

Legacies of the
Permanent Court of International Justice

Queen Mary Studies in International Law

Edited by

Malgosia Fitzmaurice
Panos Merkouris
Phoebe Okowa

VOLUME 13

The titles published in this series are listed at brill.com/qmil

Legacies of the Permanent Court of International Justice

Edited by

Christian J. Tams
Malgosia Fitzmaurice

Assistant editor

Panos Merkouris

MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN • BOSTON
2013

Library of Congress Cataloging-in-Publication Data

Legacies of the Permanent Court of International Justice / edited by Christian J. Tams, Malgosia Fitzmaurice.

pages cm. -- (Queen Mary studies in international law ; v. 13)

Includes index.

ISBN 978-90-04-24493-1 (hardback : alk. paper) -- ISBN 978-90-04-24494-8 (e-book) 1. Permanent Court of International Justice. 2. Jurisdiction (International law) 3. Arbitration (International law) 4. International courts. I. Tams, Christian J. II. Fitzmaurice, M.

KZ6260.L44 2013

341.5'52--dc23

2012044132

This publication has been typeset in the multilingual "Brill" typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities. For more information, please see www.brill.com/brill-typeface.

ISSN 1877-4822

ISBN 978-90-04-24493-1 (hardback)

ISBN 978-90-04-24494-8 (e-book)

Copyright 2013 by Koninklijke Brill NV, Leiden, The Netherlands.

Koninklijke Brill NV incorporates the imprints Brill, Global Oriental, Hotei Publishing, IDC Publishers and Martinus Nijhoff Publishers.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher.

Authorization to photocopy items for internal or personal use is granted by Koninklijke Brill NV provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers, MA 01923, USA.

Fees are subject to change.

This book is printed on acid-free paper.

INTRODUCTION

Malgosia Fitzmaurice and Christian J. Tams

The PRESIDENT in opening the sitting, stated that it marked the commencement of the work for which the Court had been established. In fact, it was the opening of the first ordinary session of the Court, fixed by the Statute for June 15th of each year.¹

In these rather matter-of-factly words, the minutes record the beginning of the PCIJ's 'operative life' on 15 June 1922, almost ninety years ago to the day.² The Court's first proceedings dealt with rather mundane issues;³ but to most participants and many observers, the establishment of the PCIJ was anything but a mundane matter. The British Attorney-General, Sir Ernest Pollock, expressed his hope that

each case here decided [by the newly-established Court] may light a beacon over the shoals and rocks of misunderstandings, by which they can be avoided in the future, that gradually step by step, a causeway may be built, by reverence and respect for public law, for international rights and international aims, that will lead to enduring peace worthy of the great lawyers before whom I stand, worthy of the great nations which are here represented.⁴

Four months earlier, at the Permanent Court's inaugural ceremony, the Secretary-General of the League of Nations, Sir Eric Drummond, had praised the Court's establishment as 'the greatest and ... most important creative act of the League' and had gone on to observe:

There have been various well-distinguished marks in the progress of mankind. The opening of the Court is not the least of these. Indeed, we believe and hope that it will prove the greatest. After all, the ideal to which

¹ [1922] PCIJ Ser C No 1, vol I (Public Sitings), at 1. (These and all other official documents relating to the Permanent Court are available at <www.icj-cij.org/pcij/>).

² Four months earlier, the PCIJ had held its preliminary and inaugural sittings, devoted notably to the elaboration of the first Rules of Court. For details see [1922] PCIJ Ser D No 2.

³ Namely issues arising from the *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, the PCIJ's first Advisory Opinion ([1922] PCIJ Ser B No 1).

⁴ [1922] PCIJ Ser C No 1, vol II (Speeches and Documents), at 42.

I presume all men of goodwill look forward is that not only individual nations but the whole world shall be ruled by law.⁵

Twenty-four years, sixty-five proceedings, thirty-two judgments and twenty-seven Advisory Opinions later, the ‘great [land]mark in the progress of mankind’ was displaced rather quietly—but, perhaps fittingly for a judicial institution, in an orderly way. Judges tendered their resignations in early 1946, following which the Assembly of the League of Nations (after deliberations in the First Committee) decided that the PCIJ could be terminated by agreement; and after this had been effected through a resolution of 18 April 1946;⁶ the PCIJ’s registry oversaw the transfer of archives and property to the ICJ. The Court’s active life of course had effectively ceased in 1940, when German troops had invaded the Netherlands.⁷

The decision to dissolve the PCIJ after World War II was taken deliberately, and after considerable debate.⁸ Most agreed that—just as the League—so the new world order of the United Nations should include a court. Yet a majority felt that a fresh start required new players, and the PCIJ, while not one of its organs, was too closely linked to the League, whose structural deficiencies the United Nations sought to overcome.⁹ And so, on one view,

⁵ [1922] PCIJ Ser D No 2, at 320.

⁶ [1946] LNOJ Spec Suppl 194, 256; and also reproduced in *ICJ Yearbook 1946–1947*, 28–29, fn 2. The operative paragraph provided that “the Permanent Court of International Justice is for all purposes to be regarded as dissolved with effect from the day following the close of the present session of the Assembly” (ie 19 April 1946). A concise summary can be found in S Rosenne, *The Law and Practice of the International Court, 1920–2005* (Vol 1, Nijhoff, Leiden/Boston 2006) 14–16.

⁷ From 1940, the PCIJ’s President and the Registrar were based in Geneva, at the seat of the League, while ‘Judge Jonkheer van Eysinga sought to defend the rights of the PCIJ at The Hague’. See Ole Spiermann, Historical Introduction, in A Zimmermann, C Tomuschat, K Oellers-Frahm, and CJ Tams (eds), *The Statute of the International Court of Justice. A Commentary* (2nd edn, OUP, Oxford 2012) 68–69.

⁸ The matter had notably been left open in the influential report of the Informal Inter-Allied Committee (the ‘London Committee’: see (1945) 39 AJIL (Supplement) 1–42); and at Dumbarton Oaks. The decision in favour of a new court was reached at the San Francisco Conference: see the reports of Subcommittee IV/1/A and Subcommittee IV/1, both in *United Nations Conference on International Organization*, vol 13, at 524 and 381. Drawing on informal accounts, Rosenne states that the decision to dissolve the PCIJ was reached with a majority of 7:3 (with Brazil, France and the United Kingdom against) (n 6, 66).

⁹ To quote again Rosenne (n 6, 66): ‘Both Powers [the USSR and the United States], it seems, shared a general belief that the previous association of the Permanent Court with the League of Nations would be an inauspicious augury for the reconstruction of the judicial arm of the organized international community.’

the PCIJ has been history for six-and-a-half decades and the active PCIJ for more than seven. It could be said to belong to the past, in fact an increasingly distant one.

Yet the organizational rupture between the old and the new was merely superficial. True, the new Court was a novel entity, was given a new name; it was to hold its own inaugural session; and in some ways it differed from the old.¹⁰ But in most respects, it was supposed to follow in the PCIJ's footsteps:¹¹ formally a new institution, it was closely modelled on the PCIJ; led initially by the same President;¹² and for the first 25 years of its existence, it effectively applied the PCIJ's Rules of Court.¹³ Having advocated the establishment of a new court, Subcommittee IV/1 of the San Francisco Conference confidently observed that this would

not break the chain of continuity with the past. ... [T]he 1945 Statute will garner what has come down from the past ... [and] continuity in the progressive development of the judicial process will be amply safeguarded.¹⁴

Indeed, the new Court quickly made clear that it had no intention to break the 'chain of continuity'. From early on, its jurisprudence built on that of the PCIJ, to which ICJ judgments and opinions refer frequently. In short, the organizational break notwithstanding, there was, and there remains,

¹⁰ Among them, the organic link with the United Nations (cf Articles 7 and 92–96 of the Charter); and the decision to move away from the system of general elections of judges.

¹¹ In the opening paragraphs of their 'General Introduction' to the ICJ Statute, Robert Jennings and Rosalyn Higgins note that '[t]he intention in 1946 was that there should be continuity between the new Court and the old Court, the PCIJ' (in Zimmermann, Tomuschat, Oellers-Frahm, and Tams, n 7, 4). In October 1945, the PCIJ had equally passed resolutions seeking to ensure 'continuity in international justice': cf *ICJ Yearbook 1946–1947*, 26.

¹² Namely José Gustavo Guerrero, elected President of the PCIJ in late 1936 (in office 1937–1946) and President of the ICJ from 1946–1949. With Charles de Visscher, another serving PCIJ judge (1937–1946) was elected to the ICJ's first bench.

¹³ In 1946, the ICJ took over the 1936 version of the PCIJ's Rules of Court with only minimal amendments. These were not revised until 1972 and again, comprehensively, in 1978.

¹⁴ *United Nations Conference on International Organization*, vol 13, 381, at 383.

A very similar point was made in one of the earliest retrospective studies of the PCIJ, JP Fockema Andreae's *An Important Chapter from the History of Legal Interpretation: The Jurisprudence of the First Permanent Court of International Justice* (Sijthoff, Leyden 1948), in which the author observed on p 141: 'But in any case it is to be expected that much of the present legal material, i.e. as far as laid down in treaties, conventions, declarations etc. from the first years after the world war of 1914, shall have lost its importance and that the judgments of the Court based on it shall have lost their practical value.' Yet this did not 'in the least mean that the great pains which the Court has taken, will have been in vain. The judgments and advisory opinions keep their full value as instructive examples, as precious specimens of the thorough, sagacious and noble way in which the Court has considered the legal questions put before it and which it has brought to a solution.'

‘functional continuity between the two Courts’,¹⁵ and this has been the dominant narrative: in fact, in Manley O Hudson’s influential *annuaire*, the year 1946 was not primarily a new beginning, but ‘the twenty-fourth year of the world court’,¹⁶ and without much ado, comprehensive works treat the jurisprudence of the World Court’s ‘two incarnations’—notwithstanding changing in circumstances and perceptions over time—in principle as one joint *acquis*.¹⁷

Against that background, the contributions to the present book assess legacies of the Permanent Court. ‘Organizational rupture’ and ‘functional unity/continuity’ are taken as premises; and an attempt is made to bring to light choices and challenges that faced the PCIJ. As the term ‘legacy’ implies, this is retrospection, but one that appreciates the PCIJ in its own right rather than reducing it to the role of a precursor that would morph into the ICJ. The focus of the inquiry is on the legal and institutional framework within which the PCIJ operated, and on the law that it applied and shaped. More specifically, the contributions are organized in five parts: (i) A first cluster of pieces explores the PCIJ’s regime of jurisdiction: Marika Giles Samson and Douglas Guilfoyle, as well as Panos Merkouris trace the Court’s invention and application of advisory proceedings at the international level; while Christian J Tams assesses the different bases of contentious jurisdiction and highlights how in the 1920s, the modern understanding of contentious jurisdiction was shaped. (ii) Four further contributions—by Stephan Wittich, Catherine Brölmann, Ursula Kriebaum and Joanna Gomula—analyse the PCIJ’s influence on selected areas of substantive law: the law of treaties, minority and human rights law, rules of international trade, and those designed to protect foreign investments.

Three further clusters of contributions are devoted to more specific sets of questions: (iii) Anneliese Quast, Iain Scobbie and Jean d’Aspremont address the relationship between the PCIJ and other judicial and arbitral bodies of the inter-War period—an early, sometimes overlooked,

¹⁵ Rosenne (n 6) 73.

¹⁶ MO Hudson, ‘The Twenty-Fourth Year of the World Court’ (1946) 40 AJIL 1.

¹⁷ Rosenne’s *Law and Practice of the International Court (1920–2005)* (n 6) is a prominent example; on p 16 of that book, the author speaks of the two Courts’ ‘joint history’, which he suggests can be divided into five periods. See also JHW Verzijl, *The Jurisprudence of the World Court* (2 vols., Sijthoff, Leyden 1965/1966) whose two volumes address the work of the PCIJ and ICJ respectively.

variation on the theme of ‘proliferation’. (iv) In two very different pieces, Photini Pazartzis and Akbar Rasulov deal with fundamental aspects of legal method: the former revisiting the Court’s *Lotus* judgment, the latter scrutinizing the PCIJ’s conception of sources and the role of a contractual paradigm in particular. (v) Antonios Tzanakopoulos and Roman Kwiecień use the PCIJ’s jurisprudence to reflect on ‘constitutional’ issues, namely the Permanent Court’s perception of the international community (a notion subsequently popularized by its successor) and its contribution to what might be termed international constitutional law more generally. The book concludes with Ole Spiermann’s general assessment of the Court, whose work, in Spiermann’s words, ‘brought not only the Peace Palace but also international law to life.’¹⁸

As readers will quickly realize, the approaches adopted in the contributions vary, and contributors do not necessarily agree on the relevance of the PCIJ’s legacy in ‘their’ respective area. However, while reaching different conclusions, the contributions share two characteristics. First, throughout, the PCIJ is—to adapt an expression coined by Richard Falk—assessed as ‘fact’, not as ‘dream’.¹⁹ This may be obvious, but it seems worth mentioning: With the establishment of a permanent international court, the dream of organised and regular adjudication by an international court—giving effect to ‘the ideal [of] the whole world ... ruled by law’²⁰—had become a possibility. However, the newly-established Court that many had dreamt of had to grapple with realities, practical as well as political; had to attract and persuade its clients; and had to find its place in the legal system of the day and within the organised international community. The contributions to the book provide much evidence of the difficulties encountered in the process.

Second, throughout, an attempt is made to appreciate the PCIJ not merely as a precursor to the ICJ, but as an institution in its own right. Of course, in order to assess legacies, one has to identify what has remained; and typically, contributions conclude with reflections on developments post-1945. However, the PCIJ is not treated as a prequel; instead, the

¹⁸ O Spiermann (in this volume), at 400.

¹⁹ See R Falk, *Reviving the World Court* (Univ Press of Virginia, Charlottesville 1986), chapter 1.

²⁰ Cf Drummond (n 5).

different contributions revisit debates of the day, occasionally unearth forgotten evidence, and often provide fresh perspectives.

The perspectives offered in the following are diverse, and no one single view on the PCIJ is presented. Yet two recurring ‘themes’ can be made out: The first is that of the *PCIJ as a pioneer*. This is well-known aspect of our retrospective assessment of the Permanent Court: ‘[w]hat remains so particularly attractive about the Permanent Court and its decisions is that they were pioneers’ writes Ole Spiermann early on in his *International Legal Argument*.²¹ Pioneering was the ‘invention’ of advisory proceedings;²² pioneering was the Court’s ‘judicial legislation’ in the field of minorities law, ‘a new body of law, without much doctrine or precedent to rely on’;²³ and a pioneering spirit was required where the Court, in handling questions of jurisdiction, admissibility and procedure, ‘had to determine how it would discharge its judicial function, and had to do so more or less from scratch.’²⁴ These are but a handful of examples, of course, and the subsequent contributions provide much further evidence of the Permanent Court’s pioneering work, which indeed ‘remains so particularly attractive’²⁵ and which retains its relevance (as Ursula Kriebaum and Joanna Gomula show) even in areas of international law that have undergone substantial reform.²⁶

A common association is that pioneers not only venture into new terrain, but that they march boldly, oblivious to threat and danger. The chapters provide evidence of that, no doubt; but they also show the *PCIJ as a pragmatic institution*. This second theme, does not immediately fit in with idealistic views of a world court supervising a world order based on law; but it is a recurring feature of many of the subsequent chapters. Roman Kwiecień emphasises the Court’s willingness to rely on a consensual model of international law, which could be said to be a pragmatic strategy

²¹ O Spiermann, *International Legal Argument in the Permanent Court of International Justice* (Cambridge, CUP 2005), 19.

²² See M Giles Samson and D Guilfoyle (in this volume), at 42–43, for brief comment on the background.

²³ C Brölmann (in this volume), at 142.

²⁴ I Scobbie (in this volume), at 208, (where the process is aptly described as one of ‘role-negotiation’). Aspects of this role-negotiation are addressed in the chapters on advisory proceedings, as well as the contributions by Tams, Quast and d’Aspremont.

²⁵ Cf Spiermann (n 21).

²⁶ See the contributions by U Kriebaum (on foreign investment) and J Gomula (on world trade law) to this volume.

designed not to frighten its ‘customers’.²⁷ Jean d’Aspremont points to PCIJ cases in which the Court drew a clear line between international law and domestic legal orders (which were famously said to be ‘merely facts’²⁸), but also notes that the PCIJ, unlike its successor, ‘had no qualms endorsing the role of domestic courts and independently acting as a domestic court’.²⁹ In matters of jurisdiction and procedure as well, the Court, in ‘mapp[ing] out the contours of the international judicial function’,³⁰ was certainly not oblivious to the dangers of judicial activism, but typically moved cautiously.³¹ In fact, even in respect of advisory jurisdiction (which certainly was pioneering or ‘innovative in conception’) Marika Giles Samson and Douglas Guilfoyle observe that it ‘did not prove groundbreaking in design or execution’.³² In short, while the PCIJ was a pioneer, it typically moved carefully, and the general picture emerging may perhaps be said to be that of ‘pragmatic pioneer’.

As the subsequent contributions show, this ‘pragmatic pioneer’ was in many respects more than just the ICJ’s precursor, or its ‘previous incarnation’. It faced particular challenges, and as many contributors note, it operated in a different era. A retrospective assessment cannot ignore these differences; they concern, amongst other things, the institutional setting, the density of international rules, and the different priorities of participants in international dispute resolution.³³ However, even though the conditions of international adjudication have changed, the ‘pragmatic pioneer’ remains relevant: In many fields, the PCIJ’s ‘accepted success [has

²⁷ R Kwiecien (in this volume), at 392–393.

Akbar Rasulov challenges the dominance of a consensualist/contractualist paradigm in PCIJ jurisprudence and pointedly describes the Court as a ‘committed practitioner of conceptualist reasoning’; however he would not seem to rule out that the Court (pragmatically) might have felt the need to use consensualist arguments so to maintain its position. See A Rasulov (in this volume) at 308.

²⁸ Cf *Upper Silesia Case*, [1926] PCIJ Ser A No 7 at 19.

²⁹ J d’Aspremont (in this volume), at 236.

³⁰ I Scobbie (in this volume), at 203.

³¹ See also CJ Tams (in this volume) especially at 29–33.

³² M Giles Samson and D Guilfoyle (in this volume), at 67–68.

³³ To give just two examples, explored by Stephan Wittich and Antonios Tzanakopoulos in their contributions, when the PCIJ pronounced on the law of treaties or began to deal with issues of community interest, it could not draw on developed sets of rules, but needed to map the ground itself.

indeed] ensured the constitution of its successor';³⁴ in others, the Court may have missed opportunities or taken wrong directions. Yet one thing seems clear: the PCIJ's legacies are manifold. The subsequent contributions identify and assess many of them. They are an invitation to reacquaint ourselves with a pragmatic pioneer that began to operate ninety years ago and that, for better or worse, has shaped our thinking about binding legal dispute resolution.

³⁴ Sir RY Jennings, 'The International Court of Justice after Fifty Years' (1995) 89 AJIL 493.