THE PERMANENT COURT OF INTERNATIONAL JUSTICE IN GLOBAL HISTORY

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The Permanent Court of International Justice's contributions often are overshadowed by the fact that it was the predecessor of the overwhelmingly important International Court of Justice. This article is the first to look at the Permanent Court's possible contribution to global history in its own right. While the case-study method adopted in this article does not allow for the determination of causal linkages between acts of the Permanent Court and consequences in global history, it nevertheless provides compelling support for liberal institutionalism and the notion that global history has been influenced by actors other than states, even though states remain the main shapers of global history.

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I. INTRODUCTION

The establishment of the Permanent Court of International Justice (PCIJ) in 1922 revolutionized judicial settlement of inter-state disputes by providing the first-ever sitting institution designed specifically to directly handle these types of cases.[1] The prior adjudicative manner of handling such disputes involved ad hoc arbitrations run by different judges or panels of judges under different rules virtually every time,[2] which was highly inefficient and frustrated the development of a coherent system of judicial dispute settlement. Despite the Permanent Court's auspicious beginning, virtual consensus exists among contemporary international legal historians who have written about the Permanent Court that its accomplishments during its inter-war lifespan were meagre and disappointing.[3] Instead of focusing on the Permanent Court's impact on its successor, the International Court of Justice, or on international law generally, as erstwhile commentators have done, this article is the first to explore the Permanent Court's impact on global history through its perceived impact on global leaders.[4]

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1. *See generally* PERMANENT COURT OF INTERNATIONAL JUSTICE, THE PERMANENT COURT OF INTERNATIONAL JUSTICE: ITS CONSTITUTION AND WORK (1939); ALEXANDER P. FACHIRI, THE PERMANENT COURT OF INTERNATIONAL JUSTICE (Humphrey Milford ed., 2d ed. 1932); Statute of the Permanent Court of International Justice, Dec. 13, 1920, 6 L.N.T.S. 390 [hereinafter *PCIJ Statute*] (setting out the details of the PCIJ).

2. *See* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 794–803 (2012); Manley O. Hudson, *The Permanent Court of International Justice*, 35 HARV. L. REV. 245, 253–55 (1922); JOHN G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 98–101 (4th ed. 2005) (talking about public international arbitration). The Permanent Court of Arbitration predates the PCIJ by over two decades, although it handles the administration of cases, as opposed to directly resolving cases like the PCIJ.

3. *See* OLE SPIERMANN, INTERNATIONAL LEGAL ARGUMENT IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE 14 (2005) (asserting that the Permanent Court now is "associated by many with a distant and less sophisticated past"); Born, *supra* note 2, at 803 (downplaying the significance of the Permanent Court on account of its "modest" caseload); Stephen M. Schwebel, *The Performance and Prospects of the World Court*, 6 PACE INT'L L. REV. 253, 257 (1994) (noting the irrelevance of the Permanent Court to preserving peace during the inter-war period).

4. By "history," this article adopts the plain-language definition provided by the Oxford English Dictionary: "A written narrative constituting a continuous chronological record of important or public events (esp. in a particular place) or of a particular trend, institution, or person's life." *History*, OXFORD ENGLISH DICTIONARY ONLINE, www.oed.com/view/Entry/125285?rskey=eF0Srd&result=1 (last visited Aug. 26, 2022). By "global history," this article means diplomatic history relating to the interactions between states. *See generally* SEBASTIAN CONRAD, WHAT IS GLOBAL HISTORY (2016). This article's usage of the phrase is similar to how international historians such as David Armitage and Jennifer Pitts use the phrase "global history." *See, e.g.*, CHARLES H. ALEXANDROWICZ, THE LAW OF NATIONS IN GLOBAL HISTORY (David Armitage & Jennifer Pitts eds., 2017). Global history is distinct from other types of history not involving the interactions between states, such as art history and religious history. *See generally* JOHN W. LUBBOCK, REMARKS ON THE CLASSIFICATION OF THE DIFFERENT BRANCHES OF HUMAN KNOWLEDGE 5–8 (1838) (listing various branches of history); MAURICE H. MANDELBAUM, THE ANATOMY OF HISTORICAL KNOWLEDGE 3–14 (1977) (emphasizing the diversity of branches of historical study while acknowledging a measure of unity between them). Of course, PCIJ cases simultaneously can

This article is divided into six parts, including this introduction and an equally brief conclusion in Parts I and VI, respectively. Part II provides the reader with a review of a broad sample of the literature on the Permanent Court by post-1945 historians. As that part shows, most commentators from the sample either focus on the Permanent Court's contribution to the development of the International Court of Justice or to the development of international law generally, as articulated by other courts and scholars. Admittedly, legal importance and historical importance may go hand in hand, although they can be distinguished based on where the influence is observed—legal fora or political fora. While international courts and tribunals have political components to them, they generally are not characterized as political entities, at least not in the way that states usually are characterized. For the purposes of the literature review provided in Part II, erstwhile commentators on the Permanent Court fail to mention, let alone analyze, how the Permanent Court may have had an impact on global history outside of these two contexts of ICJ and international law development. Part III sets out the overarching theory that this article is testing with its case studies—namely, that global history has been influenced by non-state actors such as the Permanent Court. As explained in Part III(B) below, this is the essence of liberalism and neo-liberalism in international relations theory, with their emphasis on how international institutions play a key role in the international system. Part IV explains how historians select their case studies and the types of evidence on which they rely, with the aim of reassuring the reader that the case studies relied on in this article are valid and actually help develop the overarching theory in question. With these observations in mind, Part V analyzes and evaluates the impact on global history of what arguably are the three most important contributions of the Permanent Court: (1) the stability from the sources doctrine of international law provided by the Statute of the Permanent Court; (2) the default rule of presumed legality of states' actions unless expressly prohibited under international law from the 1927 *S.S. Lotus* case; and (3) the softening effect on international law and international relations from the application of equity to judicial dispute settlement, which originated in the 1937 *Diversion of Water from the Meuse* case. Each involves a practical example of the Permanent Court's impact on global history. The observations in this part merely are suggestive of impact,

impact global history and the development of international law. While the distinction is somewhat subtle, the development of international law involves courts and legal scholars, whereas global history involves actors beyond those in the legal realm interacting on a grander political stage. In other words, the PCIJ always was acting with legal importance when adopting its opinions, given its principal judicial function during the inter-war period, while its impact on political actors like world leaders provided the historical importance. Therefore, the PCIJ's historical importance is derivative and dependent on the actions of others.

not determinative, on account of the qualitative methodology and counterfactual reasoning involved. If time, space and resources permitted, all instances of impact on global history by the Permanent Court would have been considered in this study, including instances of low impact and non-impact, as well as an exploration of the reasons behind such divergence in impact. Such exhaustiveness will be left for future research, with this study pointing those researchers in a new direction. The Permanent Court may not have been able to perfectly maintain peace through the application of law to disputes following the First World War, as its founders had intended,[5] because it largely bolstered state sovereignty and power, instead of keeping it in check. Nonetheless, the aspects of the Permanent Court highlighted in this article suggest that the Permanent Court may have had a more lasting impact on global history than what commentators have asserted in the past.

II. THE PERMANENT COURT AS THE PREDECESSOR OF THE INTERNATIONAL COURT OF JUSTICE

What was intended to be a cataloguing of contemporary historical literature relating to the Permanent Court admittedly has turned into a broad sample of that literature on account of the size of that body of literature. Instead, this part focuses on the literature relating to the international legal history of the Permanent Court. At most, it would appear that these historians emphasize the Permanent Court's contributions to its ostensibly more impactful successor, the International Court of Justice. This usually takes the form of assessing the impact of the Permanent Court on the procedures and substantive jurisprudence of the International Court of Justice, with numerous authors even talking about the Permanent Court and the International Court of Justice as if they were one court,[6] notwithstanding the

5. *See* Iain Scobbie, *The Permanent Court of International Justice, Arbitration, and Claims Commissions of the Inter-War Period, in* LEGACIES OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE 203, 203–04 (Malgosia Fitzmaurice & Christian J. Tams eds., 2013) (emphasizing how the PCIJ's founders had intended for the PCIJ to replace the application of force with the application of law).

6. *See generally* SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS (Martinus Nijhoff ed., 5th rev. ed. 1995) (analyzing the jurisprudence of both courts together); Hugh Thirlway, INTERNATIONAL LEGAL ARGUMENT IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE: THE RISE OF THE INTERNATIONAL JUDICIARY (Book Review), 101 AM. J. INT'L L. 246, 249 (2007) ("unless the approach is purely historical, it is somewhat artificial to treat [the Permanent Court's jurisprudence] independently of the decisions of the postwar Court . . . ."); SPIERMANN, *supra* note 3, at xiii–xiv (foreword by James Crawford) (recognizing criticism of international dispute settlement as "largely unrelated to key issues facing the world at this time," and emphasizing the significance of the Permanent Court as the predecessor to the International Court of Justice, although Spiermann does not connect these two courts); Philip V. Tisne, *The ICJ and Municipal Law: The Precedential Effect of the Avena and LaGrand Decisions in U.S. Courts*, 29 FORDHAM INT'L L.J. 865, 876–87 (2006); Kenneth J. Keith, *The Development of Rules of Procedure by the World Court through Its Rule Making, Practice and Decisions*, 49 VICTORIA U. WELLINGTON L. REV. 511 (2018) (referring to "the Court" throughout

fact that they were entirely separate entities with separate constitutions.[7] Alternatively, these international legal historians focus on the Permanent Court's contributions to the development of international law generally,[8] similar to how international lawyers from the inter-war period wrote about the Permanent Court's jurisprudence during their time.[9] Some among this group are critical of the Permanent Court for its perceived failure to develop international law sufficiently.[10] Those contemporary commentators who see significance in the Permanent Court's decisions fail to adequately explain what makes them so significant.[11] Others are neutral concerning the Permanent Court's contribution to international law, even though they spend time analyzing the cases.[12]

Of course, international law impacts global history inasmuch as international law constitutes the language of diplomacy.[13] The way states

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without distinguishing between the ICJ and the PCIJ); Edward Gordon, *The ICJ: On Its Own*, 40 DENVER J. INT'L L. & POL'Y 74 (2011) (same); Gerhard Wegen, *Discontinuance of International Proceeding: The Hostages Case*, 76 AM. J. INT'L L. 717, 721–22 (1982) (focusing on development of the rule of discontinuance); Note, *The Corfu Channel Case: The International Court of Justice Bids for Expanded Jurisdiction*, 58 YALE L.J. 187, 188–90 (1948) (focusing on the development of compulsory and non-compulsory jurisdiction).

7. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).

8. *See, e.g.*, SPIERMANN, *supra* note 3 (using PCIJ jurisprudence to illustrate a unique perspective that international law is created by national lawyers and international lawyers); Ole Spiermann, *Professor Walther Schücking at the Permanent Court of International Justice*, 22 EUR. J. INT'L L. 783 (2011) (showing the impact of the German judge on the Permanent Court's jurisprudence and asserting that his approach is similar to many international lawyers today, but not saying that he influenced them or global history); Ole Spiermann, *Judge Max Huber at the Permanent Court of International Justice*, 18 EUR. J. INT'L L. 115 (2007) (showing the impact of Judge Max Huber on the Permanent Court's development of international law, without asserting there was a corresponding impact on global history); LEGACIES OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE (Malgosia Fitzmaurice & Christian J. Tams eds., 2013).

9. *See, e.g.*, HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE (1934).

10. *See, e.g.*, Sheila Weinberger, *The Wimbledon Paradox and the World Court: Confronting Inevitable Conflicts Between Conventional and Customary International Law*, 10 EMORY INT'L L. REV. 397 (1996) (focusing on the failure of the Permanent Court to develop international law by tolerating conflicts between treaty and custom in its *Wimbledon* case, which the author sees as a continuing problem in international law).

11. *See, e.g.*, Born, *supra* note 2, at 802 (noting that the Permanent Court "rendered a number of carefully reasoned and influential decisions, including several in significant disputes arising from the World War I peace arrangements").

12. *See, e.g.*, BIMAL N. PATEL, THE WORLD COURT REFERENCE GUIDE: JUDGMENTS, ADVISORY OPINIONS AND ORDERS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND THE INTERNATIONAL COURT OF JUSTICE (1922-2000) (providing comprehensive information about the cases of the PCIJ and the ICJ until 2000, without much evaluation).

13. *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT: REISSUE WITH A NEW EPILOGUE 568 (2005).

understand one another indirectly impacts global history. Therefore, critics might argue that all of these contemporary international legal historians indirectly discuss the impact of the Permanent Court on global history when they focus on how the Permanent Court developed international law or developed ICJ jurisprudence.[14] However, they have neglected to identify and analyze the Permanent Court's more direct impact on global history through its influence on global leaders who were operating in the political sphere, a shortcoming that this article remedies or at least provides a first attempt at remedying.[15] Again, more exhaustive analysis of the Permanent Court's impact on global history will be left to future publications. Having identified this gap in the literature that the article addresses, the following part establishes the theoretical foundation for understanding the importance of the Permanent Court in terms of global history.

III. TESTING THEORIES

This article focuses on three case studies to test the theory that global history can be influenced by non-state actors. Various definitions of "case study" appear in the methodology literature, although they all seem to share a desire to capture the complexity of real life or a theory about real life by thoroughly exploring only one or a few examples.[16] The main activities associated with the case-study method are evidence gathering and using that evidence to test the narrative presented by a theory.[17] This part identifies the narratives presented by the relevant theories and the ways to decide between them. As emphasized in the previous part, existing scholarship on the Permanent Court has ignored the possibility that the Permanent Court influenced the direction of global history.[18] Of course, states (and their agents) are the most significant actors when it comes to the shaping of global history. However, the influence of non-state actors like the Permanent Court on states must not be forgotten. That is the overarching purpose of this article.

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14. *See generally* SPIERMANN, *supra* note 3 (focusing on the PCIJ's impact on the ICJ when mentioning the PCIJ); Born, *supra* note 2 (same); Schwebel, *supra* note 3 (same).

15. Admittedly, the Permanent Court's impact still has a measure of indirectness, inasmuch as its impact on global history comes through the Permanent Court's impact on states and their agents. Nevertheless, the Permanent Court's impact on global history (as explained in this article) is more direct than how previous commentators have demonstrated because it does not focus on the Permanent Court's influence on the International Court of Justice. This is a significant development for the literature.

16. *See* John Gerring, *The Case Study: What It Is and What It Does*, *in* THE OXFORD HANDBOOK OF POLITICAL SCIENCE 1133, 1134–35, 1137 (Robert E. Goodin ed., 2011).

17. *See* Dan G. Bachor, *Increasing the Believability of Case Study Reports*, 48 *ALTA. J. EDUC. RSCH.* 20, 21–22 (2002). *See also* Gerring, *supra* note 16, at 1135 (identifying a key role of the case-study method as testing broad theories and their predictive powers).

18. *See* SPIERMANN, *supra* note 3; Born, *supra* note 2; Schwebel, *supra* note 3.

A. Defining Theory

Before discussing theory, it is important to define the notion of "theory." Raymond Aron asserts that the term is quite ambiguous in the realm of international relations, covering such categories as hypotheses, models and concepts, allegedly on account of this field wanting to catch up to the progress of economics theory.[19] Nonetheless, the field of international relations is interested in making generalizations and finding patterns that can be used to predict behavior. Such generalizations and patterns will be considered "theory" for the purpose of this article. Some theorists seem to think that theories must be created from empirical evidence,[20] although this is only the inductive method of theory building. The equally valid deductive method takes the opposite approach. Theories not only improve the perceived order and meaning of seemingly disconnected, complex observation, but also provide a tool for predicting events and actions. In short, theories are the paradigms through which we see facts, which often cannot speak for themselves. This article adopts a more deductive method of theory building inasmuch as it looks to see what narratives can be told by various cases of the Permanent Court.

Such theory is formed through a scientific approach of putting personal values aside, observing events and creating hypotheses as to why events occur or occurred in a certain way, and subjecting such hypotheses to repeated scrutiny.[21] It is during the scrutinizing stage when scholars judge whether theories are sound and persuasive. The scrutiny intends to be objective, with no preconceived notions of old theories being outdated and novel theories being praiseworthy,[22] with favor being given to those that explain events. The reader is invited to provide that scrutiny. Invariably, some theories explain some events but not others, with no one theory being the explanatory panacea. On the contrary, theories are relied on by different people to explain different situations, so comparison can be rather difficult. Certainly, some theories have broader appeal than others, but this is not to say that these theories are inherently better. Indeed, some theories might be on the speculative side of the spectrum, where supporting evidence remains sparse, despite the best efforts of the theorist to find support. As explained

19. *See* Raymond Aron, *What Is a Theory of International Relations?*, J. INT'L AFFS. 185, 185–86 (1967).

20. *See, e.g.*, HANS JOACHIM MORGENTHAU & KENNETH W. THOMPSON, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 3 (6th ed. 1985) ("The test by which . . . a theory must be judged is not *a priori* and abstract but empirical and pragmatic.").

21. *See* Tim Dunne, *Liberalism*, *in* THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS 185, 194 (John Baylis & Steve Smith eds., 3d ed. 2005).

22. *See* MORGENTHAU & THOMPSON, *supra* note 20, at 4.

in later parts, the research behind this article generally falls into that category.

When assessing the theories presented in this article, the reader is encouraged to consider several criteria: coherence (free of internal contradictions); clarity; lack of bias from subjective values; breadth in scope and applicability to multiple issues of importance; and depth in ability to explain a particular phenomenon.[23] These criteria are not necessarily equal in importance. Zakaria appears to emphasize the fourth criterion above when he states that a "good theory" starts by looking at the effect of the international system on the issue at hand, and not focusing primarily on an internal level of analysis, because the former applies to the largest number of cases by crossing over cultures and regimes.[24] Admittedly, these criteria may give certain advantages to some theories and not others, so there is no objective way of determining the best, whatever that might mean. Moreover, clarity and scope of applicability of a theory appear to be inversely proportional,[25] so there is a trade-off to be made between these two criteria. However, good theories will likely have most, if not all, of these qualities. With these general notions of theory in mind, the following section identifies the actor as being a main way of distinguishing between theories.

B. Theories Based on the Actors Involved

Actors are natural and legal persons (which includes entities) whose decisions and actions impact politics on the international level. According to international law, these actors have the right to be taken seriously on the international level, and as a result they have particular weight in the system. This typically is what is meant when international lawyers refer to states and international organizations as having international legal personality.[26] Agents, on the other hand, represent actors, have no meaningful independence, and therefore have no international legal personality of their own. Agents simply execute decisions after referring back to their principals, rarely making their own decisions without express authorization. Examples would include militaries, diplomats, and functionaries of states, as well as

23. *See* ROBERT H. JACKSON & GEORG SØRENSEN, INTRODUCTION TO INTERNATIONAL RELATIONS: THEORIES AND APPROACHES 62 (2d ed. 2003); MORGENTHAU & THOMPSON, *supra* note 20, at 3–7 (focusing on coherence and clarity).

24. *See* Fareed Zakaria, *Realism and Domestic Politics: A Review Essay*, 17 INT'L SEC. 177, 196–97 (1992).

25. *See id*. at 197–98.

26. *See* James D. Fry, *Rights, Functions, and International Legal Personality of International Organizations*, 36 B.U. INT'L L.J. 221, 222 (2018) (observing that the right to be taken seriously on an international level typically is all that is meant when commentators assert that international organizations enjoy international legal personality).

any entities that act as the representatives of states and international organizations, as long as they do not exercise significant independence.

A fitting example of the actor/agent distinction can be found in the feudal Chou structure where the princes and vassals acted as agents to the king in administering the small states surrounding the king's land. Both the princes and vassals were beholden to the king's "divine" decrees as the "Son of Heaven," and any challenge to his power was taken as sacrilege.[27] Clearly, they were not independent entities, but were acting as the king's representatives. This changed later on, as feudal lords consolidated their power to form self-sufficient states, thus becoming actors in their own right.[28] The feudal princes even began to call themselves kings by the fifth century BCE, and went to war with each other and the Chou monarch, indicating that these entities were substantially independent actors, at the least, or actual sovereigns, at the most.[29] The Greek city-states provide a nice example of reliance on agents, as many used merchants and later formal ambassadors as agents in representing their interests with other city-states and in putting diplomatic pressure on each other.[30] Of course, some scholars see agents themselves as forming an integral part of the international legal system, inasmuch as they enjoy a measure of independence from their principals,[31] although this generally departs from the mainstream view of the system.

The International Court of Justice emphasized the right of entities with international legal personality to be taken seriously on the international level in its 1949 *Reparation for Injuries Suffered in the Service of the United Nations* advisory opinion. The opinion declared the following in the context of the United Nations being able to bring an international claim for the assassination of one of its representatives:

> Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the Statute.[32]

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27. *Id*. at 28.

28. *See id*.

29. *See id*. at 28–29.

30. *See id*. at 39–41, 45 (providing an example of European overseas diplomatic corps between 1648 and 1814).

31. *See* STEVEN WHEATLEY, THE IDEA OF INTERNATIONAL HUMAN RIGHTS LAW 10 (2019) (discussing how agents make up part of the international law system).

32. *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 177 (Apr. 11).

The International Court of Justice went on to declare that the United Nations enjoyed international legal personality,[33] which has been extended to other international organizations over time.[34] Political scientists such as Kalevi Jaakko Holsti share this definition of an actor on the international level as being an independent entity.[35] Of course, the Permanent Court predates the United Nations and the *Reparation* advisory opinion. Nevertheless, it seems safe to assume that the Permanent Court enjoyed an objective form of international legal personality inasmuch as its constitution gave it various rights and responsibilities vis-à-vis its member states, and its constitution did not deny it international legal personality. Therefore, the Permanent Court was an actor in its own right during the time of its existence, even though it had states as members, just as contemporary international judicial organizations have states as members and international legal personality.

Just because an entity enjoys international legal personality, however, does not mean that it necessarily impacts global history in a meaningful way. Since the middle of the seventeenth century, the most important actors on the international level have been states. Presumably, few would disagree with this characterization of the situation.[36] The International Court of Justice emphasized this point in its *Reparation* advisory opinion when the Court highlighted how international organizations have "a large measure of international personality" compared to the full measure enjoyed by states.[37] Again, political scientists like Charles Tilly would seem to agree, as reflected in his definition of states as "coercion-wielding organizations" that have priority over other organizations.[38] In other words, non-state actors can include international governmental organizations such as the League of Nations and the Permanent Court of International Justice during the inter-war period, non-governmental organizations, multinational corporations, and even perhaps individuals such as those in the invisible college of international lawyers, as Oscar Schachter has opined.[39] However, states are the ones that usually grab the headlines and the attention of international

33. *See id*. at 179.

34. *See generally* Fry, *supra* note 26 (discussing the current state of the doctrine of international legal personality).

35. *See* K.J. HOLSTI, INTERNATIONAL POLITICS: A FRAMEWORK FOR ANALYSIS 29–31 (2d ed. 1972).

36. *See* John C. Garnett, *States, State-Centric Perspectives, and Interdependence Theory*, *in* DILEMMAS OF WORLD POLITICS: INTERNATIONAL ISSUES IN A CHANGING WORLD 61, 61–64 (John Baylis and N.J. Rengger eds. 1992) (observing, *inter alia*, how these types of points are "generally agreed").

37. Reparation, 1949 I.C.J. at 178–79.

38. *See* CHARLES TILLY, COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1992 1–2 (1990).

39. *See* Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977).

historians. While international organizations like the Permanent Court have the capacity to shape global history, states and states' leaders nevertheless can make adjustments to that narrative. Therefore, this article focuses on the ways the Permanent Court has influenced state leaders on the political stage, as opposed to influence in a more legal forum, with those leaders arguably going on to influence global history.

Even though this article stops short of asserting that the Permanent Court directly influenced the shaping of global history, it nevertheless represents an expansion of our understanding of the Permanent Court's position in relation to global history. Realism, as the dominant view driving the formation of global history,[40] generally dismisses the significance of international organizations like the Permanent Court, seeing states as the only actors of any real consequence.[41] However, rational choice theory, a variant of realism, posits that institutions have an important role in the system, for example, by encouraging weak and unstable states not to defect.[42] Neo-realism sees the balance of power between states as the main source of order in the otherwise anarchic system,[43] essentially leaving non-state actors out of the mix. Liberalism sees a fundamental role for all non-state actors in the system, especially institutions, in protecting its core values of liberty and justice.[44] Neo-liberalism (or liberal institutionalism) goes further by seeing institutions as shaping state behavior, controlling anarchy to some degree, and ensuring cooperation by discouraging cheating, with international security organizations being the major means of avoiding war, although other international organizations also can play a role in preventing war.[45] It is this shaping of state behavior that has the greatest potential for international organizations like the Permanent Court to influence the formation of global history. In short, realists focus on power capabilities in looking at how states influence regimes and divide up costs and benefits, whereas liberal institutionalists look at how regimes allow states to cooperate outside of an inter-state framework while still operating in an essentially

40. *See* Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 507 (1995) (asserting that realism has been the dominant theory for the past two millennia); Stanley Hoffmann, *Sovereignty and the Ethics of Intervention*, *in* THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION 12, 16 (Stanley Hoffmann ed., 1996) (recognizing the dominance of realism for the past 50 years).

41. *See* Tim Dunne & Brian C. Schmidt, *Realism*, *in* THE GLOBALIZATION OF WORLD POLITICS 161, 172 (John Baylis & Steve Smith eds., 3d ed. 2005).

42. *See id*. at 166, 171.

43. *See* Steven L. Lamy, *Contemporary Mainstream Approaches: Neo-Realism and Neo-Liberalism*, *in* THE GLOBALIZATION OF WORLD POLITICS 205, 208 (John Baylis & Steve Smith eds., 3d ed. 2005).

44. *See* Dunne, *supra* note 21, at 188, 195.

45. *See id*. at 194–95; Lamy, *supra* note 43, at 211–14.

anarchical world.[46] The Permanent Court would be such an international organization that has had an impact on global history through its influence on state behavior. Previous commentators on the Permanent Court have not addressed these types of issues concerning whether the Permanent Court can shape global history, let alone how it has shaped global history. This aspect in itself makes this article noteworthy.

Before exploring those specific instances of impact on global history, the following part explains how historians typically select case studies and sources, which is necessary to justify the case studies used in this article.

IV. HISTORIANS' METHODOLOGY IN SELECTING CASE STUDIES AND SOURCES

In deciding which case studies and sources to look at to persuasively suggest impact on global history, this part explores the ways that global historians have undertaken such a task in the past, with the aim of determining the range of acceptable ways of engaging in such tasks. To be clear, studying global history has become popular in the past two decades, with topics ranging the gamut, and with the methods and sources employed depending on the narratives being told and the historians telling them.[47] In other words, the study of global history or an institution's impact on global history is more of an art form than a science.[48] Nevertheless, some explanation of the methodology adopted in this article must be provided.

Given the ostensible youth of the field of global history, some might say that the older guides to historical research are somewhat irrelevant. However, they still provide considerable guidance in this effort. Jules Benjamin's accessible guide explains how historians try to ask important and answerable questions in trying to understand the past, with the key function being to understand what sources of evidence exist and how they explain what *actually* happened in a reliable and authentic way.[49] Robert Fogel and G.R. Elton see two kinds of historical research, the "scientific" and the

46. *See Richard Little, Dilemmas of World Politics: International Issues in a Changing World, 41 POLITICAL STUDS. 362, 371 (1993).*

47. *See* Jacob Katz Cogan, *Review of Bardo Fassbender and Anne Peters eds., The Oxford Handbook of the History of International Law*, 108 AM. J. INT'L L. 371, 371–72 (2014) (internal citations omitted); Karen J. Alter, *The Empire of International Law?*, 113 AM. J. INT'L L. 183, 192–93 (2019) (reviewing JUAN PABLO SCARFI, THE HIDDEN HISTORY OF INTERNATIONAL LAW IN THE AMERICAS: EMPIRE AND LEGAL NETWORKS (2017); ARNULF BECKER LORCA, MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY 1842–1993 (2014); OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017)).

48. *See generally* Isaiah Berlin, *The Divorce Between the Sciences and the Humanities*, *in* AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS 101 (Henry Hardy ed., 2d ed. 2013) (examining the relationship between science and humanities in studying history).

49. *See* JULES R. BENJAMIN, A STUDENT'S GUIDE TO HISTORY 4 (12th ed. 2013).

traditional, with both being equally valid even though each might disagree about the other.[50] Those who focus on global history seem to fall squarely within the more traditional approach, where the complexities of historical details are savored and used to tell an accurate and contextualized reconstruction of the historical event or institution in question, often with an objective thesis in mind.[51] The accuracy element means that evidence contrary to the thesis also must be addressed. In a compelling book on historical methodology from a traditional perspective, John Lewis Gaddis pushes international historians to be transparent about their methods, whatever they might be,[52] which undoubtedly will annoy those in the scientific camp to no end. Regardless of which approach one takes, Marc Bloch would force each historian to think about and articulate the value of the history being researched and written,[53] which seems to mean that the history must have meaning for the larger population from a broad perspective, not just importance to experts in that epistemic community. This is the essential difference between historically significant events and legally significant events.

Due to these epistemological factors, this article adopts the traditional approach when studying the Permanent Court's impact on global history. Such an approach makes intuitive sense for a project of this scope and size. Indeed, a more scientific approach would not have been appropriate here because of the overwhelming number of distinct parts of Permanent Court opinions, with an infinite number of ways that those parts might influence state behavior. Even if causation between a particular part of a Permanent Court's opinion and a particular act by a state could be shown in a reliable manner, with that state act being shown to impact global history, the population census would be too large to be manageable. Notwithstanding the traditional approach adopted here, all 80 contentious cases and advisory opinions of the Permanent Court were considered for possible inclusion in this article, as well as the creation, general operation, and dissolution of the Permanent Court itself, *inter alia*. Such broad consideration of all the Permanent Court's opinions keeps any negative consequences from potential

50. *See generally* ROBERT WILLIAM FOGEL & G.R. ELTON, WHICH ROAD TO THE PAST?: TWO VIEWS OF HISTORY (1983) (dividing their book up into these two approaches, as shown in the table of contents and chapter titles).

51. *See generally* PAUL KENNEDY, THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS (2006) (providing an objective thesis and using a reconstruction of historical events and institutions to defend that thesis); ALEXANDROWICZ, *supra* note 4 (same); ARTHUR EYFFINGER, THE INTERNATIONAL COURT OF JUSTICE 1946-1996 (1996) (same).

52. *See* JOHN LEWIS GADDIS, THE LANDSCAPE OF HISTORY: HOW HISTORIANS MAP THE PAST x–xi, 7–16 (2002).

53. *See* MARC BLOCH, THE HISTORIAN'S CRAFT 14–15 (Peter Putnam trans., 1954).

confirmation bias to a minimum. On account of space and time constraints, this article randomly settles on three aspects of the Permanent Court for further analysis. Determining whether these examples are perfectly reflective of broader patterns among a larger number of cases of the Permanent Court will be left to future researchers. As explained in the following section, anecdotal evidence suggests that the types of issues that arose in these three cases also arose in other cases of the Permanent Court. Therefore, one might reasonably expect a similar impact on global history from those other cases.

As highlighted in the concluding part of this article, future researchers hopefully will be able to use automated text analysis and big-data statistical tools to fully uncover the patterns between the Permanent Court's opinions and state acts. Even with greater methodological rigor, however, those future researchers still will have to infer from those patterns an impact on global history, assuming that remains the focus. In particular, they will have to come up with a reliable way to classify the Permanent Court's opinions on state acts as high impact or low impact. Of course, it is possible to classify the Permanent Court interpreting a contract-like treaty of a commercial nature as low impact, since it presumably would have only limited significance beyond the two parties and beyond that particular case. However, the line between low impact and high impact blurs, especially when the commercial stakes vary between cases, for example. Therefore, a measure of subjectivity is likely to remain, notwithstanding the Herculean efforts needed to approach scientific objectivity. The preliminary nature of this project coupled with its aim to merely suggest ways that the Permanent Court has influenced global history should help the careful reader tolerate the obvious flaws in methodology.

As for the types of evidence that this article relies on, the goal of accuracy in suggesting the impact of an aspect of the Permanent Court on a state or its agent requires the most reliable sources. While this article uses reliable secondary sources to situate an aspect of the Permanent Court in its broader context, it uses primary sources to suggest a degree of impact of that aspect on the leader when making an important decision, whether it involves a decision to use force, a decision to sue for peace, or some equivalently grand action on the world stage. Global historians often use official statements and internal memoranda as sources, although memoirs and diaries of people involved in the actual decision-making process are no less authentic and accurate as primary sources.[54] Here, this article relies on primary sources like the diary of U.S. President Harry Truman, a book

54. *See generally* Margaret Stieg Dalton & Laurie Charnigo, *Historians and Their Information Sources*, 65 COLL. & RSCH. LIBRS. 400 (2004) (examining the importance of various materials to historians); READING PRIMARY SOURCES (Miriam Dobson & Benjamin Ziemann eds., 2008).

apparently containing the personal views of the founder of the People's Republic of China Chairman Mao Zedong, and the memoirs and speeches of the leaders of the George W. Bush Administration. Inasmuch as world leaders rarely, if ever, cite an exact case of the Permanent Court or speak in ways that are parallel to such cases, this article looks for the existence of the central idea that originated from the Permanent Court in order to infer a degree of impact on the leader. Admittedly, such an exercise involves a measure of speculation and inference. However, as explained in Part III above, theorizing is not the equivalent of proving; it instead involves the presentation of plausible narratives that can be more or less persuasive after scrutinizing them. International relations and international law undoubtedly are complex phenomena with multiple causes and factors at play at any given time on any one issue,[55] so claiming direct causation would be both illogical and amateurish.[56] Instead, this article merely suggests a relationship between aspects of the Permanent Court and important actions by world leaders, with determinations of the magnitude of that relationship and actual causation being left to future research of a more quantitative nature. Nevertheless, this article attempts to recognize and address alternative explanations for the phenomena highlighted here in an effort to make the theories presented as plausible as possible.

V. EXAMPLES OF IMPACT BY THE PERMANENT COURT

While the Permanent Court may have failed to prevent the Second World War, it did have an impact on global history. This part focuses on three candidates suggestive of the Permanent Court's impact on global history, using the previous part as a guide in selecting the aspects and sources to involve in the analysis. As mentioned in Part III above, again, the analysis and examples provided here are merely suggestive of the Court's impact on global history, given the limitations from the methodology adopted. The cases and procedures mentioned here may represent developments of international law. However, it is the glimmer of influence of these cases and procedures on the actions of global leaders that leads to their inclusion here. With regard to the theory being presented and scrutinized in this part, it is enough to know that the examples presented in this part derive from the actions of a non-state actor.

55. *See* Steven Wheatley, *The Emergence of New States in International Law: The Insights from Complexity Theory*, 15 CHINESE J. INT'L L. 579, 581, 593–94 (2016).

56. Of course, chaos theory suggests that even minor acts can have significant impacts. For a background exploration of this, see JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE (1988). This article does not dismiss that possibility. Instead, it emphasizes the distinction between legal causes and causes in fact, as well as the idea that not all possible causes are actual causes.

A. The Statute of the Permanent Court and the Sources Doctrine of International Law

The Permanent Court generally is considered to have been kept separate from the League of Nations, even though the Assembly of the League approved the Permanent Court's annual budget and Articles 13 and 14 of the Covenant of the League of Nations set out the basic elements for the establishment of the Permanent Court.[57] The 1920 Statute of the Permanent Court gave flesh to these bones, including how many judges would sit on the Permanent Court, how they would be selected, and how the Permanent Court would function. Perhaps most importantly, Article 38 of the Statute set out the types of law that the Permanent Court could apply in resolving disputes presented to it:

> The Court shall apply:
>
> 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> 2. International custom, as evidence of a general practice accepted as law;
> 3. The general principles of law recognized by civilized nations;
> 4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[58]

As a side note, the ICJ Statute contains this same language with only relatively minor amendments.[59] Before this pronouncement in the Permanent Court's Statute, however, international lawyers disagreed as to what qualifies as a valid source of international law. For example, they disagreed on whether custom was a source of international law, instead focusing on treaties, domestic codes, court decisions, and publicists' writings, among other things, or believed that there was no set sources doctrine.[60] In other

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57. *See* Gordon, *supra* note 6 at 81; League of Nations Covenant arts. 13–14.

58. Statute of the Permanent Court of International Justice art. 38. Please note that some commentators have talked about the non-legal sources of norms that the Permanent Court applied. *See, e.g.*, Abdulqawi Yusuf, *Diversity of Legal Traditions and International Law: Keynote Address*, 2 CAMBRIDGE J. INT'L & COMPAR. L. 681, 693–97 (2013) (discussing approaches advocated by Descamps and Lapradelle at that time, among others). Nevertheless, this article focuses on Article 38 of the PCIJ Statute.

59. *See* Statute of the International Court of Justice Art. 38.

60. *See* Jun-shik Hwang, *A Sense and Sensibility of Legal Obligation: Customary International Law and Game Theory*, 20 TEMP. INT'L & COMPAR. L.J. 111, 117–18 (2006) (internal citations omitted) (discussing the various alternative views of custom at that time). *See generally* JOHN WESTLAKE, INTERNATIONAL LAW 14–16 (2d ed. 1910) (discussing early approaches to the sources of international law); David J. Bederman, *Appraising a Century of Scholarship in the American Journal of International Law*, 100 AM. J. INT'L L. 20, 30 (2006) (observing that the inter-war period saw "a new calculus of the sources of international law").

words, there was no formal or informal sources doctrine for international law before the conclusion of the Permanent Court's Statute. The status of the Permanent Court's Statute as the sources doctrine for international law solidified early in the 20th century when arbitrators from numerous tribunals relied on Article 38 to determine the sources they would use to resolve the disputes before them,[61] presumably because it was the clearest articulation of a sources doctrine at that point in time. To be clear, these arbitrators were not legally obligated to look to Article 38 for guidance. Even though the Statute was not designed to become the constitution or sources doctrine for international law, this is exactly what it became over time, at least partially through the efforts of the Permanent Court.[62] Therefore, while it admittedly was the drafters of the Permanent Court's Statute that first codified the sources doctrine for international law, it was the Permanent Court's practice when implementing Article 38 that actually solidified this codification. There are examples of the Permanent Court citing to and relying on Article 38 of its Statute,[63] so there is little doubt of this provision's overall importance and legitimacy in terms of establishing this as a guide for the Permanent Court.

Constitutions typically provide a sources doctrine for that jurisdiction, which adds considerable stability to the jurisdiction.[64] The sources doctrine contained in the Permanent Court's Statute did exactly that by helping not only the Permanent Court's judges but also all makers and interpreters of international law to distinguish between law and non-law.[65] Therefore, whenever world leaders have referred to or relied on the stability of international law when making their decisions, they are indirectly acknowledging the significance of the Statute of the Permanent Court

61. *See* Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 176–77 (1998).

62. *See* Alain Pellet, *Article 38*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 731, 742–45 (Andreas Zimmermann et al. eds., 2d ed. 2012); Jan Klabbers, *Law-Making and Constitutionalism*, *in* THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 81, 88–89 (Jan Klabbers et al. eds., 2009); Woong Kyu Sung, *How Did They Become Law?: A Jurisprudential Inquiry About the Outcome Principles of Historic United Nations Environmental Conferences*, 45 GA. J. INT'L & COMPAR. L. 53, 72–73 (2016).

63. *See, e.g.*, Serbian Loans (Fr. v. Serb.), 1929 P.C.I.J. (ser. A) No. 20, at 19–20 (July 12) (citing Article 38 to justify that the Permanent Court of International Justice was intended to settle disputes between states under international law).

64. *See* Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1517–18 (2009); Richard S. Kay, *Two Ways to Rewrite the Constitution*, 2015 WIS. L. REV. ONLINE 25, 29 (2015); John Christopher Anderson, *Can State Constitutional Development Make a Difference in Illinois?*, 39 N. ILL. U. L. REV. 48, 53 (2018).

65. *See* G. M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 301–04 (1993) (emphasizing how the sources doctrine of international law from the PCIJ and ICJ Statutes helps with the identification of valid laws to be applied to a dispute).

inasmuch as it directly created such stability. One example is the Bush Administration's violation of international law following the September 11 attacks in the name of the War on Terror, although the stability and resilience of international law ultimately acted as an effective check on the Bush Administration's own powers. This check took the form of the Bush Administration retracting the 2002 and 2003 Torture Memos that had declared as legal many of the harsh interrogation tactics used during the War on Terror.

Tellingly, the Bush Administration's Jack Goldsmith—the leader of the Department of Justice's Office of Legal Counsel at that time—stated unequivocally in his memoirs that the Torture Memos were retracted at least in part because they had "no foundation" in any "source of law."[66] The Bush Administration's U.S. State Department Legal Adviser, John Bellinger, similarly documented his opposition to the Torture Memos for being against established international law, especially the 1949 Geneva Conventions and the 1985 UN Convention Against Torture, and he sought to remedy the situation.[67] Goldsmith and Bellinger arguably could not have pointed to the Torture Memos' lack of foundation in international law without a large measure of stability within the international legal regime itself. Such a retraction by the Bush Administration, presumably on account of the efforts of people like Goldsmith and Bellinger, was unprecedented concerning memos that had been written during the same administration.[68] More importantly for this article, Goldsmith's reference to "source of law" seems like only a lightly veiled acknowledgement that the Statute's language played a role in this decision. These sources of international law were instrumental in convincing the Bush Administration to backtrack on the Torture Memos and would not have been so persuasive had the Permanent Court not established such a strong and unequivocal sources doctrine for international law. Critics might try to argue that Goldsmith was referring broadly to law, not international law, although the central relevance of

66. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 151 (2007).

67. Michael P. Scharf & Paul R. Williams, *Lawyering the Treatment of Detainees in the War on Terrorism*, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 181, 194–95, 199 (Michael P. Scharf & Paul R. Williams eds., 2010) (citing and quoting John Bellinger, E-mail Supplement to Day-Long Conference of Former Legal Advisers, Remarks at the Carnegie Endowment for International Peace, Mar. 7, 2009, Chapter 13).

68. GOLDSMITH, *supra* note 66, at 146, 151–53 (discussing the difficulties of overturning binding legal opinions within the same presidential administration); John B. Bellinger III, The Bush (43rd) Administration – John B. Bellinger III (2005-2009), in SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 135, 135–37 (Michael P. Scharf & Paul R. Williams eds., 2010) (discussing the dramatic changes towards international law between the first and second terms of the Bush Administration).

international law to the legality of the Torture Memos, as articulated by Goldsmith and Bellinger, undermines this potential criticism. In short, the stability of the sources doctrine that originates from the Permanent Court enabled the Bush Administration to correct its non-compliant behavior.

B. The *Lotus* Case and Authorization to Do Anything Not Prohibited

The 1927 *S.S. Lotus* case of the Permanent Court between France and Turkey involved the collision of Turkish- and French-flagged ships on the high seas, Turkey's arresting of the captains, and Turkey's refusal to give France jurisdiction over those on the ship flying the French flag.[69] France claimed that international law required Turkey to turn over the sailors to France because of the exclusive jurisdiction of the flag state. Turkey countered that this was only a courtesy between states and not required under international law.[70] In short, the Permanent Court had to consider the right of exclusive jurisdiction over another sovereign's ships and allegedly such a right was limited by incidences where a crime was committed on the high seas.[71] The Permanent Court decided there was no rule of international law that either prevented Turkey from exercising its right of territoriality in the prosecution of criminal acts in its territory or prohibited the Turkish prosecution of the French Lieutenant on board the French ship that collided with the Turkish ship.[72] The most relevant excerpt from the decision is as follows:

> Restrictions upon the independence of States cannot . . . be presumed. . . . Far from laying down a general prohibition[,] . . . [international law] leaves . . . [states] a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."[73]

This idea from the *Lotus* case became the foundation of what has been called the Lotus Principle—that states almost nihilistically can do anything they want as long as the action has not been prohibited by international law.[74] The Permanent Court has relied on a similar principle in other cases,[75] and so the

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69. *See generally* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (settling an international legal dispute between France and Turkey).

70. *See id*., ¶¶ 307–14.

71. *See id*.

72. *See id*.

73. *Id*. at 18–19.

74. *See, e.g.*, James Brierly, *The "Lotus" Case*, 44 *L.Q. REV. 154* (1928) (summarizing this case and this principle); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 29 (1953) (same).

75. *See, e.g.*, Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921 (Gr. Brit. v. Fr.), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (explaining that the freedom

observations being made here about the *Lotus* case may be broader than just that case. The Lotus Principle essentially sets the default rule for international law that all actions by states are acceptable unless they are expressly prohibited, which resembles the default found in the common-law legal system of most states within the English-speaking world.[76] Nevertheless, on the international level, jurisdictional sovereignty largely was limited to territorial sovereignty before this case.[77]

Approximately three decades after the *Lotus* case, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, followed by the 1982 United Nations Convention on the Law of the Sea, codified the exclusive jurisdiction of a sovereign over its own ships—the flag state instituting proceedings against the wrongdoer for the crime on its ship in incidences on the high seas.[78] These treaties essentially act as a legislative veto of the *Lotus* case on this particular point.[79] Nevertheless, the Lotus Principle surprisingly lives on,[80] even though the notion has been heavily criticized.[81] The joint, separate opinion of Judges Rosalyn Higgins, Pieter Kooijmans, and Thomas Buergenthal in the ICJ's 2002 *Arrest Warrant* case provides compelling support for the notion that the Lotus Principle lives on and even thrives in contemporary times, even though these judges would aspire to limit its applicability.[82] This point lends considerable

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of a state is limited by the obligations it has expressly made to other states).

76. *See* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 237–84 (4th ed. 2010).

77. *See* An Hertogen, *Letting* Lotus *Bloom*, 26 EUR. J. INT'L L. 901, 905–07 (2015) (discussing the limits of jurisdiction before this case).

78. Convention on the High Seas of 1958 art. 11, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11; United Nations Convention on the Law of the Sea art. 97, Dec. 10, 1982, 1833 U.N.T.S. 397.

79. *See* Philip C. Jessup, *The United Nations Conference on the Law of the Sea*, 59 COLUM. L. REV. 234, 257–58, 265 (1959).

80. *See, e.g.*, Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 912 (2005) (trying to give fresh meaning to the case); Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 366–68 (2001) (same); Michael Jefferson Adams, *Jus Extra Bellum: Reconstructing the Ordinary, Realistic Conditions of Peace*, 5 HARV. NAT'L SEC. J. 377, 403–04 (2014) (same); Hertogen, *supra* note 77, at 901 (same).

81. *See generally* Hugh Handeyside, *The* Lotus *Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?*, 29 MICH. J. INT'L L. 71, 81–84 (2007) (summarizing the criticism of the *Lotus* case); Hertogen, *supra* note 77, at 901 (generally asserting that the case fails to create the conditions needed for cooperation and co-existence between states). *See also* Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, at 32–101 (Feb. 5) (Belgium arguing that there was no rule of international law denying the state of the company's shareholders the right to bring a claim, which is in line with the *Lotus* principle, but the court concluding the opposite: "No rule of international law expressly conferred such a right on the shareholder's national State."); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, ¶¶ 210–14 (June 26).

82. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 63, at 77–79 (Feb. 14) (joint separate opinion by Higgins, Kooijmans and Buergenthal).

support to the notion that the Permanent Court has had a significant influence on global history through its *Lotus* case, not just influence of a legal nature.

As suggested earlier, prior to the *Lotus* case and the brand of legal positivism that it helped establish on the world stage, there was a relatively strong notion that states had to act in a morally acceptable way and that international law was more than what states had consented to.[83] Indeed, just war theory was still alive at that time,[84] and France and the United States had not yet concluded the Kellogg-Briand Pact that prohibited the use of force.[85] While the idea of legal positivism had existed since the late 18th century,[86] the *Lotus* case pushed states closer to legal positivism to a surprising degree. Today, legal positivism and the consent-based system it helped foster remains the dominant view of international law, and it is difficult to see international law as being as strong as it is without the help of the *Lotus* case.[87]

Concerning the global impact of the *Lotus* case, world leaders talking about the freedom of states to do as they please in international relations, unless otherwise prohibited by international law, is a clear acknowledgement of the global impact of the *Lotus* case. That idea derives directly from this case. Such impact exists even if the world leader does not cite to the *Lotus* case when making her decision. There are ample examples of world leaders acting along the lines supported by the Lotus Principle.

One of the most salient examples involves U.S. President Harry S. Truman's decision to use atomic weapons against Japan at the end of the Second World War. There, Truman justified use of the atomic bombs with the belief that they would be used only against military objectives,[88]

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83. *See, e.g.*, JAMES BROWN SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VÍTORIA AND HIS LAW OF NATIONS* 9, 25, 34, 68, 76, 142–43, 196, 229, 253, (1934) (noting how morality was a central part of international law, which goes beyond state consent).

84. *See* Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 RECUEIL DES COURS 81, 203–06 (1999).

85. *See* General Treaty for Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (entered into force Jul. 24, 1929) ("The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.").

86. *See* JEREMY BENTHAM, *OF LAWS IN GENERAL* (THE COLLECTED WORKS OF JEREMY BENTHAM: PRINCIPLES OF LEGISLATION) 1 (H.L.A. Hart ed., 1st ed. 1970) (seeing law as an "assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a State, concerning the conduct to be observed in a certain *case* by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power" (emphasis added)).

87. *But see* Guglielmo Verdirame, *A Normative Theory of Sovereignty Transfers*, 49 STAN. J. INT'L L. 371, 407 (2013) (explaining that there were different types of legal positivism at the time that the Lotus Principle came about, and that the Lotus Principle contradicted several of them).

88. *See, e.g.*, Harry S. Truman, Personal Diary (July 25, 1945) (unpublished manuscript) (on file

apparently knowing that international law prohibited the targeting of civilian objectives. Critics assert that Truman was full of self-doubt and reservations once he became president,[89] which could have led Truman to be cautious when deploying atomic weapons for the very first time. However, such a singular focus on the principle of distinction between military and civilian targets, to the exclusion of virtually all other legal and moral limitations, reflects a level of confidence that few would exhibit. Moreover, it illustrates the types of atrocities that can occur when the Lotus Principle is applied in such extreme situations, thus necessitating the types of limitations that ICJ Judges Higgins, Kooijmans, and Buergenthal had in mind with regard to serious international crimes. Nevertheless, the Lotus Principle continues to linger even after decades of efforts to get rid of it, thus showing the staying power of the Permanent Court over time.

C. The *Diversion of Water from the Meuse* Case and Equity in Decision-Making

Prior to the 1937 *Diversion of Water from the Meuse* case, equity generally was dealt with in early inter-state arbitrations as part of the applicable law since disputants often wanted to give the arbitrators flexibility in reaching their conclusions.[90] In that regard, *Diversion of Water from the Meuse* represents a case of first instance, inasmuch as the PCIJ Statute prohibited the application of equity without the disputants' express consent, which apparently was the first time a treaty had provided such an express limitation. The case originally was brought by The Netherlands against Belgium for its various building projects involving water diverted from the Meuse River.[91] According to The Netherlands, Belgium's actions were in violation of an 1863 treaty between them relating to the water supply and limitations on diversion of that supply from the Meuse River in a certain part of the region.[92] Belgium responded that The Netherlands had engaged in similar projects in the past, in violation of that same treaty, to the point that

with Mass. Inst. Tech.) ("The target will be a purely military one and we will issue a warning statement asking the Japs to surrender and save lives."); Harry S. Truman, Draft of Handwritten Speech (Dec. 15, 1945) ("We picked a couple of cities where war work was the principle industry and dropped the bombs.").

89. *See* MICHAEL H. HUNT, THE WORLD TRANSFORMED: 1945 TO THE PRESENT 40–41 (2d ed. 2016).

90. *See* CATHARINE TITI, THE FUNCTION OF EQUITY IN INTERNATIONAL LAW 30–31 (2021).

91. *See* Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at ¶ 3 (June 28).

92. *See id*.

the treaty no longer was a valid limitation on Belgium's actions.[93] The Permanent Court agreed with Belgium and denied The Netherlands' claim.[94]

Commentators have cited *Diversion of Water from the Meuse* as support for the clean hands doctrine in international law, which would apply when both disputants have violated the same treaty at issue and which essentially bars the initial wrongdoer from benefiting from the rights they denied the other party.[95] While this is an important principle, the broader importance of this case is that it was the first instance where an international judicial institution applied equity where it formally was prohibited from applying equity in reaching a decision. The application of equity essentially involves the decision-maker asking what would be a fair outcome for the dispute, and deciding accordingly, notwithstanding whatever the law might provide or even require.[96] Judge Manley Hudson eloquently wrote in his separate opinion for the *Diversion of Water from the Meuse* case: "[A] tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness."[97] Equity essentially is just a legalistic way of referring to common notions of fairness when reaching a decision.[98]

As alluded to in the previous paragraph, such reliance on equity is noteworthy in international law because Article 38 of the Statute of the Permanent Court expressly prohibits the Court from deciding a case based on equity unless the parties agree to the application of equity. In other words, the international community easily could have refused any role for equity in international law, and in fact had already done so when it included that language in Article 38 of the Permanent Court's Statute. That type of prohibition typically would require strict application of the relevant legal sources. Indeed, this express prohibition keeps equity out of the formal sources doctrine for international law, at least how mainstream commentators describe it. Notwithstanding the express prohibition, the Permanent Court ignored the clear language of its mandate and relied on

93. *See id*. at ¶¶ 8, 10.

94. *See id*. at ¶ 85 ("The Court is also of opinion that there is no ground for treating [the Belgian lock] less favourably than the Netherlands lock . . . . It is thus unable to accord to the Netherlands Government the benefit of its submission.").

95. *See, e.g.*, William Thomas Worster, *The Effect of Leaked Information on the Rules of International Law*, 28 AM. U. INT'L L. REV. 443, 447 (2013) (citing and discussing the case); TITI, *supra* note 90, at 37 (same).

96. *See* RALPH A. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY 10–12 (1961) (defining equity as decision-making according to "what is fair and just" and discussing its importance in English law).

97. Neth. v. Belg., 1937 P.C.I.J. (ser. A/B) No. 70, ¶ 324 (June 28) (separate opinion by Hudson, J.).

98. *See generally* Thomas M. Franck & Dennis M. Sughrue, *The International Role of Equity-As-Fairness*, 81 GEO. L.J. 563 (1993) (equating equity and fairness throughout).

equity in that case. Following that case, the Permanent Court and subsequent courts occasionally have applied equity in reaching a decision, where the parties did not consent to the application of equity.[99] As with the previous sub-sections in this part, relating to the sources doctrine of international law and the *Lotus* case, these additional examples give the observations made here broader relevance beyond just this one case. In essence, these instances of the Permanent Court's reliance on equity are the exceptions that prove the rule of sources doctrine. Nowadays, it is difficult to envision an international legal system where considerations of equity are not factored into the calculus, at least to a small degree.[100] However, that does not diminish the level of courage that the Permanent Court exhibited when it ignored the letter of Article 38 in the *Diversion of Water from the Meuse* case for the first time and applied considerations of fairness when reaching its decision.

The practical effect of this case is that it softens an otherwise rigid body of international law. Critics will question how such flexibility can be reconciled with the rigidity imposed by the legal positivism strengthened by the Permanent Court's Statute and the *Lotus* case, as discussed above. Indeed, there is considerable tension between sub-section A above on the sources doctrine of international law and this sub-section on equity that falls outside of the sources doctrine, and it is difficult to reconcile these differing approaches. The great secret and paradox of international law is that these cannot be reconciled. Nevertheless, such a major inconsistency allows motivated states and their lawyers to escape the confines of their obligations on the international level whenever the interpreter of international law or the court handling the case sees fit, which adds a considerable degree of flexibility and unpredictability to international dispute settlement.

In terms of global impact of the *Diversion of Water from the Meuse* case, international lawyers might be tempted to focus on the wealth of

99. *See, e.g.*, Question of Jaworzina, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 8, at 39–40 (Dec. 6) (pointing out how the Delimitation Commission was basing the decision on equity); *see also* Michael Akehurst, *Equity and General Principles of Law*, 25 INT'L & COMPAR. L.Q. 801, 801–07 (1976) (discussing the different types of equity that international courts apply, including equity *infra legem*, equity *praeter legem*, and equity *contra legem*); *see generally* Shabtai Rosenne, *The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law*, *in* FORTY YEARS INTERNATIONAL COURT OF JUSTICE: JURISDICTION, EQUITY AND EQUALITY (Arie Bloed & Pieter van Dijk eds.,1988) (discussing instances where equity has come into play); CHRISTOPHER R. ROSSI, EQUITY AS A SOURCE OF INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO THE PROCESS OF INTERNATIONAL DECISIONMAKING (1993) (same); Panel Discussion, *Is There a Role for Equity in International Law?*, 81 AM. SOC'Y INT'L L. PROC. 126 (1987) (debating the proper role for equity).

100. Surprisingly, even today, commentators continue to mistakenly assert that international courts never have based a decision on equity or equitable principles, notwithstanding the preponderance of evidence to the contrary. *See, e.g.*, Gary B. Born & Adam Raviv, *The Abyei Arbitration and the Rule of Law*, 58 HARV. INT'L L.J. 177, 214 (2017).

jurisprudence where equity has featured prominently or with international law principles that are imbued with notions of equity, such as the obligation of fair and equitable treatment in the context of international investment law.[101] However, this article is more interested in instances where states and their leaders have considered fairness as trumping the blackletter of international law, where the stakes involved are far broader than just one case. An important example is the People's Republic of China's repeated criticism of the unequal treaties that resulted from the Opium War of the 19th century, most notably the 1842 Treaty of Peace between China and Great Britain (or the Treaty of Nanking) that ceded Hong Kong to Great Britain.[102] Commentators characterize Chairman Mao Zedong as a type of saint that enabled the Chinese Communist Party to survive beyond what critics might have anticipated.[103] Prior to the Chinese Communist Party taking control over China, Mao Zedong wrote powerfully in his 1945 book *On Coalition Government* about the unfairness of such unequal treaties as he implored allies to abrogate them, with the following excerpt constituting an illustrative example of his writing:

> We believe that the great efforts, sympathy and help to China by both the governments and peoples of the two great nations, Great Britain and America, specially the latter, in the common cause of fighting the Japanese invaders are worthy of thanks. But we request that the governments of all Allies and first of all the governments of Great Britain and America, pay serious attention to the voice of the broad masses of the Chinese people . . . . The Chinese people hail the measures taken by many foreign governments to abrogate unequal treaties with China and make new equal treaties to deal with the Chinese people on equal terms.[104]

Mao Zedong wrote as though he had every confidence that these states would abrogate these unequal treaties and enter into new ones, not because the law required it, but because fairness required it. Indeed, he wrote as if he was familiar with the equity-related jurisprudence of the Permanent Court that started with the *Diversion of Water from the Meuse* case, which gave him a solid foundation from which to make such a request. Critics will argue that Mao Zedong was merely relying on moral considerations, not legal ones,

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101. *See* Courtney C. Kirkman, *Fair and Equitable Treatment:* Methanex v. United States *and the Narrowing Scope of NAFTA Article 1105*, 34 LAW & POL'Y INT'L BUS. 343, 375–76 (2002) (referencing Methanex's argument that fair and equitable treatment is included in customary international law).

102. *See generally* BRUCE BUENO DE MESQUITA ET AL., RED FLAG OVER HONG KONG 1, 3 (1996) (discussing China's persistent demands that the wrongs from the Opium War be corrected, in the context of Hong Kong); *but see* Hungdah Chiu, *China's Struggle Against the "Unequal Treaties," 1927-1946*, 5 CHINESE (TAIWAN) Y.B. INT'L L. & AFFS. 1 (1985) (providing a different perspective).

103. *See* EVAN OSNOS, AGE OF AMBITION: CHASING FORTUNE, TRUTH, AND FAITH IN THE NEW CHINA 4–5 (2014).

104. MAO TZE-TUNG, ON COALITION GOVERNMENT 123–24 (1945).

when calling for the termination of unequal treaties. Admittedly, it is difficult to say definitively if Mao Zedong was aware of the *Diversion of Water from the Meuse* case and if it influenced his opinions. However, Mao Zedong's early writings showed that he was well acquainted with international law, especially as it related to equity.[105] Therefore, it is highly possible, if not probable, that he was calling for termination based on legal considerations that stemmed from sources similar to the *Diversion of Water from the Meuse* case, if not the case itself. In short, it is possible that Mao Zedong was familiar with the rules and principles that came from this case, such that the connection between *Diversion of Water from the Meuse* and Mao Zedong is believable, although unproven and speculative in nature.

The United Kingdom might suggest that it returned the parts of Hong Kong it enjoyed sovereignty over to China in 1997 due to the high costs of maintaining this overseas territory, as was the case with the withdrawal of the United Kingdom from many of its overseas territories before that point in time.[106] However, the first paragraph of the preamble of the Basic Law of Hong Kong tells a much different story, from the Chinese perspective:

> Hong Kong has been part of the territory of China since ancient times; it was occupied by Britain after the Opium War in 1840. On 19 December 1984, the Chinese and British Governments signed the Joint Declaration on the Question of Hong Kong, affirming that the Government of the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997, thus fulfilling the long-cherished common aspiration of the Chinese people for the recovery of Hong Kong.[107]

This constitutional language makes clear that the People's Republic of China saw the return of Hong Kong as a major correction of a prior wrong from the unequal treaties of the 19th century. Commentators insisted prior to the 1997 handover, [108] and continue to insist,[109] that international law does not recognize such a thing as an unequal treaty, let alone recognize a remedy for it. The case of Hong Kong is a significant example that suggests the contrary and supports the idea that the fairness considerations reflected in the *Diversion of Water from the Meuse* case can prevail over treaty rights, at least in the long run.

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105. *See, e.g.*, *id*. at 120, 125 (discussing the rights of states under international law).

106. *See* HUNT, *supra* note 89, at 20, 111, 133–34 (discussing why Great Britain withdrew from territories such as India).

107. Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa [The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China], *translated in* 29 I.L.M. 1511 (1990).

108. *See, e.g.*, Albert H. Putney & Raymond L. Buell, *The Termination of Unequal Treaties*, 21 AM. SOC'Y INT'L L. 87, 90 (1927).

109. *See, e,g.*, ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 100 (2d ed. 2010).

This example is important not only because of the historical figure claiming unfairness here, but also because Mao Zedong's claims of unfairness came at a pivotal moment in global history, when it appeared as though the world might turn away from capitalism towards communism. Similar to other Marxists at this time, Mao Zedong portrayed change as inevitable, coming from the bottom up: "In a very short time, in China's central, southern, and northern provinces, several hundred million peasants will rise like a tornado or tempest, a force so extraordinarily swift and violent that no power, however great, will be able to suppress it."[110] Mao Zedong saw this force of nature as sweeping aside all that might stand in its way, thereby uniting all of the party, country and beyond in a violent and swift manner, without much chance for compromise or moderation. Again, although Mao Zedong did not cite to or follow the language of the *Diversion of Water from the Meuse* case when making his comments in the block quote above, the relatively similar tone shared by the two leads one to wonder if there is a causal connection between them.

VI. CONCLUSION

International legal historians who have written about the Permanent Court of International Justice have seen its contribution as being limited to the development of its successor the International Court of Justice and the development of international law generally. This article has set out some of the other ways that the Permanent Court has had an impact on global history by influencing state leaders. Using the traditional approach to historical research methodology, this article has focused on three aspects of the Permanent Court in suggesting its broader impact on global history:

- The stability of international law from the sources doctrine found in the Permanent Court's Statute;
- The encouragement of states to act as they wish unless international law expressly prohibits such actions; and
- Flexibility in considering equity as a source of law, even in the absence of consent to the application of equity and even contrary to the letter of treaties.

Each section contained an illustrative example based on primary sources to suggest how that aspect of the Permanent Court had had an actual impact on global history.

If this article were to be expanded, it would provide more detailed doctrinal analysis of each aspect of the Permanent Court. Part V above

110. *See* Mao Zedong, *Report on an Investigation of the Hunan Peasant Movement*, *in* 2 SOURCES OF CHINESE TRADITION 406, 408 (William Theodore de Bary & Richard Lufrano eds., 2d ed. 2000).

avoided cases that are important only from a legalistic perspective, though further research might still show that they actually have had significant impact on global history. Examples include the cases involving the establishment of the Permanent Court's jurisdiction,[111] the diplomatic protection cases that acted as a precursor to contemporary investor-state arbitration, which has grown exponentially in recent years,[112] the development of obligations *erga omnes* that bind all states,[113] the protection of minority rights,[114] and the development of treaty law,[115] among other somewhat esoteric topics that international lawyers will care about more than historians and the broader public.

In the end, the Permanent Court's handling of such legal points may have helped avoid inter-state friction from becoming all-out conflict. However, there is no way of knowing from an objective perspective due to the counterfactual reasoning that such an exercise would require. Part V above also neglected to explore the possibility that hegemons exercise disproportionate influence on the creation and functioning of institutions like the Permanent Court, which would render these institutions no more than another source of power for hegemons, as neo-realists might argue. Be that as it may, the aspects of the Permanent Court that this article has focused on support the notion that the Permanent Court has had an impact on global history by influencing state behavior. Further research is needed to help avoid confirmation bias, to determine whether the Permanent Court is more accurately described as having low impact or high impact on global history, and to determine whether the Permanent Court was a source of power for hegemons, among other things. Regardless, the examples contained in this article—where a non-state institution appears to have impacted the

111. *See, e.g.*, Nationality Decrees Issued in Tunis and Morocco (Tunis. v. Morocco), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7).

112. *See, e.g.*, Oscar Chinn (U.K. v. Belg.), Judgment, 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12).

113. *See* MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES (1997) (exploring the impact of various cases on obligations *erga omnes*).

114. *See, e.g.*, Access to German Minority Schools in Upper Silesia, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 40 (May 15); *see also* Thomas D. Grant, *Internationally Guaranteed Constitutive Order: Cyprus and Bosnia as Predicates for a New Nontraditional Actor in the Society of States*, 8 J. TRANSNAT'L L. & POL'Y 1 (1998) (noting how these rights did not last long during the inter-war period).

115. *See, e.g.*, Robert A. Dalton, Book Review, 106 AM. J. INT'L L. 898 (2012) (reviewing THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY (Olivier Corten & Pierre Klein eds., 2011)) (noting the large number of times that the International Law Commission cited cases from the Permanent Court when working on developing the Vienna Convention on the Law of Treaties); *see also* Customs Régime between Germany and Austria (Protocol of March 19th, 1931), Advisory Opinion,1931 P.C.I.J. (ser. A/B) No. 41 at 50 (Sept. 5) (discussing the conflict of treaty obligations on Austria from the 1922 Protocol No. I of the Treaty of Saint-Germain and the Protocol of March 19, 1931, which appeared to conflict before the case was brought before the Permanent Court); Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573, 594–96 (2005).

international system and global history—seem to support the usefulness of liberalism and liberal institutionalism in helping us understand the dynamics within that international system.