

THE INTERNATIONAL COURT OF JUSTICE*

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THE International Court of Justice, "the principal judicial organ of the United Nations,"¹ has replaced the League of Nations' Permanent Court of International Justice² with little change in the Court's constitution, in its relationship to the parent international organization, in the extent of its jurisdiction, or in the procedure prescribed under its Statute. The new Court has a new name, a technically new Statute, some new judges and, perhaps most important of all, some new members.³ In matters of substance, however, the new Court is a continuation of the old. It need not be expected, nor was it intended, to add anything new to the structure of international order.

Salvaging for the new Court the twenty years' accumulation of experience and precedent of the old Court was deliberate and meaningful. When, during 1943 and 1944, the form to be given the international organization to which the Allied Powers had committed themselves first came under discussion, there was general agreement that the Permanent Court of International Justice had creditably performed a pioneering task.⁴ The draftsmen of the instrument establishing the

* The United Nations Charter will be referred to as CHARTER; the Covenant of the League of Nations as COVENANT; the Statute of the Permanent Court of International Justice as STATUTE or ORIGINAL STATUTE; the Statute of the International Court of Justice as REVISED STATUTE; HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942 (1943) as HUDSON.

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1. CHARTER, Art. 92; REVISED STATUTE, Art. 1.

2. Articles 13 and 14 of the COVENANT (Part I of the Treaty of Versailles) provided for the submission to arbitration of certain disputes between League members and for the establishment of "a Permanent Court of International Justice."

3. "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." CHARTER, Art. 93(1). Article 93(2) provides for the adherence to the REVISED STATUTE of States not members of the United Nations. Adherence to the ORIGINAL STATUTE was accomplished by individual State ratifications and did not follow automatically from membership in the League of Nations. Neither the United States nor Russia ever adhered to the ORIGINAL STATUTE. For the story of the efforts to secure such adherence on the part of the United States, see HUDSON, 216 *et seq.* In all, 59 States adhered to the ORIGINAL STATUTE, *id.* at 128.

4. "It is, we think, generally agreed that the Statute [of the Permanent Court] has on the whole worked well, and it is desirable to make full use of an existing structure which has proved well adapted for its purpose." See § 4, Report, dated February 10, 1944, of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, reprinted in (1945) 39 AM. J. INT. L. (Supp.) 1, 2. The Report was issued as BRITISH PARLIAMENTARY PAPERS, Misc. No. 2 (1944), Cmd. 6531. It was prepared by a committee of experts appointed by the Governments of Belgium, Canada, Czechoslovakia, Greece, Luxemburg, The Netherlands, New Zealand, Norway, Poland, The United Kingdom and by the French National Committee. Hudson, *The Twenty-Third Year of the Permanent*

new Court, therefore, left well enough alone and, although it was decided to prepare a completely new Statute, rather than modify the original Statute, the changes made, with a few minor exceptions, were those required to substitute United Nations terminology for League of Nations terminology.⁵

Is the present Court, or could it become, an effective agency for world peace? What is the scope of the Court's jurisdiction or competence, and what should it be? The two questions are interrelated and interdependent. The greater the area of the Court's jurisdiction, the greater the effectiveness of the Court's work, provided always, however, that the jurisdiction conferred is something more than a paper charter. Watered stock can be a judicial as well as a corporate calamity.

When the Permanent Court was established in 1920, the principal innovation was thought to be the creation of a continuing judicial body, which could by virtue of its continuity develop its own traditions, forms, precedents and jurisprudence. Previously each international arbitral tribunal had to be specially constituted by the parties, and performed its task without reference, or with only informal reference, to past decisions of similar tribunals.⁶ The Permanent Court was de-

Court of International Justice and its Future (1945) 39 AM. J. INT. L. 1, 2. Chapter 7 of the Dumbarton Oaks Proposals proposed the creation of "an international court of justice" whose statute 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." *American and Canadian Bar Associations—Consensus of Views on the International Court of the United Nations Organization*, dated March 22, 1945, reprinted in (1945) 39 AM. J. INT. L. (Supp.) 143, contains the following statements summarizing the attitudes expressed at 25 Regional Group Conferences held in the United States and Canada to discuss the proposed international court: "The Statute of the [Permanent Court of International Justice] supplies solutions, which on the whole are quite satisfactory, of issues debated over many decades. . . . The Court functioned with astonishing success over a period of eighteen years—from 1922 to 1940. Sixty-five cases came before it during this period, and the Court's handling of them produced a general satisfaction throughout the world." *Id.* at 149. The *Consensus of Views* strongly urged the continuation in force, with appropriate modifications, of the ORIGINAL STATUTE (the first alternative stated in the Dumbarton Oaks Proposals) rather than the drafting of a revised statute. The ORIGINAL STATUTE was drafted in 1920 by a Committee of Jurists in which the United States was represented by Elihu Root, who apparently had an influential role; the ORIGINAL STATUTE was revised generally in 1929 with an eye to the possible adherence of the United States to the Court.

5. See Hudson, *The Twenty-Fourth Year of the World Court* (1946) 40 AM. J. INT. L. 1, for a correlation of the ORIGINAL and REVISED STATUTES and an analysis of the changes made.

6. For a bibliography on international arbitration see 2 OPPENHEIM, INTERNATIONAL LAW (6th ed. by Lauterpacht, 1940) 19. For excellent general discussion, see LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933). The Convention for the Pacific Settlement of International Disputes signed at the Second Hague Convention,

signed to be, and was, a notable procedural advance, in that successive disputes could come before the same Court, composed of judges who sat for relatively long terms, operating under permanent rules. The Court was not designed to bring about any change in the number or gravity of international disputes submitted to arbitration, except insofar as the Court's existence, availability and (it was hoped) growing prestige might induce parties to submit themselves voluntarily to its jurisdiction. The only new jurisdictional element was an almost accidental by-product of the League Covenant: the Court was empowered to give advisory opinions on questions referred to it by the League Council.⁷

The Court's jurisdiction was thus in part contentious, in part advisory. Consideration of what the Court accomplished under its double mandate will clarify what can be expected of the Court in its second, or United Nations, phase, and, to some extent, what can be expected of any international court—*i.e.*, what limitations there are to the effectiveness of such a court.

The Court's contentious jurisdiction in both its League of Nations and its United Nations phases is substantially limited to cases which the parties to a dispute are willing to bring before it.⁸ Under the so-called "optional compulsory jurisdiction" clause in the original Statute, which has been continued without important change in the revised Statute, States adhering to the Court may, however, declare that they

1907, established a Permanent Court of Arbitration, which facilitated the setting up of arbitral tribunals by providing a central administrative body and a permanent panel of arbitrators from which parties desiring arbitration could select members for a tribunal. The Permanent Court of International Justice was designed to be supplementary to, and not to supersede, the Permanent Court of Arbitration, which has continued in existence although overshadowed by the Permanent Court of International Justice. The "national groups" in the Permanent Court of Arbitration nominate in the first instance judges of the International Court of Justice, REVISED STATUTE, Art. 4. HABICHT, *POST-WAR TREATIES FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES* (1931) collects 130 arbitration treaties between various States executed between 1918 and 1928, many of which provide for reference of disputes to the Permanent Court of Arbitration.

7. COVENANT, Art. 14: "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." The STATUTE, as drafted in 1920, made no reference to the Court's advisory jurisdiction. Rules, adopted by the Court in 1922, clarified the practice to be followed and those rules were incorporated as Article 65 of the STATUTE in the 1929 revision. HUDSON, 210-3. For the provisions on the Court's advisory jurisdiction under the REVISED STATUTE, see *infra*, note 19.

8. COVENANT, Art. 14: "The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it." REVISED STATUTE, Art. 36 (1): "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in *the Charter of the United Nations or in treaties and conventions in force.*" (Italicized words are words added to the ORIGINAL STATUTE in the REVISED STATUTE.) Since the CHARTER confers no jurisdiction on the Court, the reference to "matters specially provided for" therein seems to be presently nugatory. See Hudson, *op. cit. supra* note 5, at 32.

recognize the Court's jurisdiction as "compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation. . . ." ⁹ During the Court's League period, forty-six States made declarations under this provision.¹⁰ Many of these declarations were, however, so fogged over with reservations and exceptions that they did not in fact notably extend the Court's jurisdiction beyond the caprice and whim of the declarant States.¹¹

It is not believed that the filing of such a declaration by the United States, under the terms of a resolution recently adopted by the Senate "advising and consenting" thereto,¹² has in any way changed the existing situation. The Senate resolution authorized a declaration in the

9. REVISED STATUTE, Art. 36(2). Under both the ORIGINAL and REVISED STATUTES (Art. 36(2)) the effectiveness of such a Declaration is apparently limited to legal "disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute the breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation." See COVENANT, Art. 13. This enumeration was derived from the Hague Conventions on Pacific Settlement, 1899 and 1907, HUDSON, 193. For discussion of the effect and meaning of the four categories, see HUDSON, 454 *et seq.*

10. English texts of the various Declarations are assembled in 1 HUDSON, WORLD COURT REPORTS (1934) 29 *et seq.* Declarations made under the ORIGINAL STATUTE are, by Article 36(5) of the REVISED STATUTE, deemed to continue in effect "for the period which they still have to run and in accordance with their terms."

11. Thus the British Declaration, deposited in 1929 and ratified in 1930, covered only "disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to the said ratification," further excepted (1) disputes which the parties agreed to settle in some other way, (2) disputes between the United Kingdom and any member of the British Commonwealth, (3) disputes "with regard to questions which by international law fall exclusively within the jurisdiction of the United Kingdom," and made the whole subject to the condition that the United Kingdom could require the suspension of proceedings in the Court with respect to any dispute submitted to and under consideration by the League Council. On the meaning and effect of these reservations, see Lauterpacht, *The British Reservations to the Optional Clause* (1930) 10 *ECONOMICA* 137. "The Optional Clause . . ." concludes Lauterpacht, "as a general obligation of straightforward simplicity has been considerably weakened" by the British reservations, which he describes as introducing "an element of uncertainty and controversy" and as being "of an indeterminate nature reminiscent of a period when arbitration treaties served the purpose of concealing the true attitude of governments inimical to obligatory judicial settlement." *Id.* at 171-2. Many of the smaller nations deposited Declarations which were subject only to the limitations contained in Article 36(2) itself, *supra* note 9. In eleven cases the Court's jurisdiction was invoked under Declarations filed under Article 36(2): in two cases, neither party objected to the jurisdiction; in four cases objections to the jurisdiction were upheld in whole or in part; in five cases the proceedings did not reach a point where the Court had to consider the jurisdictional question. HUDSON, 477 *et seq.* The only case involving a Great Power in which Article 36(2) was sought to be invoked was the case of Phosphates in Morocco, P.C.I.J., Ser. A/B, No. 74 (1938), in which the Court held, on French objection to an Italian application, that it lacked jurisdiction. The Court has thus not yet found itself in the unhappy position of attempting to coerce a Great Power to appear before it, and, failing such appearance, of rendering judgment against it by default.

12. SEN. RES. 196, 79th Cong., 2d Sess. (1946), 92 Cong. Rec., Aug. 2, 1946, at 10850.

language of the "optional compulsory jurisdiction" clause, to remain in force for five years, provided that the declaration shall not apply to (a) disputes which the parties entrust to other tribunals, (b) "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States," and (c) disputes arising under a multilateral treaty unless all parties to the treaty are also parties before the Court or the United States specially agrees to the Court's jurisdiction.¹³ The reservation excepting disputes "essentially" within the domestic jurisdiction "as determined by the United States" leaves the United States a free hand to determine whether any particular dispute shall be submitted to the Court. The declaration authorized by the Senate resolution has now been filed on behalf of the United States.¹⁴

Under the Court's contentious jurisdiction, some thirty cases were disposed of between 1920 and 1940. None of these cases was of any great significance or importance, if those words be taken to refer to the bright hope of a better world. They were the undramatic, unspectacular run-of-the-mill cases which any court, international or national, is

13. SEN. RES. 196, as reported to the Senate by the Committee on Foreign Relations (see SEN. REP. NO. 1835, 79th Cong., 2d Sess. (1946)), did not include the reservation as to disputes arising under multilateral treaties and did not have in the reservation relating to domestic jurisdiction the words "as determined by the United States." The multilateral treaty reservation, sponsored by Mr. John Foster Dulles, was introduced from the floor by Senator Vandenberg and accepted without debate or record vote, 92 Cong. Rec., Aug. 1, 1946, at 10757-8. Most of the Senate debate was realistically devoted to the question whether the United States in accepting the Court's "compulsory jurisdiction" was exposing itself to the possibility of actually losing a case it might want to win. Senator Austin, making his last appearance in the Senate before taking up his duties as delegate to the United Nations Security Council, attempted to allay his colleagues' fears by pointing out that the Court does not have power to compel execution of its judgments; that, if the United States should resist an adverse decision of the Court, the only course open to the prevailing party would be to bring the matter before the Security Council under Article 94 of the CHARTER ("... The Security Council . . . may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment"). "Such a position," concluded Senator Austin, "is entirely moral and entirely legalistic, and is within the four corners of our great engagement." 92 Cong. Rec., Aug. 1, 1946, at 10763. The balance of the debate shows that the senators were not slow to catch the implication that the United States holds a veto over any action by the Security Council. To make assurance doubly sure, however, Senator Connally, while professing to have "more or less enjoyed" Senator Austin's remarks, proposed the addition of the words "as determined by the United States" to the domestic jurisdiction reservation. (*Ibid.*) In support of his resolution Senator Connally remarked: "We do not propose to have a Court of 15, 14 of whom will be alien judges—I do not reflect upon them—decide that a domestic question is an international question. . . . Mr. President, I am in favor of the International Court of Justice. I am in favor of the United Nations, but I am also for the United States of America." (*Id.* Aug. 2, 1946, at 10840.) Senator Connally's amendment was adopted by a vote of 51 to 12 (*id.* at 10841) and the resolution as amended was passed by a vote of 60 to 2 (*id.* at 10850).

14. See N. Y. Times, July 16, 1946, p. 3, col. 5.

primarily equipped to handle. They were, since the Court's jurisdiction was limited to cases which the disputant States were willing to have adjudicated, cases on which the States concerned were willing to take a chance of losing.

Typical cases involved the right of Germany to deny passage through the Kiel Canal to a vessel engaged in transporting munitions of war for use by Poland in its war against Russia;¹⁵ the right of Turkey to arrest and institute criminal proceedings against a French citizen who, as captain of a French ship, shared responsibility for the collision of the French ship with a Turkish ship on the high seas;¹⁶ the rights of holders of various Serbian loans issued in France to receive payment in gold;¹⁷ and the right of the Belgian Government to regulate river transportation on the Congo to the benefit of a government monopoly and the detriment of a trader of British nationality.¹⁸

Thus the Court's contentious jurisdiction produced nothing particularly novel and the Court functioned smoothly and efficiently in traditional grooves. Its advisory jurisdiction, however, which turned out to have been booby-trapped, deserves more extended analysis. (It should be noted that one of the few significant changes made in the revised Statute has worked a limitation in this branch of the Court's jurisdiction.)¹⁹ We shall examine two of the cases referred to the Court

15. *The S. S. Wimbledon*; Great Britain, France, Italy, Japan, and Poland (intervening) v. Germany, P.C.I.J., Ser. A, No. 1 (1923); 1 HUDSON, *WORLD COURT REPORTS* (1934) 163.

16. *The S. S. Lotus*; Turkey v. France, P.C.I.J., Ser. A, No. 10 (1927); 2 HUDSON, *WORLD COURT REPORTS* (1935) 20.

17. *Payment of Serbian Loans*; France v. Yugoslavia, P.C.I.J., Ser. A, No. 20/21 (1929); 2 HUDSON, *WORLD COURT REPORTS* (1935) 340.

18. *The Oscar Chinn Case*; Belgium v. Great Britain, P.C.I.J., Ser. A/B, No. 63 (1934); 3 HUDSON, *WORLD COURT REPORTS* (1938) 416.

19. For the extent of the Court's advisory jurisdiction under the COVENANT and the ORIGINAL STATUTE, see note 7 *supra*. Article 96(1) of the CHARTER: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." Thus while under the COVENANT the Court could give its opinion on "any dispute or question referred to it," under the CHARTER the Court's opinion may be requested only on "legal questions"—thereby, it may be, sharply narrowing its advisory jurisdiction. Article 96(2) of the CHARTER empowers "Other organs of the United Nations and specialized agencies, . . . authorized by the General Assembly," to request advisory opinions "on legal questions arising within the scope of their activities." Article 96 of the CHARTER is implemented by Article 65 of the REVISED STATUTE, which provides: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." It may be noted that while the CHARTER restricts the referring body (Council, etc.) to "legal questions," the STATUTE completes the job by limiting to "legal questions" the Court's jurisdiction to give opinions on questions referred. Thus on each reference the Court will have initially to determine that the question referred is "legal" or "non-legal" and cannot take the position that reference by the Security Council, etc. is determinative of the "legality" of the question referred, as might have been argued under

for its advisory opinion by a League Council which was never notable for its capacity to meet difficult issues squarely.

The *Eastern Carelia* case²⁰ grew out of hostilities between Russian and Finnish forces following the Russian Revolution. A peace treaty concluded at Dorpat in 1920 provided *inter alia* for the withdrawal of Finnish troops from certain Communes which were to be "reincorporated in the State of Russia and . . . attached to the autonomous territory of Eastern Carelia . . . which shall enjoy the national right of self-determination." Annexed to the peace treaty was a "Declaration of the Russian Delegation with regard to the autonomy of Eastern Carelia" which, on behalf of the "Socialist Federative Republic of the Russian Soviets," "guaranteed" to the Carelian population that "(2) that part of Eastern Carelia which is inhabited by the said population shall constitute, so far as its internal affairs are concerned, an autonomous territory united to Russia on a federal basis." In 1921, following an attempted revolt against Russian sovereignty in Eastern Carelia, the Finnish Government brought the matter before the League Council. An attempt, made through the Estonian Government to have Russia submit the matter to the Council as a non-member State, met with Soviet refusal on the ground that the question was purely domestic, the references to Carelian autonomy in the Dorpat Treaty and the annexed Declaration being merely descriptive of an existing situation and not intended to create treaty obligations. After a year's delay the Council, at the suggestion of Finland, referred to the Court the question whether those references in the Treaty and Declaration constituted "engagements of an international character" which Russia would be under a duty, towards Finland, to carry out. Finland appeared before the Court and submitted a voluminous dossier. Russian participation was limited to a splenetic telegram signed by Tchitcherin, Commissar for Foreign Affairs, which stated that Russia found it impossible to take part in the proceedings before the Court, which were "without legal value either in substance or in form," briefly rehearsed the Russian position in a series of "Whereases," denied the right of the "so-called League of Nations" to intervene, and in conclusion referred to the shabby treatment of Russia by the League Powers in a number of instances as demonstrating the impossibility of an impartial hearing, under League auspices, of any question involving Russia. The resulting opinion, seven of the eleven judges who sat on the case concurring, stated the facts and concluded that, although in form the Court was being asked to give an advisory opinion, nevertheless "answering the question would be substantially equivalent to deciding the

the language of the CHARTER alone. For the meaning attributed to terms "legal," "non-legal," see text discussion *infra* at 1060.

20. Status of Eastern Carelia, P.C.I.J., Ser. B, No. 5 (Advisory Opinion, 1923); 1 HUDSON, WORLD COURT REPORTS (1934) 190.

dispute between the parties," and, Russia having declined to participate, "the Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court." "The Court therefore finds it impossible to give its opinion on a dispute of this kind."²¹ The Council, having received the Court's reply, took note of it, and, after discussion, entered in its minutes a somewhat irritated justification of its own procedure.²² The Eastern Carelians then retired from the international stage.

The *Austro-German Customs Union* case²³ presented issues notably more serious than those in the *Eastern Carelia* case. Article 88 of the Versailles Treaty provided that "the independence of Austria is inalienable" other than with the consent of the Council of the League of Nations and imposed upon Austria the undertaking "to abstain from any act which might directly or indirectly or by any means whatever compromise her independence." In 1922, in Protocols drafted at Geneva in connection with loans to Austria by the victorious powers, Austria reiterated its undertaking under Article 88. The 1922 Protocols contained language construing the undertaking as not restricting Austrian action in relation to "customs tariffs and commercial or financial agreements," subject to the proviso that no State should be granted "a special regime or exclusive advantages" calculated to threaten Austrian independence. In 1931 Austria and Germany executed a Protocol, dated March 19, under which the two Governments agreed to negotiate for a treaty "to assimilate the tariff and economic policies of their respective countries." Under the Protocol, drafted with considerable technical skill to avoid even the appearance of offending against Article 88 of the Versailles Treaty and the 1922 Geneva Protocols, the projected treaty would, among other things, have prescribed the substantial elimination of duties as between Germany and Austria, a uniform tariff law for their dealings with other countries, and a proration of tariff receipts between them. The League Council, acting with unwonted dispatch, heard French objections to the proposed union on

21. P.C.I.J., Ser. B, No. 5, at 28, 29 (Advisory Opinion, 1923); 1 HUDSON, WORLD COURT REPORTS (1934) 190, 205. The question of the Court's privilege to refuse to give an advisory opinion was complicated by a discrepancy between the French and English texts (both official) of Article 14 of the COVENANT. The English text (see note 7 *supra*) provided that the Court "may also give" advisory opinions on proper reference; the French text provided that the Court "donnera aussi des avis consultatifs," which seemed to put the Court under a duty to respond. For discussion see LA ROCHEBROCHARD, L'UNION DOUANIÈRE AUSTRO-ALLEMANDE (1934) 156 *et seq.* The Court, in its opinion, however, chose not to notice this textual difficulty.

22. See (1922) LEAGUE OF NATIONS OFFICIAL JOURNAL 1337, 1502, cited at 1 HUDSON, WORLD COURT REPORTS (1934) 190.

23. Customs Régime between Germany and Austria, Ser. A/B, No. 41 (Advisory Opinion, 1931); 2 HUDSON, WORLD COURT REPORTS (1935) 711. LA ROCHEBROCHARD, *loc. cit. supra* note 21, is a detailed study of the legal and political issues involved.

May 18 and 19, and promptly referred the matter to the Court, with a request that the Court act with all possible speed, for its opinion whether the Austro-German Protocol was "compatible" with Article 88 and the Geneva Protocol. Austria, meanwhile, agreed to take no further action pending the Court's opinion. Represented before the Court were the Governments of Austria, Czechoslovakia, France, Germany and Italy. A preliminary question involved the appointment of so-called *ad hoc* judges. Under the Court's Statute,²⁴ a State, party before the Court and not having a judge of its own nationality on the Court, has a right to have a national appointed judge *ad hoc*. Both Austria and Czechoslovakia, being unrepresented, requested such appointments. The Court, after argument, denied both requests, ten of the fifteen judges concurring, on the ground that, Austria and Germany being in the same interest, Austria was sufficiently represented by the German judge, and Czechoslovakia, being in the same interest as France and Italy, was sufficiently represented by the French and Italian judges.²⁵ The Court then heard oral argument between July 20 and August 5, written statements having been filed previously.

On September 3, before the Court's opinion had been announced, the Foreign Ministers of Austria and Germany declared that the March 19 Protocol and the idea of a Customs Union had been abandoned by the two Governments. On September 5 the Court, without reference to the announced abandonment, delivered its opinion, widely predicted in advance, that the Austro-German Protocol was, in the wording of the Council's request, "incompatible" with the 1922 Geneva Protocol, although "compatible" with Article 88 of the Versailles Treaty. On September 7 the Council noted the Court's opinion and disposed of the affair with a statement that, in view of the September 3 renunciations "there can no longer be any occasion for [the Council] to proceed further with the consideration of this item of its agenda."²⁶ Getting "items" on and off the "agenda" appears to have been, in 1931 as in 1946, the principal preoccupation of international deliberative bodies.

The Court's division over the point at issue could not, so far as the Court's prestige was concerned, have been more unhappy. It appears from the opinions that seven judges (including the German judge) found that the Austro-German Protocol was "compatible" with both Article 88 and the 1922 Protocol. Seven others (including the French

24. Article 31. Under the REVISED STATUTE, Art. 31, this provision is continued in force without any change in substance.

25. Custom Régime between Germany and Austria (Order *re* Appointment of Judges *ad hoc*) Ser. A/B, No. 41, at 88 (1931); 2 HUDSON, WORLD COURT REPORTS (1935) 711, 743.

26. (1931) LEAGUE OF NATIONS OFFICIAL JOURNAL 2070, cited at 2 HUDSON, WORLD COURT REPORTS (1935) 711.

and Italian judges) found that it was "incompatible" with both. The Brazilian judge alone saw that, while it was "compatible" with Article 88, it was "incompatible" with the 1922 Protocol. As odd man on an otherwise evenly divided Court, his peculiar insight became the opinion of the Court. This line-up was invitingly open to the charge, promptly formulated, that the Court had split on nationalistic, political grounds into a "Latin bloc" and a "Teutonic bloc."²⁷ The argument in defense of the Court's integrity was more involved, although on the whole more convincing.²⁸

The majority opinion was based on the conclusion that the arrangement contemplated by the Austro-German Protocol (even though no specific provision of the Protocol itself was tainted with "incompatibility") would constitute a "special regime" affording Germany in relation to Austria "advantages" withheld from third Powers—thus a regime forbidden by the language of the 1922 Protocol. The Italian judge, contributing a notable dose of Latin realism, delivered a separate concurring opinion, premised on the observation that "the answer depends on considerations which are for the most part, if not entirely, of a political and economic kind,"²⁹ took judicial notice of the movement for political union between Germany and Austria, and dismissed with polite skepticism the clauses in the March 19 Protocol designed to safeguard Austrian "independence." The dissenting judges joined in an opinion in which they professed to be unable to understand how the March 19 Protocol could be "incompatible" as a whole without being "incompatible" in any detail, found that the "provisions" of the Protocol did not purport in any way to subordinate Austria to German control, and suggested that the majority had condemned not the proposed regime itself, but assumed consequences which might result from the establishment of that regime—thereby overstepping the limits of the Court's function.³⁰

The *Carelia* and *Customs Union* cases have been reviewed, not with

27. Cassidy, *The Advisory Opinion Concerning the Austro-German Protocol for the Establishment of a Customs Union* (1931) 20 GEO. L. J. 57, 69.

28. Mathews, *Judicial Attitudes in the Customs-Union Case* (1932) 30 MICH. L. REV. 699; Hudson, *The World Court and the Austro-German Customs Régime* (1931) 17 A. B. A. J. 791; see, for further bibliographical references, 2 HUDSON, WORLD COURT REPORTS (1935) 712.

29. Ser. A/B, No. 41, at 68 (1931); 2 HUDSON, WORLD COURT REPORTS (1935) 711, 732.

30. As examples of the criticism heaped on the Court's head, see Borchard, *The Customs Union Advisory Opinion* (1931) 25 AM. J. INT. L. 711; Cassidy, *op. cit. supra* note 27 at 69: "Reactionary . . . , [against] the weight of the evidence . . . , the prestige of the World Court as an impartial medium has not been enhanced"; and, more mildly, Manning, *The Permanent Court and the Customs Union* (1932) 9 N. Y. U. L. Q. REV. 339: "The Court, as a Court, in effect contented itself in saying 'No' with observing that it was difficult indeed to maintain that 'Yes' would have been the proper answer."

any idea of weighting a conclusion that the Court failed, either in those cases or generally, but rather for the light they throw on the advisable limits of an international court's jurisdiction, on the theoretical usefulness of such a court. We have noted that the Court's contentious jurisdiction, dependent on the parties' willingness to gamble on judicial issue, produced a routine crop of cases routinely decided and, without exception, routinely disposed of by the parties in accordance with the Court's mandate.³¹ The same statement may be made concerning most of the advisory opinions which the Court delivered.

The *Carelia* case, on the other hand, may be seen as a novel attempt on the part of the League Council, on paper a supra-national body, to accomplish an extension of the Court's compulsory jurisdiction by inviting it to adjudicate the substance of a dispute between two States, only one of which accepted the adjudication—since it was clear at the time when the Council referred the issue that Russia would not recognize the Court's competence. And it was the Council's sense, after the event, that the Court should have gone right ahead and adjudicated no matter what the probable consequences might have been and despite the fact that the Council, when the Court declined, could think of nothing useful that the Council itself might undertake in the premises. In the *Customs Union* case the accused States willingly accepted the Court's jurisdiction, although it is reasonable to infer that the 1931 ratio between French and German armament was relevant to such unsovereign docility. Even in 1931, however, the political issue was politically decided by politicians—the only way it could have been decided—before the Court had even been given the opportunity to pronounce on the legal issues in which the political ones had been wrapped for transmission to the Hague.

The cases are cited, then, to the proposition that there are issues which it is not healthy to bring before an international court—in 1920 or in 1930 or in 1950—because they escape or transcend judicial competence. "Adjudication" of such issues, however court-like the attendant proceedings, will be fruitless and inconclusive at best, and at worst prejudicial not only to the ideas of "law" and "court" but to the continuing and always delicately poised international ordeal of peace. Such issues may be composed, and the composition will reflect the current shift of power; they can be only exacerbated by being subjected to a judicial weighing of rights which must, overtly at least, exclude all counters except the words of treaties and the accepted propositions of international law.

31. HUDSON, 595-7. The Court itself has no power to compel obedience to its judgments. CHARTER, Art. 94, provides that members of the United Nations, parties to a case, undertake to comply with the Court's decision, and that, if one party fails so to comply, the other party may bring the matter before the Security Council. COVENANT, Art. 13, contained substantially similar provisions.

Precisely this inquiry, whether there are issues suitable for international arbitration or adjudication and issues not suitable, has long sparked controversy among theorists and publicists of international law. The standard texts on international law have long been in remarkable agreement that international arbitration or adjudication is competent to dispose of only relatively minor differences between States.³² It has, however, been correctly pointed out that this is not at all the same thing as saying that international law regulates only minor matters—but rather amounts to saying that international tribunals have been or will be, or ought to be, allowed to dispose only of such matters.³³ The matters that tribunals will be allowed to settle have been designated by the terms “legal” or “justiciable” as opposed to the terms “non-legal,” “political,” “non-justiciable,” which in this context refer to disputes which have not been, or will not be, or should not be, brought before international tribunals.

Difficulty has been found in formulating a workable test for distinguishing “justiciable” from “non-justiciable” issues. An early test, now in disfavor, was based on the assumed incomplete nature of international law: “legal” disputes are those whose subject-matter is adequately governed by existing rules of international law. Another formulation, incorporated by way of reservation in many arbitration treaties, was that “legal” disputes are those which do not affect the vital interests, honor or independence of a State. It is the current fashion to define “legal” disputes as all those involving conflicts between opposing sets of “legal rights”; all others—*i.e.*, conflicts of “interests”—are “non-legal” or “political.” When analyzed, the foregoing definitions turn out to be merely false fronts for the statement that a “legal” dispute is one which the States involved are, for whatever reason, willing to have arbitrated and various writers have vigorously and diligently rung changes on the demonstration of such logical insufficiency.³⁴ Some of these writers have, however, used the demonstration that no one has ever been able to draw a satisfactory—*i.e.*, rigid, invariant, predictable—line between “legal” “justiciable” on the one hand and “political” “non-justiciable” on the other to buttress the conclusion that all disputes between States ought to be judicially determined and resolved. This perilous jump merits consideration.

The most convinced and effective advocate of a court of unlimited jurisdiction has been Professor Hans Kelsen, who has clarified matters

32. For a comprehensive and brilliant discussion of the achievements and potentialities of international arbitration, together with a careful analysis of the authorities, see LAUTERPACHT, *op. cit. supra* note 6. Dr. Lauterpacht himself takes a critical view of asserted theoretical limitations and an expansive one of possible future developments.

33. KELSEN, *PEACE THROUGH LAW* (1944) 27 *et seq.*^o

34. See generally LAUTERPACHT, *op. cit. supra* note 6, *passim*; BRIERLY, *THE LAW OF NATIONS* (2d ed. 1936) 219 *et seq.*

by offering a draft Covenant of a Permanent League for the Maintenance of Peace.³⁵ Central in this League would be a court, whose membership would result from nominations submitted by the member States but which actually would be determined within each State by "the highest courts of justice, its legal faculties and schools of law" and similar institutions. The court would be competent to decide any dispute between member States submitted by any party to the dispute, and any dispute between a member State and a non-member State, provided the non-member State accepts the court's jurisdiction. In reaching its decision the court would apply international law, including the general principles of law recognized by civilized nations, and would decide *ex aequo et bono* if the parties so agreed. The court also would have the duty to decide whether the actions of any member State violate the Covenant. The Council, with the Great Powers as permanent members, would have the duty of taking any measures necessary to assure execution of the court's orders and necessary economic or military sanctions against a member whose actions had been declared by the court to violate the Covenant.

The argumentation in favor of such an all-powerful and irresponsible court is learned and ingenious, although it has the defect of being in the form of a series of responses to assumed objections.³⁶ To the objection that an international court competent to decide any dispute would be hamstrung in the absence of an international legislature to set norms for the court's decisions, is opposed the proposition, assumed as historical or anthropological fact, that courts have always preceded legislatures in the organization of human society. To the objection that international law in its present stage of development is incomplete, fragmentary and, as a system, riddled with gaps, it is answered that no system of law can ever be considered defective since it is axiomatic that any act, not specifically forbidden, is permitted; thus the court can always pronounce for or against any contention.³⁷ To the objection

35. Kelsen, *op. cit. supra* note 33, at 127 *et seq.*

36. Kelsen, *LAW AND PEACE* (1942); *PEACE THROUGH LAW* (1944) and his other writings arguing that "the establishment of a court with compulsory jurisdiction is the first and indispensable step to an effective reform of international relations" cited at note p. 14 of the last-mentioned work. Also Kelsen, *The Old and the New League: The Covenant and the Dumbarton Oaks Proposals* (1945) 39 *AM. J. INT. L.* 45.

37. That this is true in a purely formal sense is of course beyond doubt. *Quaere* whether it is a really helpful or responsive approach to the problem. Compare BRIERLY, *op. cit. supra* note 34, at 56: "International law, like any other system of law, is, in a formal, though of course not in any other, sense a 'perfect' system; it can provide a solution for any issue submitted to a court, and it can do this because it accepts the practice by which the judge is required to 'find' a rule of law which is applicable to the case before him." LAUTERPACHT, *op. cit. supra* note 6, at 134: "Notwithstanding the admitted peculiarities and comprehensiveness of its gaps, international law, like any other system of law, is complete from the point of view of its adequacy to deal with any dispute brought before an international

that certain classes of disputes are not susceptible of judicial determination and resolution—disputes variously referred to as “political,” “non-legal,” “non-justiciable”—is opposed a flat denial, on the ground that any dispute can be reduced to terms of opposing sets of legal rights, and a State in dispute with another State has only the choice of justifying its position legally or of frankly taking an extra-legal stand, thus impliedly admitting that right is on the other side. By way of illustrating the feasibility of an all-powerful court, reference is finally had to the jurisdiction of the United States Supreme Court over disputes between the several states, and the early case of *Rhode Island v. Massachusetts*,³⁸ in which a boundary dispute was adjudicated, is favorably commented on.

The proponents of an international court of unlimited jurisdiction have thus run up a neat, tidy, and orderly scaffolding of theory. It is submitted, however, that their logic goes no more than skin deep and that their conclusions are shored up by a series of assumptions which are at best unprovable and at worst false. Thus, inherent in their reasoning is the premise that disputes within a national State are settled within the framework of law and courts—at least so long as the parties lack the strength to resort to civil war. Brief reflection will show how vast is the area of dispute even within the State which is settled extra-judicially or politically—currently, for one example, in the field of labor relations. In this extra-judicial area decision is actually reached between the contending groups; despite the elaborate structure of legality, the organs of government, court and legislature, do little more than transcribe dictation.

Governments govern and courts adjudicate, effectively, only where disputes arise between groups none of which has power to threaten the State, or where disputes arise between power groups on minor issues, which both sides are willing to submit to the arbitrament of chance or justice. The area within which effective government or adjudication is possible is still vast, but it does not improve matters to pretend that it is all-embracing or without limit. It is dangerous to believe that “law” can do something it is not equipped to do, *viz.*, make the less-powerful prevail over the more-powerful on the ground that the less-powerful is “right”—morally, economically, or traditionally—and the more-powerful is “wrong.”³⁹

judicial tribunal. At the same time . . . , like any other system of law, international law contains gaps from the point of view of the approximation of its rules to the essential purposes of international law and to the requirements of international justice. To disregard this fact, in deference to a purely mechanical conception of the completeness of international law, is to thwart the judicial activity of international tribunals in a manner contrary to the spirit of international law.”

38. 12 Pet. 657 (U. S. 1838).

39. Compare BRIERLY, *op. cit. supra* note 34, at 223-4: “. . . [T]here are also certain

When disputes arise, not between groups within the State but between States themselves, the difficulties in the way of any effective "government" or "adjudication" are immediately multiplied to something approaching impossibility. Even were we to assume as fact the proposition that all disputes within the State are regulated by law, the analogy between disputes within a State and disputes between States is hazardous. But if we start with the contrary assumption, that disputes between what we have loosely called "power-groups" will be settled, whether within States or between States, extra-legally, we must conclude that in the class of "disputes between States" there will be alarmingly little room for government and adjudication. As within the national community, certain power groups in the international community are predominantly strong and the weaker units subject to their coercion. Internationally, as nationally, the matters subject to effective adjudication will be those (a) involving Great Powers which the Great Powers are willing to have adjudicated and (b) involving Small Powers which the Small Powers are willing to have adjudicated or which the Great Powers insist on having adjudicated.

Light is sought to be thrown on the practicability of "world government," "world court," by analogy to the subjection in federal governments of component "states" to central legislative and judicial authority, the example of the United States being thought to cast a particularly mellow glow. If in the past separate states, asserting sovereignty, have combined and established a super-government and a super-court into which the juice of individual sovereignties has been drained, then what logical impossibility is there to the thing happening again, and on a broader scale? ⁴⁰ To an *a priori* argument an *a priori*

limitations on the potentialities of judicial procedure in general which it is well to bear in mind. One is that a dispute does not necessarily receive its quietus because a court of law may have pronounced upon it. . . . This is true of *Hampden's Case* . . . and of the *Dred Scott Case*. . . . [E]ach of these cases had its sequel in a civil war which was fought in part to determine afresh the very issues which the courts had decided.

"Further, it ought never to be forgotten that law is not merely a convenient device for the settlement of disputes; it is not something that can be made an effective instrument at a crisis and left out of account at other times; it is useful as a means of settlement only when, and so far as, a society has accepted the rule of law as its way of life. . . . In fact the example of the state . . . is discouraging to the view that all disputes ought to or can be settled on the basis of existing law, for international disputes find their nearest analogy not in the disputes of individuals at all, but in a class of disputes which the practice of states itself tends to treat by political rather than judicial methods. By their very nature they are differences between large associated groups; and when such a group of persons within the state is discontented with its existing legal rights, a wise government does not merely refer them to the courts of law; it considers the arguments for and against a change of the law." See also BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* (1944) 118 *et seq.*

40. Professor Kelsen is not, of course, guilty of such vulgar simplification. ". . . [T]he examples of the United States of America and Switzerland are usually referred to in order to show that the difficulties [of an international federal state] are not insuperable. But these

answer may be hazarded. That the thirteen original states could fuse their individual sovereignties into a greater collective sovereignty stands, not for the proposition that power can, and therefore should, be subordinated to "law," but for this: that at the time the trick was turned the thirteen "states" had ceased to be effective power-units in a national community which had established itself in disregard of "state" lines and "state" existence. Reading the history lesson this way, we might hypothesize the subjection of existing national States to super-government and super-court at a time when such States have ceased to be significant power units and power has passed to other groupings: economic cartels, labor unions, political parties, to mention a few modern inventions which show possibilities of growth. Such a development might well be an improvement on the existing order—as the Federal Government in 1789 was an improvement on the Confederation. But any such radical political reorganization will follow, and not bring about, shifts in the power groupings; will be a result and not a cause.

The function of courts is essentially conservative—to maintain, or to settle incidental disputes within the framework of, a status quo satisfactory to the majority or to a minority sufficiently strong to impose its will on a disarmed majority. When the existing order is radically altered, courts go out of business for a time. Revolution and war are not justiciable.

The idea of a big court is undoubtedly an attractive one. Professor Kelsen and others, during the period 1940–5, have given it a theoretical basis. In the drafting of the Court's new Statute, representatives of many of the smaller nations were enthusiastically in favor of giving the Court compulsory jurisdiction—not as sweeping perhaps as that of Professor Kelsen's suggested court, but with the same ultimate end in view. The Great Powers, particularly the United States and Russia, were, however, adamant in opposition, and, as has been noted, no significant changes were made in the jurisdictional provisions of the Revised Statute except to cut down the scope of the Court's advisory jurisdiction.

The limitation on the Court's advisory jurisdiction is of interest in the light of the foregoing discussion. Under the original Statute and the League Covenant this jurisdiction covered "any question" properly referred by the League. The Court's refusal in the *Eastern Carelia*

examples prove little. . . ." KELSEN, *PEACE THROUGH LAW* (1944) 11. Professor Kelsen refers to the historical-political relations and the common economic and political interests uniting the peoples which were ultimately united in a Federal State as well as to the geographically contiguous territory involved, and continues: "To base the hope of the erection of such a federal World State upon nothing more than the examples of the United States and Switzerland is a dangerous illusion." *Id.* at 12. The lower the level of discussion, the more attractive this analogy seems to become.

case to pass on "any question" has been noted. The United Nations Charter and the Revised Statute provide for reference to the Court for its advisory opinion of "legal questions" only. The mere reference of a question to the Court will of course imply a determination by the referring body that the question is a "legal" one. It is in the highest degree unlikely, however, that the Court would consider itself bound by such determination. Presumably an essential element of all advisory opinions under the Revised Statute will be a finding by the Court that a "legal" question has been asked. If the Court is content to exercise a wise discretion, the "legal" question limitation will allow it to keep as far out of politics as it may desire.

There seems to be no present disposition to refer to the Court any of the ticklish questions which have arisen during the first few months of the United Nations' activity, even though several of these—for example, the effect of the Charter provisions giving the veto to the Great Power members of the Security Council—could easily have been cast as "legal questions" and referred to the Court.⁴¹ Presumably, so long as the Great Powers remain split among themselves, the Court will not be invited to practise the art of constitutional interpretation over the ambiguous phrases of the Charter.

There remains much useful work for the Court to do. The prestige which the Court undoubtedly won between 1920 and 1940 should assure the appearance on its docket of a steady flow of cases susceptible of judicial determination.⁴² The United Nations Charter provides that its subsidiary organs—such as the Economic and Social Council—and specialized agencies may refer to the Court "legal questions arising within the scope of their activities."⁴³ Direct access to the Court on the part of such bodies is an innovation which should be useful. Further, the Court is the obvious tribunal before which to bring dis-

41. As another example of what might have been cast as a "legal question," see the resolution on Spain introduced in the Security Council on April 18, 1946, by the Australian delegate, *N. Y. Times*, April 19, 1946, p. 12, cols. 4-5. That resolution set three questions for inquiry, of which the first was: "Is the Spanish question one essentially within the jurisdiction of Spain?" See *Nationality Decrees Issued in Tunis and Morocco*, P.C.I.J., Ser. B, No. 4 (Advisory Opinion, 1923); 1 HUDSON, *WORLD COURT REPORTS* (1934) 143 for a case in which the League Council referred to the Court the question whether a dispute between England and France arising out of action taken in Tunis and Morocco (French protectorates) was "by international law solely a matter of domestic jurisdiction."

42. Two cases, one between Belgium and Bulgaria and one between Liechtenstein and Hungary, were pending before the Court at the outbreak of the war. The case between Belgium and Bulgaria has been discontinued by agreement of the parties; no steps have been taken in the Liechtenstein-Hungary case. Hudson, *The Twenty-fourth Year of the World Court* (1946) 40 *AM. J. INT. L.* 1, 2. The first new case to be submitted to the reconstituted Court may be a 75-year old dispute between Great Britain and Guatemala, whose adjudication by the Court has been proposed by Great Britain. See Kunz, *Guatemala vs. Great Britain: In re Belize* (1946) 40 *AM. J. INT. L.* 383.

43. CHARTER, Art. 96(2).

putes between the personnel of international organizations and their employers. The Court could appropriately be called upon to resolve difficulties of interpretation and disputes as to rights arising under the increasing number of multi-national treaties, such as the Convention on International Civil Aviation,⁴⁴ or the complex instruments evidencing international loan agreements.

Particularly in the field of trade relations an expansion of the Court's jurisdiction would be valuable. These relations are continuous, complex, a fruitful source of dispute, and are nevertheless generally carried on at a low level of political pressure. Individuals and their particular transactions may best be left as now to the laws and courts of one or other of the States under whose control the transactions are engaged in, and it is not believed that any form of appellate jurisdiction over national courts is advisable or, in any case, within the realm of possibility. If, however, the contemplated International Trade Organization is established on a permanent basis, an appropriate instrument will be available for channeling to the Court questions relating to the regulation of international trade, and, further, the Court might well be empowered to determine disputes arising under the many reciprocal trade treaties now in existence. International communications and transportation, which will undoubtedly be carried out under increasing international supervision, are particular fields in which a greater use than in the past might well be made of the Court's facilities.

The new Court may be expected to continue the contribution so well begun by its predecessor; the clarification of thought and principle which results from impartial investigation of particular situations is far from being an unimportant or ignoble task, and a hard case well decided is always a landmark to the future. The principal thing is for the Court to preserve its virtue from the insistent embraces of its own most ardent followers.

44. Article 84 of the Convention, reprinted in (1945) 39 AM. J. INT. L. (Supp.) 111 (concluded at Chicago in December, 1944) makes provision for possible appeals to the Court from decisions of the Council of the International Civil Aviation Organization with reference to disputes relating to the interpretation or application of the Convention.