

Denver Journal of International Law & Policy

Volume 40
Number 1 *40th Anniversary Edition*

Article 9

January 2011

The ICJ: On Its Own

Edward Gordon

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Edward Gordon, The ICJ: On Its Own, 40 Denv. J. Int'l L. & Pol'y 74 (2011).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

The ICJ: On Its Own

Keywords

Courts, International Court of Justice, Jurisprudence

THE ICJ: ON ITS OWN

EDWARD GORDON*

*“[A]n institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life.”*¹

I am honored and pleased to contribute to this *Festschrift* for Ved Nanda. It was at Ved’s invitation, four decades ago, that I contributed some thoughts to the very first issue of the *Denver Journal of International Law and Policy*.² They concerned the International Court of Justice’s abrupt and highly unpopular dismissal of a suit brought by Ethiopia and Liberia challenging the legality of the application of South Africa’s *apartheid* policy in South West Africa, a territory South Africa administered pursuant to a League of Nations Mandate. In what was expected to be the merits phase of the litigation, the Court had reversed, or seemed to reverse, a ruling it had made four years earlier in the suit’s preliminary objections phase, this time holding that the Applicants had not established that their legal rights in the administration of the Mandate were sufficient to constitute a cause of action.³

The earlier ruling had been obtained by a slim margin: eight to seven.⁴ Its reversal came on a seven to seven tie vote, broken, pursuant to the Court’s Statute,⁵ by the casting (i.e., second) vote of the Court’s President, Sir Percy Spender. Judge Spender had been in the minority in the earlier phase, co-authoring a joint dissenting opinion with Judge Sir Gerald Fitzmaurice. The minority in the first phase of the litigation

* Honorary Vice President, American Branch of the International Law Association. LL.B. Yale, Dipl. Int’l L., Cambridge.

1. Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, at 68 (May 28) (separate opinion of Judge Alvarez).

2. Edward Gordon, *Old Orthodoxies Amid New Experiences: The South West Africa (Namibia) Litigation and the Uncertain Jurisprudence of the International Court of Justice*, 1 DENV. J. INT’L L. & POL’Y 65 (1971).

3. South West Africa Cases, Second Phase (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, ¶ 61 (July 18).

4. South West Africa Cases, Preliminary Objections, 1962 I.C.J. 319 (Dec. 21).

5. Statute of the International Court of Justice art. 55(2), June 26, 1945, 33 U.N.T.S. 993.

became the majority in the second in large part because two judges who had been in the majority the first time were prevented by illness from participating thereafter, and a third was forced to recuse himself from participating in the second phase because of the partisanship implicit in his having been appointed as *ad hoc* judge by the Applicants prior to being elected to the Court as a regular member.

Dismissal of the Applicants' claim did not speak to the merits of the case against *apartheid*, only to the Applicants' right to sue. Other than among lawyers and legal scholars, though, the distinction was too subtle to matter. What mattered was that the World Court had ruled in favor of South Africa and against opponents of *apartheid*. Not to reach the merits of the dispute meant leaving the status quo unchanged, with the effect magnified, in this instance, by the ability of the respondent state's friends to block effective remedial action by the UN's political organs.

More than the Applicants themselves, and by extension critics of *apartheid*, it was the Court itself, and by extension international law, that had lost. The ruling came at a critical moment in history. Colonialism was coming to its end. African colonies in particular had gained independence with spectacular speed and decisiveness. The case had been expected to demonstrate to newly independent states, and to their citizens, that the procedures and institutions of traditional international law could be used to promote their distinctive goals in international life.⁶ Instead, it left the impression that international law was in cahoots with the past, with the prerogatives of inherited power, and in this instance with white supremacy. That the two judges seen to be principally responsible for the suit's dismissal – Spender and Fitzmaurice – were of Australian and British nationality, respectively, only reinforced this impression. Both the Court and international law were seen to be on the wrong side of history – and humanity.

Some observers wondered if members of the Court had been influenced by adverse reaction to its *Certain Expenses* opinion,⁷ issued the same year as its ruling in the preliminary objections phase of the *South West Africa* case. The *Certain Expenses* opinion had raised – or renewed – suspicion in some quarters that the Court was interpreting its position as the UN's "principal judicial organ"⁸ to mean that it was under an obligation to cooperate with the UN's political organs, rather than to act as an independent court of law. Could the Court's subsequent dismissal of Ethiopia and Liberia's claim have been

6. See Richard A. Falk, *The South West Africa Cases: An Appraisal*, 21 INT'L ORG. 1, 1 (1967).

7. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151 (July 20).

8. U.N. Charter art. 92.

influenced by a feeling that it might be better to not decide the case at all than to be seen as deciding it solely to associate the Court with a politically popular cause?

The impression that the Court had become beholden to UN politics was enhanced in 1971, when the UN Security Council gave the Court an opportunity to redeem itself, politically, by requesting from it an advisory opinion on the compatibility of the application of *apartheid* in South West Africa with international legal obligations.⁹ The Council had already expressed its own views on this subject, leaving the Court in the position of either agreeing with the Council's opinion or openly defying it. It agreed, deciding by a vote of thirteen to two that South Africa was under a legal obligation to end its administration of South West Africa,¹⁰ and by a vote of eleven to four that members of the UN were under an obligation to recognize the illegality of South Africa's continuing presence there and the invalidity of acts it undertook on behalf of the territory.¹¹

Technically, its opinion in 1971 was not inconsistent with its dismissal of Ethiopia and Liberia's suit five years earlier. The questions on which its opinion was requested did not relate to standing. But if in 1966 the Court appeared to be an agent of the past, then in 1971 it seemed to be kowtowing to UN politics, getting itself back on the right track politically, but at considerable cost to its credibility as an independent decision process.¹²

Much of my article recounted this history.¹³ But its main thrust was directed less at the litigation itself than at the legal community's reaction to it – not so much its revulsion against the support the Court seemed to have given *apartheid* in 1966, or its apparent obeisance to the Security Council in 1971, but rather the assumption that in neither instance had the Court acted independently of all political considerations, as a court of law should do. It was a reaction that seemed to me to assume the existence of relatively stable expectations about courts of law as adjudicative institutions. Specifically, it assumed that courts are homogeneous, *sui generis*, regardless of differences among them in formal structure or in the patterns of interaction with contending social processes that empirically determine how they direct their institutional energies. I found these assumptions unjustified, both logically and empirically.

9. 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.

10. *Id.* ¶ 118.

11. *Id.* ¶ 119.

12. See STEPHEN M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW 21-24 (2011).

13. See Gordon, *supra* note 2, at 72-91.

A LEGACY OF AMBIGUITY

Here in the United States, attitudes towards the ICJ as an institution have tended to assume that it was created in the image of the U.S. Supreme Court. The Supreme Court was, indeed, the prototype of an international tribunal that the American delegation proposed when the idea of establishing a permanent international court was first discussed at the diplomatic level, in 1907, at the second Hague Peace Conference.¹⁴ In its idealized form, which is how it was presented to the Conference and to the public, the proposed tribunal's function was to have been simply that of applying existing principles of international law to the facts of an international dispute, as it found them, let the chips fall where they may.

Its advocates argued that the Supreme Court model's suitability to the international arena had been demonstrated by its success in deciding disputes between the states of the American union.¹⁵ Though less than sovereign in an international sense, the American states were every bit as protective of their presumed prerogatives as sovereign states were. If the Supreme Court could settle their disputes, why could ones like it not be equally successful in resolving disputes between sovereign nations?

In retrospect it is easy to recognize that the enthusiasm its advocates brought to the proposal may have struck some delegates as parochial, if not downright arrogant. Institutions like the Supreme Court were not invariably found in other national legal systems. Doubters were disinclined in any event to find merit in the misgivings the Americans expressed about the more traditional model of international arbitration, whose principal mission was understood to be that of settling disputes by finding diplomatic solutions, taking law into consideration but not attributing to it a deciding quality.¹⁶

To the Americans, the difference between the two approaches was critical. In his instructions to the American delegation Secretary of State Elihu Root had written:

It has been a very general practice of arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlement of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable

14. See ELIHU ROOT, *MEN AND POLICIES: ADDRESSES 325-26* (Robert Bacon & James Brown Scott eds., 1925).

15. See JAMES BROWN SCOTT, *SOVEREIGN STATES AND SUITS 40-41* (1925).

16. See *id.* at 245.

obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to submit its differences to an impartial judicial determination is unwilling to submit them to this kind of diplomatic process.¹⁷

To lawyers outside the United States, however, the distinction did not appear to be of great moment; Root's argument gained little traction at the Conference.¹⁸ A measure of agreement did exist as to the benefits of a permanent judicial panel, rather than the constantly shifting clusters of judges characteristic of *ad hoc* arbitral panels. The absence of a permanent judiciary was seen by many to render the rulings of *ad hoc* tribunals spasmodic, discontinuous, and lacking in coherence, depriving them of any credible capacity to clarify or develop the rules of international law.¹⁹

Even this was not invariably regarded as a defect. International law was largely uncodified, the specific content of its norms having not developed to anything like the degree of specificity or certainty that characterized the long-established, comprehensive codes courts in civil law countries apply. Such of its rules as were settled seemed unconnected with one another, gaps between them being so wide that bridging them was seen to afford judges a degree of discretionary authority many states were reluctant to concede to them.²⁰ Among some observers, even in the U.S., the discontinuity of awards made by *ad hoc* tribunals was a blessing in disguise, precisely because the rules on which the awards were based applied only to a particular dispute, without generating anything like precedent or "clarifying" existing rules and principles.²¹

17. *Id.* at 219.

18. *See id.* at 215.

19. *Cf.* JOHN W. FOSTER, *ARBITRATION AND THE HAGUE COURT* 60-61 (Fred B. Rothman & Co. 1980) (1904) (discussing the benefits for a permanent arbitration tribunal, noting especially the increased uniformity).

20. *See* HERBERT ARTHUR SMITH, *THE AMERICAN SUPREME COURT AS AN INTERNATIONAL TRIBUNAL* 118 (Oxford Univ. Press 1977) (1920):

[N]o Court of the Nations can possibly satisfy the world unless it administers a known and written code of international law. On many important questions of international law there is no general agreement and the actual practice of nations has in fact differed widely. It cannot be expected that the nations of the modern world will be willing to leave important *rights at the mercy of judges who are fettered by nothing stricter than their own predilections.*

21. J.M. Dickinson, a prominent American lawyer, had said:

No one ever expected infallibility from any human court. Under the corrective influence of international jurists, unsound doctrine will be repudiated. There will be a constant change in judges. As new cases arise, not having any pride of opinion in the decision of others, they will the more promptly expound as the law that which the enlightenment of the time shall demand, for international law will always develop and stand as the

The feature of the Supreme Court model that appears to have made the least impact on the Conference and may well have been regarded as symptomatic of its advocates' naiveté was its assumption that an international court which ignores the political consequences of its decisions – i.e., where the chips fall – could flourish. The idea of submitting disputes to third-party decision itself represented a substantial concession from the presumed prerogatives of national sovereignty. It was tolerable only because – and to the extent that – it provided an opportunity to resolve international disputes amicably, in a way the parties could live with, so as to prevent the differences between them from festering into a justification for war, which often meant before they could be exploited by domestic political elements.

Nevertheless, if the only models discussed at the 1907 Conference had been those of diplomatic arbitration and adjudication modeled after the Supreme Court, respectively, the differences between them might have been accommodated in a compromise that would have permitted the would-be court to adopt either approach as circumstances warranted and the parties to a dispute preferred. But there were not just two models; there were three.²² Among small states, both the adjudicative and the arbitral models were received with skepticism. With ample historical justification, they suspected that, whatever its ostensible mission, the proposed court would end up serving the interests of the great powers unless it embodied the principle of sovereign equality. This, they made clear, meant that every state party to a treaty establishing the court had to be empowered to appoint one of its judges.²³ In essence – and as immediately noted – this would have endowed the court with the distinctive earmarks of a constituent assembly.

In the end, the differences between the three models were so substantial they could not be resolved at the Conference.²⁴ It concluded in stalemate, the delegates able to agree only upon a general outline of

exponent of such international justice and morality as the consensus of nations shall approve.

FOSTER, *supra* note 19, at 73-74.

22. See A. PEARCE HIGGINS, *THE HAGUE PEACE CONFERENCES* 516 (1909).

23. See *id.*

24. The name by which the court was to be known was itself a subject of contention, each suggested name being suspected of harboring a hidden institutional agenda. See WILLIAM I. HULL, *THE TWO HAGUE CONFERENCES* 378-79 (Kraus Reprint Co. 1970) (1908). The word "court" drew opposition, for example, "Permanent *Tribunal* of Arbitration" and "Permanent *Institution* of Arbitration" being suggested as alternatives. In exasperation, Joseph H. Choate, head of the U.S. delegation, finally said to the other delegates: "Give us the baby and you may baptize it as you will!" See JAMES BROWN SCOTT, *THE JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES* 57 (1927). The name finally agreed upon, i.e., the Court of Arbitral Justice, was discarded at Versailles. See *infra* note 27.

a permanent court and the hope that the differences could be resolved by diplomatic negotiation.

VERSAILLES AND THE CREATION OF THE PCIJ

But they could not be, and the outbreak of the First World War put the whole idea of a permanent international court on the backburner until after its conclusion. When discussions began again, prior to, during and after the post-war peace conference at Versailles, the circumstances that had existed in 1907 had changed dramatically. Versailles was a victors' conference, smaller states participated but were given few options beyond accepting positions assigned to them by the powers, which had won the war.²⁵

The influence that the U.S. model exerted in the design of the new international court appears to have peaked during the discussions and in the recommendations of the Advisory Committee of Jurists, a group of experts appointed by the League to recommend a plan of organization for the proposed court. Meeting in The Hague in the summer of 1920, the Committee adhered closely to the plan Root had promoted in 1907, causing one American participant to proclaim afterwards that the Committee's plan was "as closely modeled on the Supreme Court of the American States as one tribunal can resemble another without being identical."²⁶

But the members of the League did not follow all of the Advisory Committee's recommendations. To be sure, the new court was given the bland name *Permanent Court of International Justice* (PCIJ), rather than that of the *Court of Arbitral Justice*, as the 1907 Conference had proposed (and the U.S. had bitterly opposed).²⁷ It was also kept separate from the League, at least formally, again in keeping with the wishes of the U.S., in this instance to leave open the possibility that the U.S. Senate would consent to U.S. participation in a world court even if it ultimately rejected U.S. membership in the League itself.²⁸

To what extent its name and formal separation from the League ever motivated the PCIJ's judges or affected the political community's reactions to their rulings is difficult to say. The separation was more formal than substantive. The PCIJ's budget still had to be approved by the Assembly of the League.²⁹ Of at least equal importance, in order to

25. See SCOTT, *supra* note 15, at 222.

26. *Id.* at 221.

27. See SCOTT, *supra* note 24, at 57; Manley O. Hudson, *The Permanent Court of Arbitration*, 27 AM. J. INT'L L. 440, 445 (1933).

28. See Ake Hammarskjöld, *Sidelights on the Permanent Court of International Justice*, 25 MICH. L. REV. 327, 336 (1927).

29. See *id.* at 345. The budget of U.S. federal courts has to be approved by Congress, too, a circumstance that gives Congress influence over them, but not to the extent of

break the stalemate that had stymied the 1907 Conference, the Advisory Committee, at the suggestion of Root and his British counterpart, Lord Phillimore, recommended and the League subsequently adopted a compromise under which the judges would be elected by both the Council of the League, which the big powers were expected to (and did) control, and the Assembly, where the influence of the smaller states was expected to be (and was) more substantial, even decisive.³⁰

In any event, differences between the PCIJ and the Supreme Court model were substantial enough to call into question the assumption that the two institutions were cut from the same cloth or in anything like the same size. Beyond the absence of a formal institutional relationship, a crucial difference is that the PCIJ was never accorded compulsory jurisdiction, much less given political machinery to enforce its judgments.³¹ Either feature would have been an anathema to perceived prerogatives of national sovereignty. Without them the PCIJ, and later the ICJ, was destined to hear cases having far less international significance than ardent advocates of a world court had hoped for.

Another feature separating the PCIJ, and later the ICJ, from the Supreme Court model is the authority to render advisory opinions.³² Early in its own institutional history, the Supreme Court had determined that giving advice, which can be ignored, is incompatible with its adjudicative role. The U.S. opposed giving the PCIJ authority to render advisory opinions for just this reason, as well as because critics in the U.S. Senate regarded the advisory opinions as a device designed to circumvent the ostensible denial of compulsory jurisdiction³³ – that is, by allowing the PCIJ to decide issues important to specific disputes that the parties were unwilling to submit to

preventing them, *inter alia*, from overturning congressional legislation they deem to be incompatible with the Constitution.

30. See Lord Phillimore, *Scheme for the Permanent Court of International Justice*, 6 TRANSACTIONS GROTIUS SOC'Y 89, 90-91 (1920).

31. Jan Hostie, *The Statute of the Permanent Court of International Justice*, 38 AM. J. INT'L L. 407, 427 (1944); *History*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1&p2=1> (last visited Feb. 9, 2012).

32. The final draft of the PCIJ Statute did not mention advisory opinions, the Assembly having eliminated a draft article that explicitly authorized them. The Covenant of the League itself did, however, in Article 14. While empowering the Council of the League to formulate plans for the establishment of the Court, Art. 14 added that “the Court may also give an advisory opinion upon any dispute or question referred to it by the Council or the Assembly.” Early on, the PCIJ decided that since, by virtue of Article 1 of its Statute it had been established “in accordance with” Article 14 of the Covenant, Article 14 should be considered an integral part of the Statute.

33. Quincy Wright, *The United States and the Permanent Court of International Justice*, 21 AM. J. INT'L L. 1, 3 (1927); MANLEY O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942*, at 510-11 (1943) [hereinafter HUDSON].

adjudication. As it turned out, advisory opinions became a mainstay of the PCIJ's case load, proving to be of far greater value than had been anticipated.³⁴

Coincidentally, it was one of the Court's advisory opinions that so severely weakened its standing that it virtually ceased to operate soon after the opinion was issued. The *Customs Regime* case was a political hot potato that the Council of the League sought to avoid by handing it off to the Court.³⁵ The legal question it presented was whether a proposed merger of Germany and Austria's customs offices was consistent with treaty commitments the two countries had made following their defeat in the war. Formality aside, the decisive question was whether the proposed customs union was likely to lead to a political union – a question whose determination entailed an irreducibly political judgment. The Court was unable to deal decisively with the issue, much less to settle the underlying dispute. It decided, by a vote of only eight to seven, that the union was incompatible with an agreement Austria had made not to compromise its political independence. But the majority gave few reasons for their opinion, and the minority included several of the most eminent, learned and impartial members of the Court. Rightly or not, the ruling left the impression that politics, not law, had carried the day.³⁶

Like the *South West Africa (Namibia)* cases decades later, the 1931 *Customs Regime* case demonstrated that the line separating political and legal disputes is evanescent, if not utterly illusory, when the litigants are sovereign nations and the issues are of substantial importance to them. Virtually all cases an international tribunal hears have political overtones; the very act of taking a case to an international court politicizes it.³⁷ That the norms of international law themselves are not as insulated from politics as conventional wisdom had assumed was also becoming too obvious to deny in the name of theoretical constructs.

These changes in perception had been occurring independently of the work of the PCIJ. As much as anything, they reflect incursions made by the social sciences in the analysis of law and legal institutions, long hallowed grounds reserved exclusively to an aristocracy of lawyers and legal scholars. What initially had taken the form of criticism from

34. See HUDSON, *supra* note 33, at 513-24.

35. *Customs Regime between Germany and Austria*, Advisory Opinion, 1931 PCIJ (ser. A/B) No. 41, at 1 (Sept. 5).

36. See F.P. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* 452 (Oxford Univ. Press 1967) (1952).

37. See Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT'L & COMP. L.Q. 848, 852-53 (1995); see *Judicial Settlement of International Disputes: International Symposium Heidelberg, July 10-12, 1972*, 32 HEIDELBERG J. INT'L L. 543, 546 (1972) (remarks by Professor R.Y. Jennings).

within the ranks of the legal profession – *legal realism*, as it was known – expanded into an interdisciplinary recognition that, in the final analysis, legal concepts and institutions are not nearly as unique as lawyers and legal scholars maintain; that treating them as unique serves principally to preserve a professional monopoly; and that the idea that law and courts of law are unaffected by the social and political currents in which they swim is untenable.

One of the victims these insights claimed was the idea, originally considered critical to the Supreme Court model, that the application of rules of law in a given case can and should be indifferent to how well it serves the policies the rules were meant to implement. The notion that an international court can be indifferent to social and political outcomes suffered a loss in credibility, other than among those who remain wary of the tendency of policy perspectives to merely rationalize judges' personal or political biases.³⁸

REORGANIZING THE COURT

The ambiguity of its institutional role notwithstanding, the PCIJ had been active enough in its first decade to justify hopes that once the world community reorganized itself after the end of the Second World War, the Court could be given a new lease on life.³⁹ If in the final analysis it had proved to be less than the adjudicative institution the U.S. had wanted, or the dispute-settling, war-preventing diplomatic mechanism other states were hoping for, or the constituent assembly implicit in the principle of sovereign equality applied to the selection of judges, nonetheless until it came a cropper in the *Customs Regime* case it had shown enough promise to justify its continuation.

This, and little more, accounts for the reestablishment of the PCIJ in the form of the ICJ. In most respects, the language of the ICJ's constitutive instrument follows that of the PCIJ fairly closely – conspicuously so. The significance of the Charter's designation of the ICJ as the UN's "principal judicial organ" is often exaggerated. If it had been intended to endow the Court with a qualitatively different institutional role than that of its predecessor, its legislative history should make the point clearly. It does not. In fact, it suggests only that by the time the UN was established no purpose would have been served

38. See, e.g., John Lawrence Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 135, 143 (1987) ("The business of courts is to apply the law and preserve the integrity of the legal order, without regard to any perceptions of the relative power or moral purity of the parties."); and SHABTAI ROSENNE, *THE INTERNATIONAL COURT OF JUSTICE: AN ESSAY IN POLITICAL AND LEGAL THEORY* 62 (1961) ("[I]t cannot be too often emphasized that the Court is a court of justice and not of ethics or morals or of political expediency.").

39. Over the eighteen years it was formally in operation (1922-1939), the PCIJ heard twenty-four contentious cases and gave twenty-seven advisory opinions.

by continuing to maintain a formal separation between the Court and the world organization with which it was substantively tied anyway. The implication that either the language of the Charter or the intention of its framers compels the ICJ to defer to the wishes of the political organs of the UN represents little more than political ambition masquerading as original intent.

Whether as a matter of policy the Court *should* seek to align its judgments and opinions with those prevailing in the political organs of the UN, or for that matter with its own perceptions of where humanity's best interests lie, are very different questions, ones whose answers must be found, over time, in the world community's reaction to the Court's assertions of authority and in the Court's own prudential adjustment to the institutional limitations under which it operates.

Despite the global implications suggested by the word *international* in its name, the PCIJ had been a European court. Virtually all the cases it heard involved the interests of European states, many of the legal issues arising from changes in legal relationships and obligations brought about by the outcome of the First World War and treaties entered into upon its conclusion. The most influential of the PCIJ's judges were Europeans or European-trained, as well.⁴⁰ In truth, much of the success the PCIJ enjoyed, and the reassuring familiarity it presented to its predominantly European target audience, can be attributed to the mutuality of the judges' legal training, habits of reasoning and expectations of judicial propriety, and to their familiarity with the codes and traditions of interpretation that form the bases of law throughout Europe.⁴¹

These advantages were not available to the ICJ once European states began establishing regional dispute-settlement institutions soon after the ICJ itself was established. Litigants and issues which might once have found their way to the Court were thereafter more apt to be heard by the European Court of Justice or the European Court of Human Rights, instead. In contrast to the early experience of its predecessor, the ICJ, from the outset and for several decades thereafter, had a very light case load. Members of the Court took to openly

40. See Ole Spiermann, *Judge Max Huber at the Permanent Court of International Justice*, 18 EUR. J. INT'L L. 115, 116 (2007). American nationals were routinely elected to the Court so as to encourage public opinion in the U.S. to regard the Court as something other than a threat to U.S. sovereignty. But the absence of the U.S. from both the PCIJ and the League limited American influence. See SEAN D. MURPHY, *THE UNITED STATES AND THE INTERNATIONAL COURT OF JUSTICE: COPING WITH ANOMALIES* 14 (2007), available at <http://www.law.georgetown.edu/internationalhrcolloquium/documents/PICTProjectICJPaper.pdf>.

41. EDWARD MCWHINNEY, *THE INTERNATIONAL COURT OF JUSTICE AND THE WESTERN TRADITION OF INTERNATIONAL LAW: THE PAUL MARTIN LECTURES IN INTERNATIONAL RELATIONS AND LAW* 66-67 (1987).

soliciting new cases from governments and from the UN's political organs.⁴² International law associations established blue-ribbon panels to suggest ways the Court could be made more accessible and attractive to potential litigants.⁴³

The reluctance of non-European states to fill the void has many explanations. One, already noted, lies in the suspicion among newly emerging states that international law, as applied by the ICJ, was too respectful of the past and the past's allocation of power, wealth and status, and insufficiently hospitable to perceived contemporary needs, especially ones entailing the amelioration of inherited inequities.⁴⁴ But another, every bit as influential, was the countervailing perception that members of the Court were becoming altogether too sensitive to world politics, and thereby too biased politically to give independent judgments based solely upon existing rules of law.⁴⁵

Given this divergence, and the unresolved conflict among differing perceptions as to the Court's proper institutional role, it is not surprising that no consensus has emerged with respect to the qualities members of the Court should possess or whether it is desirable for them to have had judicial experience prior to their election to the Court. Consensus or not, over time, the fact that so many members of the Court have served in or for their country's foreign ministry, while so few have had prior judicial experience, has served to reinforce the impression that the Court is a quasi-political body whose members lack genuine independence from their governments or the blocs of states that secure their election.

This perception has been intensified as a result of the unseemly and demeaning politicking that attends the selection process itself. To some extent, this is a byproduct of the frequency of elections, a triennial cadence in which one-third of the Court's fifteen judges are elected every three years.⁴⁶ The election process is openly political: candidates and their foreign office sponsors lobby for months at a time; vote-trading is commonplace; votes are known to be motivated as much by

42. See, Paul C. Szasz, *Enhancing the Advisory Competence of the World Court*, in *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE*, Vol. II 499, 499-500 (1976) (discussing the creation of UN organs designed to solicit opinions from International Court of Justice in order to address the Court's low caseload).

43. The American Society of International Law established two such panels, their papers published as *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* (Leo Gross ed. 1976), and *INTERNATIONAL LAW AT A CROSSROADS* (Lori Fisler Damrosch ed. 1987), respectively.

44. See R.P. Anand, *Role of International Adjudication*, in *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 1, 3-4 (Leo Gross ed., 1976).

45. See Thomas R. Hensley, *National Bias and the International Court of Justice*, 12 *MIDWEST J. POL. SCI.* 568, 568 (1968).

46. Shabtai Rosenne, *The Composition of the Court*, in *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 337, 377 (Leo Gross ed., 1976).

political considerations as by merit, with little or no distinction made between the requirements of a judicial and non-judicial post. Worst of all, the process is almost entirely lacking in public scrutiny or political accountability.⁴⁷

The possibility that the selection process would become politicized had been foreseen in 1920, when the decision was made to give both the Council and the Assembly of the League a role in the election of the judges. The Root-Phillimore compromise had recommended that nominations be made, not by governments themselves, but by groups of four lawyers each government is free to name to a registry of individuals available to act as arbitrators, known then and now – misleadingly – as the Permanent Court of Arbitration.⁴⁸ These so-called National Groups, in turn, were expected to consult with professional groups within their own country prior to making their nominations. No one expected the scheme to eliminate political influence in the choice of nominees or in their election. But it was hoped that the professional standing of individuals who are deemed to be qualified to act as arbitrators would ensure that greater attention would be given to the professional qualifications of candidates for the Court than would be likely if governments were left to make the nominations themselves.⁴⁹

The recommendation found its way into the constitutive instrument of the PCIJ, and later that of the ICJ, but as an option, not a requirement.⁵⁰ It is still there, but is all but ignored in practice, even by governments like the U.S. that adhere to the formula in form, but reduce the role of their National Group to that of bit players or that name to the Group persons so closely tied to their governments that the distinction between the two is inconsequential.⁵¹ As much as the elections themselves, the breakdown of the system intended to assure independent screening of nominees detracts from the capacity of the

47. For an empirically-based analysis of these and similar shortcomings in international judicial elections, see RUTH MACKENZIE, KATE MALLESON, PENNY MARTIN & PHILLIPPE SANDS, *SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS* 1 (2010) [hereinafter MACKENZIE ET AL.].

48. S.K. VERMA, *AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 342 (2004).

49. See SCOTT, *supra* note 15, at 229.

50. Stephen M. Schwebel, *National Judges and Judges Ad Hoc of the International Court of Justice*, 48 INT'L & COMP. L.Q. 899, 891, 899 (1999).

51. The U.S. National Group that in 2010 nominated the State Department's Principal Deputy Legal Adviser, Joan Donohue, for a place on the ICJ consisted of the Department's Legal Adviser, two of his predecessors in that post, and a former Deputy Legal Adviser.

judges' own professional standing to imbue their rulings with a compelling authority.⁵²

The onset of the Cold War, coming as it did at the same time as the UN and the ICJ were being established, had something to do with the politicization of elections to the Court. It froze many of the leading states into rival blocs, intensified the political ramifications of everything that went on at the UN, and led to the nomination by some states of candidates whose lack of independence from their government was virtually taken for granted.⁵³ Ironically, the proliferation of international tribunals since the end of the Cold War seems only to have compounded the problem, having transformed what had been a small judicial elite into a sizeable professional corps such that, as one group of scholars put it recently, for lawyers in foreign offices and international organizations an international judgeship has become "a natural part of career progression."⁵⁴

EXPANSION AND PROLIFERATION

Among the most critical factors bearing upon the evolution of the ICJ to this point has been the unprecedented expansion in the scope of claims made in the name of international law, the degree of specialization that has come with it, and an acceptance within the international law community of a degree of discretionary authority in judicial interpretation that might once have been considered overreaching. In theory, these developments should open up a vast new array of issues for the Court to resolve.⁵⁵ In practice, this has not yet happened to the extent one might have expected, in part because so many of the issues international law now raises are being handled by specialized dispute-settlement mechanisms like the International Center for the Settlement of Investment Disputes (ICSID), the International Tribunal for the Law of the Sea, the appellate body of the World Trade Organization, the International Criminal Court and *ad hoc* criminal tribunals.⁵⁶

52. MACKENZIE ET AL., *supra* note 47, at 64-66. In contrast, the professional qualifications of the members of the PCIJ were never questioned. WALTERS, *supra* note 36, at 170.

53. See Michael Reisman, *Judge Shigeru Oda: Reflections on the Formation of a Judge*, in LIBER AMICORUM JUDGE SHIGERU ODA 57, 68 (2002).

54. MACKENZIE ET AL., *supra* note 47, at 58.

55. See ROSALYN HIGGINS, *THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AT THE TURN OF THE CENTURY 1-2* (1999).

56. The high visibility enjoyed by some of these tribunals and the cases they hear attenuates the image the Court once enjoyed as international law's central adjudicative instrumentality. One cannot help but observe that, in contrast to what one would have found at the time the *South West Africa (Namibia)* cases were decided, the ICJ is seldom referred to these days as *the* World Court or even the *World* Court.

The expansion of international criminal law is especially significant in this respect, but so, less dramatically, is the expansion in claims being made in the name of the rights and obligations of individuals and other non-state actors. Generally speaking, these subjects are independent of the rights and obligations of states as such, and since, other than through requests for advisory opinions, only states have access to the ICJ, they are being raised in forums other than court.

Knowing this, the UN's political organs by now might have acceded to requests to increase accessibility to the Court or to install it at the head of a hierarchy of international courts. They have chosen not to do so, however, instead creating ever more courts, even in the face of arguments that proliferation could lead to a fragmentation of international law.⁵⁷ It is not beyond the realm of possibility, in fact, that some foreign offices find the prospect of fragmentation appealing, and are disinclined for this reason alone to establish a judicial hierarchy. Seen from the perspective of political power, after all, institutions like the Court are useful when they lend compelling legal authority to political will, but only so long as their authority is insufficient to enable them to question the legitimacy of that will when it conflicts with fundamental community standards or goals. Blocs of small states are every bit as likely as powerful states to proclaim their adherence to international law while resisting any attempt to endow the judicial system with sufficient authority to apply it to their own actions.

In any event, while the proliferation of international tribunals may increase the risk of fragmentation, it also raises the possibility that, if only for reasons of collective professional or bureaucratic self-interest, proliferation could lead to cross-fertilization, not only in the headiest realms of jurisprudence but in routine matters of practice and procedure as well. If so, it could end up endowing international law with a degree of cohesion – and thereby authority – it has never before had.

It is not difficult, in fact, to envision the emergence of a global common law – a judicially constructed common law, not one pronounced by academics, theologians or apologists for governments, as has been true throughout much of international law's post-Westphalian history. The absence of a structural hierarchy among international tribunals

57. E.g., Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267, 272 (2001); Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System*, 31 N.Y.U. J. INT'L L. & POL. 791, 792 (1999); Jonathan I. Charney, *Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697, 698 (1999).

does not preclude appreciation of the mutual benefits that symmetry can bring.

CONCLUDING OBSERVATIONS

The obscurity into which the Court seemed to have fallen after the *South West Africa (Namibia)* cases proved to be ephemeral. It hears more cases today that it ever has.⁵⁸ Whether this reflects an increase in confidence, though, is problematical. Some cases submitted to the Court appear to be motivated less by a desire to clarify legal rights than by a desire to obtain diplomatic cover for practical solutions the parties are willing to accept anyway. The ICJ is not likely to be an effective deterrent to the use of military power by militarily powerful states determined to have their way or to play a decisive role in the settlement of inter-state disputes threatening world peace.

But the very breadth of its mission affords the Court an opportunity to amalgamate and blend evolving elements of international law that specialized tribunals do not possess. Ironically, this attribute, aided by the ambiguity of the Court's role, could end up providing it with a central position inverse to its loss of glamour. As it matures according to the requirements of international life, the Court may find itself inadvertently well-positioned to fashion an institutional life of its own making.

58. Douglass Cassel, *Is There a New World Court?*, 1 NW. U. J. INT'L HUM. RTS. iii, vi (2003).