish Warships in Danzig, 2 World Ct. Rep. 763 (Ser. A/B, No. 43, 1931). Cf. dissenting opinions in the Wimbledon Case, 1 World Ct. Rep. 163 at 182 (Ser. A, No. 1, 1923).

[91] Austro-German Zollverein, 2 World Ct. Rep. 711 (Ser. A/B, No. 41, 1931). See also *Its Advisory Opinions*, infra II, 5, a, at 858.

[92] The Serbian Loans, 2 World Ct. Rep. 340 at 370 (Ser. A, No. 20, 1929).

of no case in which any state has objected to the procedure."[93] Its contributions to this field include:

(a) *Conciliation.* ". . . it is for the Court to facilitate so far as is compatible with the Statute . . . direct and friendly settlement" to which "judicial settlement . . . is simply an alternative."[94]

(b) *Parties.* Under Article 34 of the statute "only states or members of the League of Nations can be parties before the Court." But, as construed by the latter, this does not prevent private individuals from acquiring, under international agreement, rights which the Court will enforce in their behalf when represented by their governments.[95] Inter-

[93] President Henderson of the American Bar Association in an address before the Inter-American Bar Association at Mexico City, August, 1944, 30 A.B.A.J. 439 at 440 (1944).

[94] Free Zones of Upper Savoy and the District of Gex, 2 World Ct. Rep. 454 at 460 (Ser. A, No. 22, 1929).

The Court declined a proposal by the parties to render a partial decision before allowing "a reasonable time to settle." The parties (France and Switzerland) were given until May 1, 1930 to effect an agreement.

"It has indicated . . . that the order entered for voluntary adjustment is to be deemed exceptional. It would seem necessary and proper, however, for the Court to have such power as part of its function of determining disputes under voluntary submissions. Such power would not extend its jurisdiction. It would serve to develop its usefulness as a court of conciliation where the conciliatory process is needed to supplement determination of justiciable issues." A. K. Kuhn, 24 AM. J. INT. L. 350 at 353 (1930).

"Compulsory jurisdiction of an international court does not exclude a procedure of conciliation. When the parties agree, the conflict may first be submitted to a commission of conciliation. Then the court becomes competent only in the event of failure of conciliation. This is provided by Art. 20 of the General Act of the Pacific Settlement of International Disputes of 1928." Kelsen, "Compulsory Adjudication of International Disputes," 37 AM. J. INT. L. 397 at 405 (1943).

[95] Jurisdiction of Danzig Courts, 1 World Ct. Rep. 236 at 246-247 (Ser. B, No. 15, 1928).

"It is difficult to exaggerate the bearing of the Court's Opinion on the subject under discussion. The acquisition of treaty rights directly by individuals is made a consequence of the intention of the parties. The view that they can acquire rights only through the instrumentality of the municipal law of States, is rejected. The postulated insurmountable barrier between the individual and international law is ignored. The exclusiveness of States as beneficiaries of international rights, is denied. Had the Court wished to adhere to the traditional doctrine, it would have interpreted the controversial intention of the parties in the light of that doctrine. This it refused to do. Moreover, the departure from the established view was effected with such ingenious restraint that some have been led to believe that the decision . . . amounts to a solemn affirmation of the established doctrine. Henceforth, whenever a similar case arises—at least before the Permanent Court—it will no longer be possible to appeal, with any chance of success, to the alleged impossibility of individuals acquiring directly rights under a treaty. All will depend on the intention of the parties." LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 52 (1934).

"Nevertheless, as was proved by the great number of cases decided by the Court

vention is allowed a state having an interest in the controversy or which is a party to a convention involved therein.[96]

(c) *Remedies.* Relief in the nature of an injunction has been sought from the Court on several occasions. In one it was found unnecessary to "deal with the question whether such a prohibition, although customary in contracts between individuals, might form the subject of an injunction to a government even . . . of working, as a state enterprise, the factory of which export was to be limited."[97] In another case an injunction was denied upon the merits.[98]

(d) *Pleadings.* Proceedings are instituted either by "special agreement" (stipulation) [99] or by a written application (*requete*).[100] The adverse party may file "a preliminary objection" [101] and, if it is overruled, a counter-claim.[102] The official language is "French or English." [103]

falling into the category of international economic and financial law, . . . the fact that individuals had no direct access to the Court only meant that formally such vested interests had to shelter behind the authority of the entities from which the *locus standi* cannot be withheld. On the other hand, the likelihood that an enterprise can induce its government to take up its case is probably not unconnected with its economic, financial, and social impact, and this situation therefore creates a certain inequality in the sphere of economic and financial law which is here, as elsewhere, hardly compatible with the conception of law in the Western sense." Schwarzenberger, "The Development of International Economic and Financial Law by the Permanent Court of International Justice," 54 JURID. REV. 21 at 26, 27 (1942).

The Central American Court allowed individual claims to be presented, 19 IOWA L. REV. 190 (1934); and the Inter-American Bar Association (Rio de Janeiro, Aug. 1943) recommended that the World Court be made "accessible . . . to individuals when their fundamental rights have been violated by states." See 37 AM. J. INT. L. 669 (1943).

[96] Statute, arts. 58, 59, 63; HUDSON, PERMANENT COURT OF INTERNATIONAL JUSTICE (1943) at p. 207-208. Reference is made to Hudson's work last cited, hereafter cited as HUDSON, this note, for citations to the Statute establishing the World Court and also for the 1936 rules of the court. S. S. Wimbledon, 1 World Ct. Rep. 166 (Ser. A, No. 1, 1923). Under Rule 64 (1936), HUDSON 749, an application (*requete*) is necessary upon which a hearing is held.

[97] Chorzow Factory, 1 World Ct. Rep. 646 at 686 (Ser. A, No. 17, 1928).

[98] Meuse Diversion Case, 4 World Ct. Rep. 172 at 202 (Ser. A, No. 81, 1937).

[99] See example in 2 World Ct. Rep. 451.

[100] Statute, art. 40 HUDSON, supra note 96 at p. 197; Rules 32 et seq. (1936), HUDSON 740. A copy is transmitted to the adverse party, members of the Court and of the League of Nations. Examples of application appear in 2 World Ct. Rep. 4, 5, 94 and 269; 1 World Ct. Rep. 164-165, 294, 478, 509, 578, 619.

[101] Rule 62 (1936) HUDSON, supra note 96 at p. 748. E. g., to the Court's jurisdiction.

[102] Rule 63 (1936) HUDSON, supra note 96 at p. 749. It must be "directly connected with the subject of the application." This was availed of by the Belgian government in the Meuse case, 4 World Ct. Rep. 172, 180, 188 (Ser. A/B, No. 70, 1937); but its "counter-memorial" was rejected (p. 202). The "memorials" and "counter-memorials" (briefs) appear to supplement the pleadings (Rules 41, 42).

[103] Rule 39 (1936) HUDSON, supra note 96 at p. 721.

(e) *Proof* may be oral or documentary.[104] Witnesses "declare . . . on honor and conscience" and are examined by "agents, counsel or advocates" or by the judges.[105] The *onus probandi* rule has been applied[106] and presumptions are indulged;[107] a land register entry was treated as sufficient to establish title to land[108] and documents produced held sufficient to show legal personality.[109] The Court has judicially noticed historical facts[110] and rejected a contention of a party for want of evidence.[111]

Exclusion. A self serving document in the nature of a brief was excluded "at the present stage of the case."[112] and the Court has declined to consider *travaux preparatoires*—"preparatory work"[113] con-

[104] Statute, art. 43 HUDSON, supra note 96 at p. 199; 3 World Ct. Rep. 322 (Ser. A/B, No. 61, 1933).

[105] Rule 53 (1936) HUDSON, supra note 96 at p. 724. The Court may call upon the state to summon witnesses therefrom. Statute, art. 44 HUDSON 200.

[106] ". . . It is for the Respondent to prove that the concessions are not valid." Mavrommattis Palestine Concessions, 1 World Ct. Rep. 355 at 373 (Ser. A, No. 5, 1925). Cf. European Danube Commission, 2 World Ct. Rep. 138 at 221 (Ser. B, No. 14, 1927).

[107] 2 World Ct. Rep. 268 at 291 (Ser. A, No. 15, 1928); id. 402 at 432 (Ser. A, Nos. 20-21, 1929).

[108] German interests in Upper Silesia, 1 World Ct. Rep. 510 at 540 (Ser. A, No. 7, 1926).

[109] Peter Pázmány University, 3 World Ct. Rep. 311 (Ser. A/B, No. 61, 1933).

[110] Brazilian loans, 2 World Ct. Rep. 402 at 428 (Ser. A, Nos. 20-21, 1929). But the Court "is not obliged . . . to know the municipal [internal] law of the various countries." Polish War Vessels in Danzig, 2 World Ct. Rep. 763 at 775 (Ser. A/B, No. 43, 1931).

[111] Meuse Diversion case, 4 World Ct. Rep. 178 at 200 (Ser. A/B, No. 70, 1937). Cf. 4 id. 432 where a similar failure of the same government was mentioned as follows in a dissenting opinion: ". . . the Belgian Agent definitely offered to produce proof, but left the Court to decide whether he should . . . it seems difficult to draw any conclusion detrimental to Belgium from the non-presentation. . . ."

[112] Free Zones of Upper Savoy and the District of Gex, 2 World Ct. Rep. 448 at 460, 466 (Ser. A, No. 22, 1939).

[113] S. S. Lotus, 2 World Ct. Rep. 20 at 33 (Ser. A, No. 10, 1927). Cf. 2 World Ct. Rep. 159; 4 id. 241 at 264-265; id. 286 at 292-293, 296; id. 388 at 439, 447; LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 35-40 (1934). What a contrary ruling might lead to is well illustrated in Jay Burns Baking Co. v. Bryan, 264 U. S. 504 at 520, 44 S. Ct. 412 (1924) where "The opinion [by Brandeis, J.] contains dozens of references to books, articles, reports of committees, testimony before congressional committees, reports of state and municipal officers and agencies, federal administrative regulations, regulations adopted by the Conference on Weights and Measures, a 1917 letter from Herbert Hoover to President Wilson, results of an investigation by the Bureau of Chemistry, and many other similar references, with frequent quotations of statements, findings, opinions, beliefs, and points of view—all in utter disregard of any rules of evidence that would

sisting usually of documents exchanged or otherwise used by the parties litigant before the case was actually instituted.

Production of proof is governed by liberal and elastic rules.[114]

View. In one case[115] resort was had to the practice sometimes provided for juries, of an ocular inspection of the scene involved in the controversy.

(f) *Judgments* are subject to strict requirements as to their contents[116] and are usually elaborate, fortified by authority and well reasoned. However, dissenting opinions are frequent. Provision is also made for revising or interpreting judgments upon application;[117] but they are not subject to appeal.[118] "There can be no doubt as to the competence of the Court to render declaratory judgments," observed Judge Hudson.[119] In fact, it had already done so.[120]

control adjudicative facts." Davis, "An Approach to Problems of Evidence in the Administrative Process," 55 HARV. L. REV. 364 at 404 (1942).

But in Borden's Co. v. Baldwin, 293 U. S. 194 at 210, 55 S. Ct. 187 (1934), Chief Justice Hughes said:

". . . where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings." The case was remanded to develop the legislative facts.

And in Morgan v. United States 298 U. S. 468 at 480, 56 S. Ct. 906 (1936), the same judge observed: "Nothing can be treated as evidence which is not introduced as such." See also United States v. Abilene & Southern Ry. Co., 265 U. S. 274 at 288, 44 S. Ct. 565 (1923); Atcheson, Topeka & S. F. Ry. Co. v. United States, 284 U. S. 248 at 252, 52 S. Ct. 146 (1932); I. C. C. v. L. & N. R. Co., 227 U. S. 88 at 93, 33 S. Ct. 185 (1913).

[114] ". . . The court is not tied to any system of taking evidence . . . its task is to cooperate in the objective ascertainment of the truth" and it "cannot omit to use any means which may enable it to ascertain the objective . . . the Statute [art. 50] provides that the Court shall take active steps and not adopt a passive attitude." Van Eysinga, C. in the Oscar Chinn case, 3 World Ct. Rep. 416 at 479 (Ser. A/B, No. 63, 1934).

". . . The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to the facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which . . . [its] opinion . . . is desired should not be in controversy, and . . . should not be left to the Court itself to ascertain. . . ." Eastern Carelia case, 1 World Ct. Rep. 190 at 205 (Ser. B, No. 5, 1923).

[115] Meuse Diversion case, 4 World Ct. Rep. 177-8 (Ser. C, No. 81, 1937). Three days were consumed in the inspection.

[116] Rule 74 (1936), HUDSON, supra note 96 at p. 732.

[117] Rules 78-81, incl. (1936), HUDSON, supra note 96 at p. 753-754.

[118] Statute, art. 60, HUDSON, supra note 96 at p. 298.

[119] Meuse Diversion case, 4 World Ct. Rep. 172 at 233-234 (Ser. A/B, No. 70, 1937).

[120] Treaty of Neuilly Interpretation, 1 World Ct. Rep. 410 at 414 (Ser. A, No. 3, 1924). German Interests in Polish Silesia, 1 id. 475 (Ser. A, No. 7, 1926), where the Court said: "There seems to be no reason why States should not . . . ask the Court

Damages. The Court has also blazed a new path of international law in the measure of damages, which, it holds,[121] "must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." Here we find, doubtless for the first time in the international law field, the rule of consequential damages instead of merely those resulting directly.

2. *Its "Optional Clause" has been Accepted by the Great Majority of Sovereign States*

According to Judge Hudson,[122] no less than fifty-six sovereign states have at some time accepted the "optional clause,"[123] though many have done so with reservations.[124] Nordon[125] claims that "the optional clause . . . deprived it (the Court) of all value for the purpose under discussion": but the clause will cease to be "optional" whenever the few remaining sovereignties, including the United States have accepted it. Surely it should be easier to persuade these few, in the light of current events, than to induce the nearly sixty others to ratify a new pact.[126]

to give an abstract interpretation of a treaty; rather would it appear . . . one of . . . [its] most important functions."

"The Court's Judgment No. 7 [referring to the preceding case] is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question. . . ." Chorzow Factory, I World Ct. Rep. 624 at 636 (Ser. A, No. 13, 1927). See 2 id. 708 (Ser. A/B, No. 40, 1931); 3 id. 292 at 303 (Ser. A/B, No. 58, 1933).

[121] See 1 id. 624 at 677-678 (Ser. A, No. 17, 1928). But cf. Oscar Chinn case, 3 id. 416 at 438-439 (Ser. C, No. 75, 1934).

In Greece v. Bulgaria, 1 World Ct. Rep. 409 (Ser. A, No. 3, 1924) the Court interpreted a clause in the Neuilly Treaty as providing indemnity even for acts committed outside Bulgarian territory; but later refused an interpretation of the judgement on the ground that its limits could not be exceeded.

[122] THE PERMANENT COURT OF INTERNATIONAL JUSTICE 681-705 (1943).. See also his article on "The Obligatory Jurisdiction of the Permanent Court," 19 IOWA L. REV. 190 (1934).

[123] This clause provides for a "declaration of acceptance" of the Court's compulsory jurisdiction. See Hepburn, "The Optional Clause," 19 GEORGETOWN L. J. 66 (1930).

[124] E.g., those of the British Commonwealth reserve disputes with each other. The others include Chile, Cuba, Equador, Honduras, Japan and Mexico—surely not an imposing list.

[125] NORDON, THE WORLD COURT FOR INTERNATIONAL JUSTICE AND SAFETY 31 (1939).

[126] "As for obligatory jurisdiction, there is some ground for hope in the fact that more than forty States adhered to the optional clause in the statute of the Permanent Court. . . . The most essential condition of our reaching such a point again—to say nothing of going beyond it to universal obligatory jurisdiction—is, however, the agreement of the United States. To accept the jurisdiction . . . with the reservation that a

3. *It Has an Equipment and Machinery which it would Require Many Years and Intense Effort to Duplicate; Meanwhile Needs would be Pressing and Opportunities Lost*

A World Court is necessarily an institution of slow growth. Its successful operation requires much careful planning and utilizing the lessons of experience. The Permanent Court has passed its formative stage and attained prestige and position which not even the United States Supreme Court had reached in the same period. Must all these results be discarded and its wealth of jurisprudence discredited[127] merely to provide room for a new experiment? In the fateful years which are sure to follow the present struggle, the world will need a seasoned institution—not a novice. The twenty years of the Permanent Court have prepared it to meet and solve the very problems which will confront the post-war world.

And not the least important feature of its equipment is the imposing structure,[128] provided by an American philanthropist, at an historic and strategic site, which was its home until it was forced to flee from a ruthless invader. That structure could not be moved nor, except at great cost, duplicated.

4. *Future Possibilities*

a. *The Molder of an International Law System*

After reviewing the contributions of the Permanent Court to international law, which necessarily have been fragmentary as yet, one is naturally led to hope that it may be the instrument for creating a real international law system—something which has not yet appeared. For it is the judicial, rather than the legislative, bodies which have created other legal systems.[129] Thus, at Rome it was the jurisconsults by whose

compromis requiring the consent of two-thirds of the Senate must procede the submission of any dispute, would not confer obligatory jurisdiction." Corbett, "World Order —An Agenda for Lawyers," 37 AM J. INT. L. 207 at 216 (1943).

[127] Of course the decisions of a defunct court, regardless of their soundness would not have the weight or prestige of those rendered by a "going concern."

[128] The writer will never forget the impressive scene in the hearing room of the World Court Building at the Hague when the delegates to the Comparative Law Congress of 1937 were invited to attend a session at which the Court delivered one of its most important judgments.

[129] "It is not generally recognized on the continent, even today, that these new courts made new law." MUNROE SMITH, A GENERAL VIEW OF EUROPEAN LEGAL HISTORY 309 (1927).

". . . The history of Roman and Anglo-American law shows how judicial decisions create law. A famous American jurist said, 'All the law is judge-made law.' " Kelsen, "Compulsory Adjudication of International Disputes," 37 AM. J. INT. L. 397 at 401 (1943). See Secretary of State Stimson's letter of Nov. 18, 1929 to President Hoover, requesting authorization to sign protocal, Senate Ex. Doc. 1, 72d Cong., 1st sess., p. 128.

"decisions," reached in the imperial council, the law of the empire was chiefly developed.[130] So in England,[131] said the late and eminent Holdsworth,[132] "we must look to the rules of the King's Court for the foundations of the common law." Again, the development by the court of chancery and the chancellors, both in England and America, of the system known as "equity," is a familiar chapter to the lawyers of both countries, while "British Prize Law is formed by a body of precedents."[133] Today another distinct branch—administrative law, has been growing rapidly and, at least in France, under the guiding hand of the *Conseil d'etat*, has been developing into a system.[134] No good reason is apparent why international law, which is yet little more than a mass of heterogeneous and often disputed doctrines, may not be molded by this World Court into a scientific system, comparable to those above mentioned, all of which are the products of the courts which have administered them.[135]

[130] MUNROE SMITH, A GENERAL VIEW OF EUROPEAN LEGAL HISTORY 304-305 (1927), adding: "The great jurists of the second and third centuries were judges in the modern sense . . . their decisions were reported and digested in their writings. Their commentaries were, for the most part, digests of case law; their books of 'questions' and 'responses' were, as the names imply, collections of cases. . . . During the early empire there was little direct legislation."

[131] "It is interesting to note that it was the courts which first appeared with specialized functions in the history of English institutional development." Goodrich, "The Nature of the Advisory Opinions of the Permanent Court of International Justice," 32 AM. J. INT. L. 738 at 757 (1938).

[132] 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 192 (1932). It was through recognition by the King's Court that the local custom of a shire became part of the customary law of the realm.

[133] Kunz, "British Prize Cases, 1939-1941," 36 AM. J. INT. L. 204 at 205 (1942).

[134] See Lobingier, "Administrative Law and *Droit Administratif*," 91 UNIV. PA. L. REV. 36 at 58 (1942).

[135] "A new body of international jurisprudence is gradually being accumulated. So firmly fixed is the Court's position in the world's treaty law that its permanence now seems assured." Hudson, "Permanent Court of International Justice," 12 ENCYC. SOC. SC. 78 at 81 (1934).

"The cumulation of case-law is important both because it emphasizes the element of continuity . . . and because of the greater guidance offered by the Court's jurisprudence to persons confronted with problems of international law. Without exaggeration, the cumulation may be said to point toward 'the harmonious development of the law' which was a desideratum with the draftsmen of the Statute. . . ." HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 630 (1943).

". . . There are rules which the Court has repeatedly applied, with the result that there has established itself a kind of '*jurisprudence*' in matters covered by them; . . . there are rules and principles which legal analysis may legitimately deduce from those already applied by the Court. The result has been the development of an imposing body of law which can be used not only as direct evidence of the rules of law as understood by the Court, but also as indicative of the method and the spirit in which the Court

b. *A Tribunal to Try Offenders Against the War Law of Nations*

The Declaration of Moscow,[136] after promising punishment under local law for such offenders, adds that this "is without prejudice to the case of German criminals whose offenses have no particular localization and who will be punished by joint decision of the allied government." Of course, this involves a trial before a tribunal of some kind.[137] For the participants in the conference which resulted in that declaration must have had in mind the abortive provision of the Versailles Treaty[138] from which the "Powers" allowed themselves to be outmaneuvered by the crafty German leaders so that their *Reichsgericht* was substituted, and conducted "trials" which proved farcical.[139]

Doctor Sheldon Glueck of Harvard, after considering the national courts and military tribunals, both national and joint, presents a strong argument[140] for a judicial trial under the auspices of the United Na-

can be counted upon to approach similar cases." LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 8-9 (1934).

[136] See CORDELL HULL, THE MOSCOW CONFERENCE, State Department Publication No. 2027 (1943). On Nov. 16, 1937, a "Convention for the Creation of an International Criminal Court" was signed by the representatives of thirteen states. For text see 7 HUDSON, INTERNATIONAL LEGISLATION 878 (1941).

[137] See e.g., the report of an American Bar Association Sub-Committee, 37 AM. J. INT. L. 663 (1943); Finch, "Retribution for War Crimes," id. 81.

[138] The Versailles Treaty with Germany provided that, "Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power." Art. 229.

[139] "Of an original list of some 900 persons accused of serious offenses only 45 were included in a 'test list' submitted by the Allies after protracted argument on the part of the Germans. Only 12 were actually tried and but 6 convicted. They received inadequate sentences and the two whose sentences were severest soon escaped from the German jails, apparently with official connivance." Glueck, "By What Tribunal Shall War Offenders Be Tried?" 56 HARV. L. REV. 1059 (1943) where he adds in a note: "The Allied mission sent to 'observe' the Leipzig trials withdrew in protest at the outcome of the twelve cases mentioned above. Practically all the remaining cases on the Allied list, as well as . . . [those] which came to the attention of the *Reichsgericht* . . . from persons within and outside the Reich, were disposed of by order of the court discontinuing the proceedings, usually on the ground of 'insufficient evidence'," citing 3 MEURER, VÖLKERRECHT IM WELTKRIEG 58 et seq. (1927).

But the commission which reported the original plan had also recommended an international "high tribunal" for the trial of more serious offenses against the allied powers. Unfortunately the opposition of the Japanese and (strange to say) American, delegations prevented the proposal's adoption. See 14 AM. J. INT. L. 95 at 146, 151, 143-144 (1920).

[140] "Apart from technical theories, it does not seem unfair to hold a violator of the laws and customs of war to account by direct application of the law of nations and by means of an international tribunal which was not in being when he committed his offense. . . . Under the customary law of nations a belligerent may punish serious violators of the laws of war by death; any lesser punishment that its domestic legislation may im-

tions. The principal arguments against the proposal are those of *ex post facto* and *nulla poena sine lege;*[141] but the former relates to the offense and the latter to the penalty. Neither pertains to the tribunal. Moreover, "*nullum crimen sine lege* was never literally followed[142] . . . as to *nulla poena sine lege* . . . there has been very considerable departure from classical views."[143] Every word of Doctor Glueck's logical argument[144] of over thirty pages, would support a proposal to confer such jurisdiction upon the Permanent Court. For here again, why create a new tribunal when we have at hand a seasoned one upon which the United Nations could more easily confer the desired jurisdiction than to create a new one? The trend of expert opinion favors a tribunal with several branches rather than separate courts.[145]

5. *Objections to the Court*

a. *Its Advisory Opinions*

This is listed first, not because it is deemed the weightiest, but because it was the one most stressed by the opponents of the resolution of adherence to the Court, when pending before the United States Senate.[146] The original World Court Statute contained no mention of such opinions, although the League of Nations Covenant (Article 14) had authorized them. Articles 65 to 68, now appearing in the statute, were added in order to meet such objections. Advisory opinions, long used in England[147] have been authorized by the constitutions of eight

pose is therefore a matter of grace to the offender." Glueck, "By What Tribunal Shall War Offenders Be Tried?" 56 HARV. L. REV. 1059 at 1084, 1086 (1943).

One advantage of the Permanent Court is that it is already "in being."

[141] See Manner, "The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War," 37 AM. J. INT. L. 407 (1943). This author quotes Nielsen, negotiator in the United States-Turkey Claims Settlement, at 415, as having "once criticized Oppenheim's description of penal offenses against the laws of war as 'war crimes' because the term . . . suggests an offense against the law of nations." But Oppenheim's description is amply sustained by the logic of Glueck and of Hall, cited infra note 142.

[142] Jerome Hall, "*Nulla Poena Sine Lege,*" 47 YALE L. J. 165 at 182-183 (1937), a thoroughly scientific discussion of the subject.

[143] Ibid.

[144] Glueck, "By What Tribunal Shall War Offenders Be Tried?" 56 HARV. L. REV. 1059 (1943).

[145] E.g., the English High Court of Justice.

[146] A majority of the Foreign Relations Committee reported that it was "believed . . . to be a highly dangerous (*sic*) and undesirable jurisdiction" to render advisory opinions. S. Rep. No. 634 Cong., 1st sess., p. 3, March 27, 1924. Cf. Senate Ex. Doc. 1, 72d Cong., 1st sess., pp. 69 et seq.; Hervey, "Advisory Opinions as an Obstacle to Our Admission to the World Court," 6 TEMPLE L. REV. 15 (1931).

[147] Veeder, "Advisory Opinions of the Judges of England," 13 HARV. L. REV. 358 (1900).

American states and have been rendered by the Supreme Courts of seven others and of Hawaii.[148] Whatever adverse comment may have been offered meanwhile, it certainly can not be claimed that they are unprecedented or "un-American."[149] But they have a special *raison d'etre* in the international field.[150]

An advisory opinion[151] which occasioned such discussion at the time of its rendition involved two questions: (1) whether the "Vienna Protocol" of the St. Germain Treaty would *ipso facto* alienate Austrian independence (which the Court unanimously resolved in the negative) and (2) whether it was "calculated directly or indirectly to compromise" that independence. On the latter question the Court divided, eight to seven, the majority (including the French judge who wrote the opinion and Italian, Spanish, Polish, Rumanian, Colombian, Cuban and Salvadorian judges) holding in the affirmative. The Italian judge (Anzilotti) in a separate, concurring opinion, pointed out "the movement already under way in Germany and Austria for political union." His words were almost prophetic, for it was only six and a half years later that Hitler's hordes entered Vienna as conquerors. It is in the light of history, both prior and subsequent, that the opinion must be

[148] See Frankfurter, "Advisory Opinions," 1 ENCYC. SOC. SC. 475 at 476 (1930); ELLINGWOOD, DEPARTMENTAL COOPERATION IN STATE GOVERNMENT (1918); Lobingier, "Constitutional Law," 6 AM. & ENG. ENCYC. OF LAW, 2d ed., 882 at 1065-1079.

[149] "Anglo-American Legal History would hardly bear out the conception that courts of justice can only act in controverted case." Hudson, "Advisory Opinions in National and International Courts," 37 HARV. L. REV. 970 at 990 (1924).

Probably one reason why the practice has not extended farther is the growing tendency of state and federal attorneys to write and publish opinions in response to official inquiry.

[150] "This type of jurisdiction has its greatest justification in the field of international law, which is based largely upon the construction of treaties and where it is in the interest of peace that cases shall be moot and that rights be determined in advance of an actual violation which may result in an inflamed national feeling and possibly war. It is not, therefore, surprising that the League regards its right to ask the Court for advisory opinions as an important element in the Pacific settlement of actual disputes and as a powerful means of avoiding threatened invasions of national prerogatives." Bok, "The United States and the World Court The Austro-German Customs Union Case," 80 UNIV. PA. L. REV. 335 at 337 (1932).

". . . The advisory opinion is useful as a means of bringing before the Court questions involving the interpretation of such constitutional documents as the Covenant of the League or the Constitution of the International Labor Organization. Here questions of law are involved which might be difficult to get before a court in any other way." Chamberlain, Book Review of HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 37 AM. J. INT. L. 694 at 695 (1943).

See also Goodrich, "The Nature of the Advisory Opinions of the Permanent Court of International Justice," 32 AM. J. INT. L. 738 at 755-756 (1938).

[151] Austro-German Zollverien, 2 World Ct. Rep. 711 (Ser. A/B, No. 41, 1931).

appraised and when it is, the criticism[152] which has appeared in some quarters, will be found untenable.

The situation out of which this case arose no longer exists and may never recur; but the two prevailing opinions indicate how, through this much criticized practice, the Court is enabled to give a realistic interpretation to treaties and thus promote the "maintenance of international . . . order."[153] Had its warning been heeded and had the allied powers combined to enforce observance of the treaty, Austria would not have been crushed and World War II might have been averted.

b. *Its National Judges*

The late Pierre Crabites[154] declared the Permanent Court not a judicial body[155] because article 31 of the statute provides for "judges of the

[152] "There is hardly a decision of the Court which has been exposed to more severe criticism. In so far as this criticism is justified, it is so not because of the nature of the conclusion reached . . . or, even less so, because it agreed to give an opinion on a matter involving the consideration of future political contingencies; but because of the absence of any concrete intimation of the reasons underlying the Opinion. The highly political nature of the controversy served to emphasize the fact that there may be cases in which the failure to give reasons may constitute a grave disservice to the cause of international justice." LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 20-21 (1934).

But the "criticism" here mentioned has not been shared by the best professional sentiment in this country; on the contrary it has been confined mostly to isolationists. As typical of the contrary sentiment the following may be noted:

"The advisory opinion . . . by the World Court on September 5, 1931, was not a political decision. It involved the determination of a legal question, i.e., whether there was a conflict between certain contractual obligations . . . of Austria.

There was no doubt of a conflict in the minds of a majority of the Court. Austria and Germany abandoned the proposed customs union two days before the Court's opinion was made public. . . ." Hervey, "Advisory Opinions as an Obstacle to Our Admission to the World Court," 6 TEMPLE L. REV. 15 at 25 (1931).

"All this pother over advisory opinions is the last obstacle in the way of full American recognition of this great Court which largely is the product of the genius of our own statesmen, and the fulfillment of recommendations made by seven Presidents and five Secretaries of State. . . ." Wickersham, "The World Court and the Senate Reservations," 1 GEO. WASH. L. REV. 3 at 16 (1932).

Cf. Findelstein, "The World Court and the Anschluss," 6 ST. JOHN'S L. REV. 209 (1932); 48 L. Q. REV. 1 (1932); Mathews, "Judicial Attitudes in the Customs-Union Case," 30 MICH. L. REV. 699 (1932).

[153] "The Court was dealing with the question which was both legal and political. It was given three texts to interpret; it was called upon to say whether a certain course of action might compromise, or 'was calculated to threaten' the independence of Austria. It would not be surprising to have a difference of opinion on that question even among Judges who held exactly the same philosophy of law." Hudson, "The World Court and Austro-German Customs Regime," 17 A.B.A.J. 791 at 793 (1931).

[154] "The World Court Not a Judicial Body," 9 CAN. BAR REV. 117 (1931).

[155] On the other hand, Gordon Ireland, who taught for a time at the same law school as Judge Crabites, pronounced it "a true Court of Justice and not an Arbitration

nationality of each contesting party" to sit with the others. Lauterpacht[156] also feared a tendency on their part to file dissenting opinions, which has proved not to be the case.[157] The Committee of Jurists which drafted the statute, deliberated at length on the question but finally reported that "it is highly desirable that the judges be able, up to the last minute, during deliberations, to present and explain the statements and arguments of the states and to insure that the sentence, however painful, in substance, should be so phrased as to avoid wounding national susceptibilities. . . . If both opposing views are represented on the bench, they counter-balance each other."[158]

c. *Its Lack of Sanctions*

(1) *Not a weighty objection.* "Courts have existed with an elaborate constitution and procedure and no compulsory powers whatever."[159] Moreover, "seldom has a State refused to execute the decision of a court which it has recognized in a treaty."[160] The United States Supreme Court, nearly a half century after its establishment, found itself unable to enforce a writ of *habeas corpus* granted a prisoner sentenced by a state court for "residing within the limits of the Cherokee reservation."[161] Nearly a generation later the Court declared itself without a

Tribunal." Ireland, "The Juridical Nature of the Orders of the Permanent Court of International Justice," 12 TULANE L. REV. 328 at 329 (1938).

[156] Lauterpacht, "The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals," 11 B.Y.B. INT. L. 134 (1930).

[157] Professor Hill found "only one advisory opinion rendered since Sept. 7, 1927, to which a national judge had dissented," and two judgments before it "in which dissenting opinions were written by the national judges" while "frequently it has happened that dissenting opinions of national judges have accompanied those of other judges," Hill, "National Judges in the Permanent Court of International Justice," 25 AM. J. INT. L. 670 at 681-682 (1931).

[158] *Procès-Verbaux* of the Committee's Proceedings 721.

Professor Hill also concluded that "the actual operation of the system indicates that the work of the court has not been hampered by the participation of judges representing litigant states," and that "it is probable that national judges have contributed positively to the achievement of the court through their representation of the legal systems of states in dispute, and that by their effort they have increased the confidence of nations in the tribunal." Hill, "National Judges in the Permanent Court of International Justice," 25 AM. J. INT. L. 670 at 683 (1931).

[159] Sir Frederick Pollock, "The Sources of International Law," 2 COL. L. REV. 511 at 514-515 (1902), adding by way of illustration, "This is the state . . . which we read of as prevailing in Iceland, not much before the Norman conquest. . . . It is not universally true that even the highest courts can always enforce their judgments."

[160] LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE (1934); HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 267 (1943); WARREN, THE SUPREME COURT AND SOVEREIGN STATES 38 (1924).

[161] Worcester v. Georgia, 6 Pet. (31 U.S.) 515 (1832). ". . . there was no

sanction to enforce the constitutional mandate (IV, 2) for extradition.[162] But no one has yet proposed to abolish the Court because of its lack of sanction in such cases.

(2) *How Sanctions May Be Supplied.* The lack of adequate sanctions has long been urged against international law as a whole and if available against the Permanent Court would be equally so, not only against all similar tribunals but against the entire system which they administer. The Pan-American publicists have been working on the subject for some years and the second Foreign Ministers' Meeting (Habana, 1940) approved[163] the "consultation procedure"[164] and recommended a "vigilance committee" (in the term's best sense) for inter-American controversies. At its third meeting (Rio de Janeiro, 1942) the same body adopted a positive declaration as to the sanctity of treaties.[165] Meanwhile, the boycott had been considered as a form of sanction[166] and the League of Nations attempted thereby to frustrate Mussolini's unprovoked attack on Ethiopia; but fell just short of success. At the outbreak of World War II, United States policy shifted to economic sanctions which proved more effective than is generally realized.[167]

A legacy from the late Dean Wigmore[168] proposes "an organized boycott by a dominant group of states" financed by a system of insurance, which, Kocourek believes is "entirely new" and which, "if it should happen to be adopted and succeeds in actual practice . . . will be rated as one of the most important contributions to the welfare of the human race." An international police force is one of the most frequently

method by which the Court could enforce its mandate." WARREN, THE SUPREME COURT IN AMERICAN HISTORY 764 (1935).

[162] Kentucky v. Dennison, 24 How. (65 U. S.) 66 (1861). Notwithstanding the mandatory language of this provision (which had been carried forward from the Articles of Confederation) Chief Justice Taney concluded at p. 109-110 that, ". . . if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other . . . to use any coercive means to compel him"; and the clause in question has remained inoperative ever since.

[163] With reservations by Colombia's representatives.

[164] Rowe, "The Habana Meeting of the Ministers of Foreign Affairs of the American Republics," 74 Pan American Union Bulletin 609 (1940).

[165] See 36 AM. J. INT. L. (Supp. No. 2) 82-83.

[166] See id. 59 at 70 (1942); Potter, "The Wal Wal Arbitration," 30 id. 27 at 34 (1936); id. 175; Stewart, "Canada and International Labor Conventions," 32 id. 34 (1938); Kuhn, "The Economic Sanctions and the Kellogg Pact" 30 id. 83 (1936).

[167] See Williams, "The Coming of Economic Sanctions into American Practice," 37 id. 386 (1943).

[168] "Bullets or Boycotts," edited by Albert Kocourek and published posthumously in 29 A.B.A.J. 491 at 491 (1943).

mentioned sanctions for maintaining peace and could be used equally to enforce the Court's judgments; but, to be effective, it would require an international organization.[169]

d. *Its Connection with the League of Nations*

Former Senator Dill's jibe that the Permanent Court is "not a World Court but a League of Nation's Court"[170] is fully answered by Judge Hudson[171] who shows that not even the former's financial support is derived from the latter. The connection between the two is, therefore, much less than that between the United States Supreme Court and Congress. Nevertheless, it was necessary for *some* international body to initiate the movement which led to the execution of the Protocol and to keep the institution going by selecting its personnel. The first step was taken by the League of Nations Council and to repeat it would be a waste of time and energy; the second is a continuing process which the same body, though now dormant, continued to provide until the Court, through the exigencies of global war, was compelled to suspend its functions. The question of continuing the League is not a part of our theme; but it is well to remember that something like it is indispensable to the maintenance of any international court.[172] Here again the question arises whether there would be any gain by discarding an institution which has functioned successfully for nearly a quarter of a century merely to provide for the exercise of similar functions in the

[169] See Kelsen, "Compulsory Adjudication of International Disputes," 37 AM. J. INT. L. 397 at 399 (1943); Rogers, "The Law Above Nations," 37 id. 305; Wright, "National Security and International Police," 37 id. 499; Corbett, "World Order—An Agenda for Lawyers," 37 id. 207 at 217.

[170] See also the reservation proposed by Senator Reed of Missouri, 67 CONG. REC. 2676 (1926). Cf. Senate Ex. Doc. 1, 72d Cong., 1st sess., p. 32.

[171] "The Independence of the Permanent Court of International Justice," 17 A.B.A.J. 430 (1931). Indeed "it would seem [to him] that the Assembly made no effort to give . . . effect to the [World Court] Statute. It is through the Protocol of Signature that the Powers have breathed life into it." Hudson, "Advisory Opinions of National and International Courts," 37 HARV. L. REV. 970 at 988n. (1924).

[172] ". . . It is commonly recognized that the Permanent Court of International Justice rendered good service and the assumption is made that we need simply put it in operation again, with enlarged jurisdiction and possibly a few improvements of structure. What escapes attention is that the composition of the court was a delicate compromise between the demand of the greater States for representation and the claim of the smaller States to legal equality and that the success of the compromise depended on the election simultaneously in the Council and in the Assembly of the League of Nations. Unless, therefore, we assume that the League will be reestablished in more or less the same form, it becomes necessary to devise some other way of manning our World Court." Corbett, "World Order—An Agenda for Lawyers," 37 AM. J. INT. L. 207 at 215, 216 (1943).

same way by another.[173] The insinuation that there has been anything sinister in the relation between the League and the Permanent Court is pure fiction.

III

THE OUTLOOK FOR ADHERENCE

It is interesting to learn from an authoritative source that "the [World] Court Statute is now being adapted to the new General Organization."[174] But the question presented to the Senate should not be complicated or confused with proposals for changing the Statute. Every such proposal offers a new excuse for some isolationist Senator to oppose the whole project. In seeking simple repeal of reservations and provisos, proponents of the Court should be careful not to invite new ones.

It is encouraging also to note that the membership of the Senate seems to have become more internationally minded since 1935. The old time isolationists are mostly gone,[175] and meanwhile new members have come in, who sense the dire consequences of isolation.[176] Again, popular

[173] "I hope we shall not lightly cast aside all the immense work which was accomplished by the creation of the League of Nations." Prime Minister Churchill's address of March 21, 1943, NEW YORK TIMES, March 22, 1943, 4:1-8.

Cf. THE SHOTWELL COMMISSION TO STUDY THE ORGANIZATION OF PEACE, 4th rep., 15 (1943) recommending that, "The international organization should build upon the foundations already laid in the League of Nations and its allied institutions, making use of whatever may be found serviceable in their experience and organization."

"I do believe that a league of sovereign nations, agreeing upon a rule of law and order throughout the world, has a real chance of success. . . . It should provide . . . for the submission of all disputes involving such laws to a world court. . . . I would prefer to build the association on the old League of Nations." Senator Taft in NEW YORK TIMES MAGAZINE, Feb. 6, 1944, 8:4, 34:2.

Cf. similar expressions by Senator Conally, NEW YORK TIMES, March 28, 1945, 38:1-2.

[174] A despatch from Washington to the NEW YORK TIMES of March 28, 1945, 16:5, sates that "jurists representing the United Nations . . . . will meet in Washington April 9 to draft the Statute for the International Court" and to decide "whether [it] will be a modified form of the existing statute . . . or . . . an entirely new [one] . . . using the old . . . as a basis. . . . State Department experts . . . feel that, with some amendments, the [existing] statute offers a tested and workable instrument, permitting rapid creation of the court." The only proposed "amendments" mentioned are: (1) "to eliminate all reference to the League of Nations"; (2) "to introduce into the Statute a provision for its own amendment"; (3) selection of Judges "by a meeting of the representatives of the member governments"; (4) more effective sanctions. Such changes would not impair the Court's identity or status.

[175] Of the seventeen who voted against adherence on Jan. 27, 1926, only Senators Johnson (Cal., now inactive) and LaFollette (Wis.) remain. Of the seven Senators who, while voting for adherence in 1926, voted against it in 1935, only two—Gerry and Wheeler—remain. Others retiring in 1944 included Smith (S. C.), Reynolds (N. C.), Clark (Mo.), Clark (Idaho) and Holman (Ore.).

[176] E.g. the four Senators who sponsored the BBHH Resolution. Fullbright of

interest in the Court has been reviving as we approach the multitudinous problems of the post-war era. Its retention has been favored at two sessions of the Inter-American Bar Association (Rio de Janeiro, 1943 and Mexico City, 1944) and the group of lawyers whose discussions bore fruit in a recent American Bar Association publication[177] while a committee of the same Association[178] recommended "continuance and extension of the Court." The American Bar Association, at its 1944 session, reaffirmed its traditional position by resolving that "the World Court should be continued as the highest tribunal of an accessible system of interrelated permanent international courts with obligatory jurisdictions."[179]

Official utterances on the subject have not however been so explicit. At the Mackinac Republican Governors' Conference of September 17, 1943, Governor Baldwin of Connecticut called for "a world court to decide justiciable disputes between nations." But the Senate (Connally) resolution of November 5, following, failed to mention any court. President Roosevelt's outline of world organization, announced June 15, 1944, used language similar to Governor Baldwin's; so did the "general agreement" of the Dumbarton Oaks Conference (announced on August 29, following) and Governor Dewey in his Louisville speech of September 8. These expressions would apply equally well to an entirely new tribunal which, as we have seen,[180] would mean the loss of most that our World Court has accomplished. Fortunately the "tentative proposals"[181] emanating from this Conference and indorsed by the

Arkansas is one of the new Senators with an international outlook. On Jan. 24, 1945, 16 of the incoming Senators joined in a letter to the President favoring "the formation at the earliest moment of a United Nations organization, to establish and preserve the peace of the world, along the general lines tentatively drafted at Dumbarton Oaks." NEW YORK TIMES, Jan. 25, 1945, 5:3. The World Court, however, was not mentioned specifically.

[177] INTERNATIONAL LAW OF THE FUTURE 102, 168 (1944).

[178] See NEW YORK TIMES, July 30, 1944, 22:1, 2. This recommendation includes proposals for circuit courts, changes in mode of electing judges and in jurisdiction, etc. But the group mentioned in note 175 deprecated "any attempt to draft a new Statute. Such an attempt might reopen many questions to which solutions have already been given, and it seems doubtful whether a more satisfactory instrument would result."

[179] 30 A.B.A.J. 547 (1944).

[180] See division II, subdivision 3 at p. 855, supra.

[181] "The statute of the Court of International Justice should be either (a) the statute of the Permanent Court of International Justice, continued in force with such modifications as may be desirable or (b) a new statute in the preparation of which the Statute of the Permanent Court of International Justice should be used as a basis." PROPOSALS FOR THE ESTABLISHMENT OF A GENERAL INTERNATIONAL ORGANIZATION, c. 7, § 3 (1944); reprinted in NEW YORK TIMES, Oct. 10, 1944, 12:4. Cf. letters of George A. Finch in NEW YORK TIMES, Oct. 22, 1944, 8E: 7, James W. Ryan, id. March 15, 1945, 22:6-7.

same President on October 9, 1944 are much more satisfactory. But the report of the "Crimea Conference" of Feb. 4-12, 1945, announces "a general organization" whose "foundations were laid at Dumbarton Oaks" and "a conference[182] of the United Nations at San Francisco... on April 25, to prepare the charter of such an organization" and there is no mention of any court. We should not, however, ignore the unpleasant fact that other nations have become suspicious of ours because of the course pursued by our Senate. Action by it now would relieve that feeling and render easier the subsequent steps in a world program. When our Senate has put itself on record as adhering to the Court without reservations or provisos, our lost leadership may be regained and other peace proposals by the United States are likely to meet a more favorable reception.

Finally this revival of interest in the court project may not continue. Post-war problems of seemingly more pressing importance may crowd it from the conference tables. If we wait until all such problems are disposed of, the World Court is likely to be forgotten. But let *us* not forget that the present Court was unable to open until nearly three years after the Versailles Treaty had been signed.

Once more the opportunity comes to us, not only to retrieve the tragic mistake of former years but to make amends for it. Our Senate is now in a position not merely to adhere to the Permanent Court Protocol, unreservedly, but to save the Court itself and to preserve the results of its work for the generations to come. But before it reaches the Senate the Protocol faces the San Francisco Conference which is "to prepare the Charter" of the United Nations within which the court provisions will almost certainly be included. May the friends of the Court rise to these occasions.

[182] To be known officially as "the Conference . . . on International Organization."