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Compulsory Jurisdiction and Defiance in the World Court: A Comparison of the PCIJ and the ICJ

Keywords

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Compulsory Jurisdiction and Defiance in the World Court: A Comparison of the PCIJ and the ICJ

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I. INTRODUCTION

Recently, scholarly literature concerning the International Court of Justice has exhibited great concern over increasing state defiance of the Court. This growing concern for the effectiveness of the World Court peaked following the United States withdrawal and subsequent flouting of the Court's decision in the *Nicaragua* case.¹

Concern over the increased defiance of the Court seems justified, some literature on the subject notwithstanding, and searches for a solution to this defiance seem timely, for while the effectiveness of the Court may at times have been threatened, it is now in danger of being rendered impotent. But, while there has been considerable state defiance of the Court during the recent ICJ years, the PCIJ years were relatively free of this phenomenon.²

We intend to explore the trend toward defiance of the Court in the

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1. Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14 (June 27, 1986).

2. Though the instances of defiance of the Court are well documented and have been given a great deal of scholarly attention, (*See H. THIRLWAY, NONAPPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE*, 3-20 (1985). *See also* Hight, *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79 AM. J. INT'L L. 992 (1985)) there is some disagreement regarding what constitutes defiance and what should be regarded as "normal behavior" provided for in the statute. (THIRLWAY, *id.* at 1-20). Rather than debate the merits of the various perspectives, we will classify defiance as any behavior where a state is legally bound to the Court's jurisdiction but disregards the orders of the Court in a *willful* manner. Thus, judgments about states' attitudes, as seen in their responses to the Court, become an important criterion for our determination. Our definition of defiance includes both non-appearance and non-performance. Albania's non-payment of the damages assessed in the *Corfu Channel* case is an example of the former; France's behavior in the *Nuclear Tests* cases (*Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)* 1974 I.C.J. Rep. 253 and 457 (Judgments of December 20)) is an example of the latter and the United States behavior in the *Nicaragua* case is an example of both willful non-appearance and non-performance. This categorization excludes then, instances like Soviet behavior toward the Court in *The Aerial Incident of October 7th, 1952*, (*U.S. v. U.S.S.R.*) 1956 I.C.J. 9 (Order of Mar. 14) and the non-appearance by the representative from Bulgaria in the *Electric Co. of Sofia and Bulgaria* case, (*see infra* note 57) who was unable to attend because of the war.

postwar years - in comparison with the low incidence of defiance of the Court in the interwar period - with the intent of assessing why the PCIJ seemed relatively more able to avoid outright defiance than the ICJ. An assessment of the apparent success of compulsory jurisdiction under the PCIJ may provide some prescriptions for an ailing ICJ.

In discussing the possible explanations for the increased defiance of the Court, we will argue that, although many factors are contributory, it is primarily a changed attitude toward international adjudication in the post World War II system that is responsible for the recent instances of defiance of the ICJ. Most importantly, present attitudes toward third party adjudication do not seem conducive to any form of compulsory jurisdiction, not even the "optional" acceptance of compulsory jurisdiction.

We will also argue that the apparent progress made toward compulsory jurisdiction in the period of the PCIJ was illusory and reflected no more than an immediate postwar legal idealism that is likewise reflected in the early years of the ICJ immediately following World War II.

II. COMPULSORY JURISDICTION AND THE PCIJ

In order to provide an adequate comparison of the success of compulsory jurisdiction under the two incarnations of the World Court, we shall first proceed with a discussion of the cases brought before the PCIJ involving compulsory jurisdiction. For comparative purposes we will rely on a recent analysis of the compulsory jurisdiction cases under ICJ auspices.³ To analyze the effect of compulsory jurisdiction on the outcome of ICJ cases, the universe of these cases was divided into four categories: Category I cases, in which the respondent state made no preliminary objections; Category II cases, in which there were preliminary objections that were upheld by the Court; Category III cases, in which the preliminary objections were overruled by the Court, but the merits decision supported the respondent state's submissions; and Category IV cases, in which the Court upheld the applicant state's case on both objections and merits.⁴

From this distribution of ICJ cases, it is evident that compulsory jurisdiction does not enhance the Court's role in Category I cases, which would probably have been submitted to the Court eventually even without compulsory jurisdiction, nor in Category II cases, because in these cases the Court simply finds it lacks jurisdiction. Thus only Category III and IV cases provide a test of the Court's compulsory jurisdiction. The record for the ICJ in these categories is rather dismal.⁵

Defiance of the Court's compulsory jurisdiction and judgments in recent years seems more the rule than the exception. A cursory look at the

3. The following analysis of the effects of compulsory jurisdiction under the I.C.J. is based on, Scott & Carr, *The I.C.J. and Compulsory Jurisdiction: The Case of the Closing Clause*, 81 AM J. INT'L L. 57 (1987).

4. *Id.* at 60.

5. *Id.* at 62-66.

PCIJ cases, on the other hand, reveals apparent success for the Court's compulsory jurisdiction during the interwar period. It is this apparent success, as compared with the failure of the ICJ, that we intend to explore and explain below.

The cases submitted to the Permanent Court of International Justice under its compulsory jurisdiction, based either on the optional clause or compromissory clauses in treaties, also can be categorized like those of the ICJ above. One discovers, through such a categorization, that the distribution of PCIJ cases is somewhat different from ICJ cases. Not only were there a greater number of joint submissions under the PCIJ than the ICJ,⁶ but even in compulsory jurisdiction cases there seems to have been a general desire for peaceful dispute settlement, either legal or negotiated, and the Court apparently was seen to have a role in that settlement process.

Even a state lodging preliminary objections to the Court's jurisdiction may not have been seen as seriously questioning the Court's role. The Court in the *Case Concerning Minorities in Upper Silesia*⁷ overruled Poland's objections to its jurisdiction, noting that Poland had already participated in the case, thereby acknowledging the jurisdiction of the Court.⁸ In other words, Poland must have initially seen the Court as a means for resolving the dispute before it lodged its preliminary objections.

Another example, to be discussed more fully below, is Germany's withdrawal of the *Factory at Chorzow Indemnity* case from the Court's list before the Court had made a decision.⁹ Germany and Poland reached an agreement through negotiations and rather than pursuing a judicial resolution, Germany agreed to withdraw the case once a negotiated settlement had been reached. The PCIJ seems then, to have afforded states a desirable means of dispute resolution, even when the cases were submitted unilaterally on the basis of the Court's compulsory jurisdiction.

A. Category I Cases

It is difficult to distinguish Category I cases from those that are brought to the Court by joint submission. In 1931 Denmark requested that the PCIJ, on the basis of the optional clause, declare that Norway's latest action in a long-standing debate with Denmark was contrary to international law.¹⁰ Since 1919, Denmark and Norway had disagreed over

6. Coplin & Rochester, *The Permanent Court of International Justice, The International Court of Justice, The League of Nations, and The United Nations: A Comparative Empirical Survey*, 66 AM. POL. SCI. REV. 529 (1972).

7. *Rights of Minorities in Upper Silesia (Ger. v. Pol.)* 1928 P.C.I.J. (ser. A) No. 12 (April 26).

8. *Id.* at 24.

9. 5 P.C.I.J. ANN. R. (ser. E) No. 5, at 200.

10. *Memorial of Denmark, Legal Status of Eastern Greenland (Den. v. Nor.)* 1933 P.C.I.J. (ser. C) No. 62 (October 31, 1931).

the sovereignty of Eastern Greenland. Denmark claimed that Eastern Greenland was its sovereign territory and Norway claimed that Eastern Greenland was *terra nullius*.¹¹ Before submitting the case to the PCIJ, Denmark suggested to Norway that both submit the case to the PCIJ by special agreement, and Norway initially agreed.¹² However, Norway wanted a guarantee that if the Court decided that Denmark did not have sovereignty, Denmark would then acknowledge that Greenland was *terra nullius*. Denmark refused, on the grounds that this would prejudice the case.¹³ Norway thereupon refused to submit the special agreement and issued a proclamation of its own occupation of Eastern Greenland.¹⁴ But, even in Norway's act of proclamation, there appears a desire for a settlement of the dispute, a desire to ensure that if the Court did not decide in Denmark's favor the dispute would not merely be returned to its status before adjudication.¹⁵ Norway raised no preliminary objections to the Court's jurisdiction and immediately complied with the Court's decision that Norway revoke its proclamation.¹⁶

The other cases in Category I also were cases in which both parties seemed favorably disposed toward adjudication, even though the cases were submitted to the Court unilaterally. In the *South-Eastern Greenland* case,¹⁷ Norway and Denmark separately appealed to the Court on the basis of the optional clause. The Court joined the two cases, saying that they were equivalent to *one special agreement*.¹⁸

*The Diversion of Water from the River Meuse*¹⁹ also resembles cases submitted by special agreement — while the Netherlands brought the case to the Court by means of the optional clause, Belgium entered counterclaims accusing the Netherlands of equivalent breaches of the 1863 Treaty that had been designed to settle all previous and future difficulties with regard to both states' interests in the River Meuse.²⁰

A fourth case that falls under this first category concerns Czechoslovakia's appeal to the PCIJ to revoke a decision of the Hungaro-Czechoslovakian Mixed Arbitral Tribunal.²¹ While this case does not necessarily

11. Preuss, *The Dispute between Denmark and Norway over the Sovereignty of East Greenland*, 26 AM. J. INT'L L. 472 (1932).

12. *Id.* at 486.

13. *Id.*

14. *Id.*

15. *Id.*

16. 9 P.C.I.J. ANN. R. (ser. E, No. 9), at 141.

17. Case Concerning the Legal Status of the South-Eastern Territory of Greenland (Nor. v. Den.; Den. v. Nor.) 1932 P.C.I.J. (ser. A/B) No. 48 (Aug. 2).

18. *Id.* at 270.

19. Diversion of Water from the Meuse (Neth. v. Belg.) 1937 P.C.I.J. (ser. A/B) No. 70 (June 28).

20. *Id.* at 7.

21. Appeal from Judgment of the Hungaro-Czechoslovakian Mixed Arbitral Tribunal (The Peter Pazmany University v. The State of Czechoslovakia) (Czech. v. Hung.) 1933 P.C.I.J. (ser. C) No. 72, at 15.

resemble a special agreement, Hungary, nonetheless, raised no preliminary objections, thus also appearing to desire a judicial resolution to the dispute.²²

The remaining case in this category, the *Société Commerciale de Belgique*,²³ was submitted to the Court by Belgium against Greece, on the basis of a compromissory clause. Greece refused to submit the case jointly, but over the course of the hearings, Belgium so altered its case that the Court declared that differences no longer existed between the parties.²⁴ As Belgium altered its position, the case came more closely to resemble a negotiated settlement or one submitted by *ad hoc* agreement rather than compulsory jurisdiction.²⁵

PCIJ Category I cases resemble those heard by the ICJ; Category I cases heard by both Courts are primarily cases that both parties identify as amenable to adjudication. States' recognition of the Court as a legitimate part of the dispute settlement process, as illustrated by the cases in this first category, does not necessarily differentiate the PCIJ from the ICJ in its early years. The differentiation becomes more clear in the categories in which states would be expected to be more adversarial when faced with the Court's compulsory jurisdiction.

B. Category II Cases

Cases in this category are cases in which preliminary objections are lodged and upheld by the Court.²⁶ The respondents' objections to a legal resolution of the dispute are thus supported by the decision of the Court. These cases then, whether heard by the PCIJ or ICJ, are designated by the Court as falling outside of its compulsory jurisdiction. For example, in the *Phosphates in Morocco* case,²⁷ France responded to Italy's application to the Court by objecting that the dispute over licenses to prospect for phosphates in Morocco arose before France and Italy accepted the optional clause.²⁸ Therefore, France claimed, the dispute fell outside of the jurisdiction of the Court. The Court agreed with France in this case and there was no further action.²⁹

The other two cases that fit this category are slightly more compli-

22. Appeal from Czechoslovak-Hungarian Mixed Arbitral Tribunal (The Royal Hungarian Peter Pazmany University) (Czech. v. Hung.) 1933 P.C.I.J. (ser. A/B) No. 61 (December 15).

23. *Societe Commerciale de Belgique* (Belgium v. Greece) 1939 P.C.I.J. (ser. A/B) No. 78 (June 15).

24.. *Id.* at 175.

25. Although Greece did not compensate Belgium in accordance with the Court's ultimate declaration, this failure was due to inability to pay rather than any willful noncompliance. Judicial Decisions, *Sovereign Immunity - Seizure of State Property*, AM. J. INT'L L. 508 (1953).

26. Scott & Carr, *supra* note 3, at 62-63.

27. *Phosphates in Morocco* (Italy v. Fr.) 1938 P.C.I.J. (ser. A/B) No. 74 (June 14).

28. *Id.* at 17.

29. *Id.* at 40.

cated, because in each the Court joined the preliminary objections and merits phases, saying that in order to make a decision upon the preliminary objections it had to consider facts impinging upon the merits of the cases. The Court ultimately decided, in each case, that it lacked jurisdiction. In the *Panevezys-Saldutiskis Railway* case,³⁰ the Court overruled one of Lithuania's preliminary objections, only to then agree with Lithuania that Estonia had not exhausted local remedies.³¹ Similarly, in the *Pajzs, Csaky and Esterhazy* case³² the Court joined the preliminary objections and merits phases, but ultimately agreed with Yugoslavia that it lacked jurisdiction.³³

C. Category III Cases

The only PCIJ case in which there were preliminary objections overruled by the Court, but where the decision on the merits supported the respondent, is the *Interpretation of the Statute of Memel*.³⁴ This case was brought to the Court by Britain, France, Italy, and Japan against Lithuania. Lithuania objected that the basis for jurisdiction, the *May 8, 1924 Convention Relating to Memel*,³⁵ indicated that any dispute must first be referred to the League Council. The Court overruled Lithuania's objection, saying that a hearing by the Council was not a prerequisite to the Court's jurisdiction under the Convention. However, the Court decided the merits of the case in favor of Lithuania's submissions.³⁶

Two points may be raised in considering this case. The first is that Lithuania did not object to the jurisdiction of the Court per se, but rather to the interpretation of the 1924 Convention.³⁷ Perhaps then, the compulsory nature of the Court's jurisdiction did not compel Lithuania to comply with the adverse ruling on its preliminary objections, but since its objections were not directed toward the jurisdiction of the Court it may have had little reason not to pursue the case as directed by the Court. The other point to consider is the possibility that a small state such as Lithuania may have realized that it had greater bargaining power before the Council or the Court than it might otherwise have had in ordinary negotiations with more powerful states such as Britain, France, Italy or Japan. This possibility could make even an unwanted court decision appear to be more desirable than certain other alternatives.

30. *Panevezys-Saldutiskis Railway* (Est. v. Lith.) 1939 P.C.I.J. (ser. A/B) No. 76, at 4 (February 28).

31. *Id.* at 22.

32. *Pajzs, Csaky, Esterhazy Case*, (Hung. v. Yugo.) 1936 P.C.I.J. (ser. A/B) No. 68 (December 16).

33. *Id.* at 65.

34. *Interpretation of the Statute of the Memel Territory* (Brit., Fr., It. and Jap. v. Lith.) 1932 P.C.I.J. (ser. A/B) No. 49 (August 11).

35. *Convention Relating to Memel*, May 8, 1924, 29 L.N.T.S. 85.

36. *Supra* note 34, at 337.

37. *Supra* note 34, at 247.

D. Category IV Cases

None of the cases in Category IV were brought under the optional clause - all three were brought to the PCIJ based upon compromissory clauses in treaties.³⁸ Interestingly, all three cases in this category were submitted to the Court in the early years of its existence. Not only were the disputes ones in which the respondents had specifically agreed to submit to the jurisdiction of the Court in recent treaties, but both the treaties and the disputes themselves followed closely on the heels of the Court's creation, thus creating an ideal situation for compulsory jurisdiction. That is, state consent to the jurisdiction of the Court was quite proximate to the issues involved in the dispute.³⁹

The *Mavrommatis Concessions* case is only the second case decided by the PCIJ and the first to fall under Category IV.⁴⁰ The case began as a dispute between a Greek national, M. Mavrommatis, and the U.K. concerning public works concessions in the mandated territory of Palestine. After negotiations between Mavrommatis and the British Colonial and Foreign Offices, followed by negotiations between Greece (on the part of Mavrommatis) and Britain; Greece applied to the PCIJ on the basis of Article 26 of the Mandate for Palestine.⁴¹ Both the preliminary objections and the merits phases of the case were decided against Britain.⁴² This decision would seem to support a contention that the compulsory jurisdiction of the Court was beneficial in bringing Britain and Greece to a peaceful resolution of their dispute. However, the judgment did not entirely favor Greece's submission over the contentions of the U.K. In fact, the decision closely resembled one of the proposals made by the British Foreign Office to the Greek Legation *before Greece submitted the case to the Court*.⁴³ Thus, the decision, albeit one that did not fully support Britain's submission, seemed to be one that Britain had already expressed a certain willingness to accept in its early negotiations with Greece. That the case was resubmitted to the Court, once again unilaterally by Greece, may suggest that the U.K. did not wish to go beyond what it had already expressed a willingness to abide with, i.e., that it would accept the Court's judgment insofar as that decision corresponded with Britain's own range of possible solutions to the dispute, expressed in the bargaining with Greece. However, whether this is true is difficult to speculate, since in the *Case of the Readaptation of the Mavrommatis Jerusalem Concessions* the Court agreed with Britain that it lacked jurisdiction.⁴⁴

38. See *supra* note 7, and *infra* notes 40 and 45.

39. See Scott & Carr, *supra* note 3, at 73-74.

40. Mavrommatis Palestine Concessions (Greece v. Gr. Brit.) 1924 P.C.I.J. (ser. A) No. 2 (August 30).

41. *Id.* at 12.

42. Mavrommatis Palestine Concessions (Greece v. Gr. Brit.) 1925 P.C.I.J. (ser. A) No. 5 (March 26).

43. Borchard, *The Mavrommatis Concessions Cases*, 19 AM. J. INT'L L. 728 (1925).

44. Readaptation of the Mavrommatis Jerusalem Concessions (Greece v. Gr. Brit.) 1927

The second case in Category IV is the *German Interests in Polish Upper Silesia and The Factory at Chorzow*.⁴⁵ This case might also seem, as did *Mavrommatis*,⁴⁶ to support the efficacy of compulsory jurisdiction. More likely, it is another example of the different attitude directed toward the PCIJ. This was a rather protracted case consisting of a series of eight orders and judgments; the apparent attempt to use the Court to work toward a negotiated settlement of the dispute. Upon the Court's decision for Germany in the first question submitted to it regarding the dispute over the alienation of properties in upper Silesia, the parties attempted to reach a friendly settlement through negotiation.⁴⁷ When the negotiations failed, Germany informed Poland that the only recourse was the PCIJ; thus the PCIJ addressed a new question concerning this problem.⁴⁸ A third question arose over the matter of any indemnity owed by Poland to the individuals alienated from their properties. This question was likewise submitted to the Court and decided in Germany's favor.⁴⁹ Yet, in the final phase of the case (the question over the amount of the indemnities) Germany informed the Court that the parties had concluded an agreement and it terminated the case.⁵⁰

The third PCIJ case that falls under Category IV is the *Rights of Minorities in Upper Silesia*.⁵¹ This case concerned the exclusion of some children from minority schools in Upper Silesia in 1926 and shortly thereafter. Germany submitted the case to the PCIJ in 1928.⁵² Poland challenged the jurisdiction of the Court, but did so at such a late point in the proceedings that the Court decided that Poland had already indicated a desire for a decision by the Court.⁵³ Even though it had objections to the Court's jurisdiction, Poland had used the Court initially. Thus it seems as though Poland, as respondent, at some point in the case must have felt that the Court could play a reasonable part in the bargaining process with Germany - it was only at some later point in the proceedings that Poland decided to contest the jurisdiction of the Court.

Unlike the ICJ in Category IV cases, the PCIJ experienced no defiance from the losing respondent states. It is likely that international pressures to uphold treaties created in the near aftermath of World War I, as well as pressures to support legal institutions created to further peace,

P.C.I.J. (ser. A) No.11 (October 10).

45. Concerning Certain German Interests in Polish Upper Silesia (Ger. v. Pol.) 1926 P.C.I.J. (ser. A) No. 7 (May 25).

46. *Supra* note 40.

47. Interpretation of Judgments Nos. 7 and 8 Concerning the Case of the Factory at Chorzow (Germany v. Poland) 1927 P.C.I.J. (ser. A) No. 13, at 7 (December 16).

48. *Id.* at 7.

49. Case Concerning the Factory at Chorzow (Ger. v. Pol.) 1928 P.C.I.J. (ser. A) No. 17 (Jud. of Sept. 13).

50. *Judgments and Orders*, 5 P.C.I.J. Ann. R., ser. E, No. 5, at 193 (1928-1929).

51. *Supra* note 7.

52. *Id.* at 4.

53. *Supra* note 7, at 24.

made defiance of the Court a relatively non-viable alternative at the time. But simply to say that states during the interwar years did not defy the Court, even in Category IV cases, does not fully address the difference between states' behavior toward the PCIJ and the ICJ.

E. Terminated Cases

Several cases like the *Factory at Chorzow Indemnity case*⁵⁴ were submitted to the PCIJ and later terminated by the parties. These terminated cases, while not fitting specifically into the categories used in this article, nonetheless support the contention that states often used the PCIJ as one alternative in their negotiations. Cases in which the applicant agreed to withdraw the case from the Court after the respondent's preliminary objections, or when progress had been made in bargaining between the parties outside the Court, indicate a desire on the part of the states for dispute settlement rather than a specifically judicial resolution.⁵⁵ These cases support the contention, based upon an examination of the cases in the four categories above, that during the interwar years, states approached the Court with an attitude different from the more recent years in the postwar period.

In the *Losinger* case, Switzerland and Yugoslavia reached an agreement outside of court and agreed to terminate their case before the Court had an opportunity to hand down any judgment.⁵⁶ In the *Electricity Company of Sofia and Bulgaria*,⁵⁷ Bulgaria refused to participate in the case following the Court's decision for Belgium on jurisdiction. However, Bulgaria's refusal to participate was based upon the refusal of the government to force its representative to travel across Europe during the war.⁵⁸ In light of Bulgaria's refusal, Belgium ultimately agreed to withdraw the case from the Court's list.⁵⁹

A third case, and another instance that might be construed as defiance of the Court, also illustrates the attitudinal difference toward dispute settlement in the interwar period. In the *Denunciation of the Treaty of November 2, 1865 between China and Belgium*,⁶⁰ Belgium sub-

54. *Supra* note 50 at 193.

55. This excludes several cases - those that were terminated when Germany left the League: Case Concerning the Prince von Pless, (Ger. v. Pol.) 1933 P.C.I.J., (ser. C) No.70 (Dec. 2); and Case Concerning the Polish Agrarian Reform and the German Minority (Ger. v. Pol.) 1933 P.C.I.J. (ser. A/B) No.60 (Dec. 2). The Polish Agrarian Reform is a case wherein Poland did not appear, however it can be distinguished from cases of nonappearance before the I.C.J. because the reason for Poland's nonappearance was the inability to meet time limits rather than defiance of the Court.

56. *Losinger and Co.*, (Switz. v. Yugo.) 1936 P.C.I.J. (ser. A/B) No. 69 (Dec. 14).

57. *Electricity Company of Sophia and Bulgaria* (Belg. v. Bulg.) 1939 P.C.I.J. (ser. A/B) No. 77 (April 4).

58. 16 P.C.I.J. ANN. R.,(ser. E) No. 16, at 152.

59. *Id.* at 153.

60. *Application of Belgium, Denunciation of the Treaty of November 2nd, 1865, Between China and Belgium* (Belg. v. China) 1927 P.C.I.J. (ser. A) No. 8, at 4 (Nov. 25).

mitted the case to the Court because it was engaged in negotiations with China over a new treaty and feared that in the interim it would be left without any treaty.⁶¹ China refused to participate in the case, but suggested that the League was the proper forum for the matter.⁶² Although China refused to participate in the case before the PCIJ, it did continue to negotiate with Belgium. As soon as a new treaty was negotiated, Belgium withdrew the case from the Court's list.⁶³

The review of PCIJ cases above, involving the compulsory jurisdiction of the Court, illuminates several points about the role of the PCIJ in the dispute settlement process. First, we do not find instances of outright defiance of the PCIJ as we do with the ICJ.⁶⁴ Further, in those cases that might be construed as defiance as with the Bulgaria and China cases above, the applicant state sought to work out an amicable solution and did not press the case. Second, there are a number of instances where parties to the disputes worked out an amicable solution to the problem even before the Court had the opportunity to act. Third, in those cases of unilateral application involving compulsory jurisdiction, the applicant state did seem genuinely to desire a settlement of the dispute. We shall argue below that this fact alone is enough to distinguish PCIJ submissions from many of the submissions to the ICJ. Finally, it should be noted that all of the cases involving a true test of compulsory jurisdiction were submitted in the early years of the PCIJ under what we have termed ideal conditions for compulsory jurisdiction.

III. THE END OF LEGAL IDEALISM

At the end of each of the two major world wars the world seemed captured by a sense of post-war legal euphoria. Struck by the need to end war for all time, statesmen and scholars alike sought solutions in the legal realm for the settlement of international disputes. The birth of the PCIJ, and its reincarnation in the ICJ after World War II, were accompanied by a feeling amongst many states that disputes were best settled rather than allowed to continue and possibly erupt into armed conflict. Third party adjudication seemed a reasonable means to accomplish this. Debates over compulsory jurisdiction notwithstanding, there did seem to be a commitment, by most states, to this form of dispute resolution.⁶⁵

61. See Woolsey, *China's Termination of Unequal Treaties*, 21 AM. J. INT'L L. 289 (1927).

62. *Id.* at 292.

63. 5 P.C.I.J. ANN. R. (ser. E) No. 5, at 203.

64. For a discussion of defiance in both the PCIJ and the ICJ, see THIRLWAY, *supra* note 2. See also HIGHER, *supra* note 2; J. ELKIND, *NONAPPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE: FUNCTIONAL AND COMPARATIVE ANALYSIS* (1984).

65. See, e.g., Lloyd, "A Springboard for the Future": A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice, 79 AM. J. INT'L L. 28 (1985); S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT*, 364-67 (1965).

Up to a certain point, we can see great similarities in state behavior toward third party adjudication between the PCIJ and the ICJ. Both Courts saw their busiest periods in the decade or decade and one-half after their creation. At this point, both Courts began to experience a decline in the number of cases presented to them. The reasons for the decline in the numbers of cases for the two Courts seem to be similar, and both seem to be related to the perceived instability of the international system at the time. With the PCIJ, the decline in business is coincident with, and seems dependent upon, the uncertainties generated by the major international financial crisis begun in 1929 and the rise of National Socialist Germany after 1933. With the ICJ, the decline in business seems tied to the intensification of the cold war and the proliferation of new states following the period of rapid decolonization. But beyond this point in the life cycle of each Court, the similarities end.

The business of the PCIJ was ended by the onset of World War II, while the ICJ was able to continue into its next phase. It is during this next phase in the life of the ICJ, beginning approximately in the early 1970's, that we begin to notice the serious phenomenon of defiance of the Court. It is a period for which there is no corollary in the life of the PCIJ. This period, that we shall call, for want of a better name, "normal" international politics, may provide a truer test of the readiness of the international system to rely on third party adjudication and to accept the Court's compulsory jurisdiction. If this is correct, then the apparent progress toward a genuine acceptance of compulsory jurisdiction made during the entire period of the PCIJ and during the early years of the ICJ may be illusory. Rather than a true commitment during times of "normal" international politics, it represents a post-war commitment to legal idealism that did not have a chance to phase out normally with the PCIJ but did with the ICJ.

There are several reasons that may account for the inability of third party adjudication generally, and compulsory jurisdiction particularly, to become viable dispute resolving mechanisms in this period of post-legal idealism or normal international politics. Significant changes occurred during the period of normal international politics in the later ICJ years that affected state behavior toward the Court. In part, the changes seem to reflect a normal phasing out of postwar legal idealism. Beyond that, there were changes in the international system, changes in the submission patterns of cases that reflected a different attitude toward international adjudication, and changes in the issues brought before the Court, all of which may have affected the success of the ICJ.

IV. ISSUE DIFFERENCES

One possible explanation accounting for the different behaviors of states toward the PCIJ and the ICJ might be found in the kinds of issues brought before the two Courts. If the PCIJ dealt with less politically charged issues than the ICJ, then one might expect states to be more compliant under the PCIJ, at least in the matter of accepting the Court's

jurisdiction and decisions.

Coplin and Rochester, in some earlier quantitative research on the Court, compared issues presented to the PCIJ and the ICJ on the basis of "salience," i.e., high political significance.⁶⁶ Coplin concluded that salience of issues was an important dimension for analysis regarding state behavior toward the Court because,

. . . nothing inherent in the issue makes a dispute legal rather than political but that indeed the determination is made by the actors themselves. A dispute is legal if the parties choose to consider it a legal dispute. By implication, then, the decision to consider a dispute primarily in the legal dimension, particularly for the side with the weaker legal argument, occurs *when the state stops attaching great importance to the issue.*⁶⁷ (emphasis added)

Coplin and Rochester discovered that the issues presented to the ICJ were of higher salience than those presented to the PCIJ.⁶⁸ Though it is possible to suggest that this means a higher degree of confidence in the ICJ than in the PCIJ, the record does not warrant such a conclusion. Rather, as Coplin and Rochester suggest, ". . . the Court has been frequently used by parties for propagandizing or legitimizing purposes rather than with the expectation of settlement."⁶⁹ This behavior has been far more frequently exhibited in ICJ submissions than in submissions to the PCIJ.

V. LEGAL AND POLITICAL USES OF THE COURT

Perhaps blatant political use of the Court was popularized by the United States during the cold war period with the numerous submissions made against Warsaw Pact states.⁷⁰ Though the United States was surely aware of the Communist states' position regarding third-party adjudication,⁷¹ it nonetheless brought several issues before the Court, only to have them later removed from the list when the Warsaw Pact states refused to participate. It is also likely that the United States enlisted the support of the Court in just such a political way in the *Iran Hostages* case⁷² and that Nicaragua did, as well, in its recent case against the United States.⁷³

66. Coplin & Rochester, *supra* note 6, at 541-542.

67. *Id.* at 541.

68. *Id.* at 542.

69. *Id.* at 538.

70. *See*, Treatment in Hungary of Aircraft and Crew of U.S.A. (U.S. v. Hung. and U. S. v. U.S.S.R.) 1954 I.C.J. 99; Aerial Incident of March 10th, 1953 (U.S.A. v. Czech.) 1956 I.C.J. 6; Aerial Incident of October 7th, 1952 (U.S. v. U.S.S.R.) 1956 I.C.J. 9 (Mar. 14); Aerial Incident of 7 November 1954 (U.S. v. U.S.S.R.) 1959 I.C.J. 276.

71. For a discussion of Soviet views toward third-party adjudication, see J. TRISKA & R. SLUSSER, *THE THEORY, LAW AND POLICY OF SOVIET TREATIES* 381-388 (1962).

72. United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

73. Nicaragua, *supra* note 1.

While this politically loaded behavior toward the Court may arguably have been learned from American actions toward the Communist bloc, there is a marked difference between cases where the Court was able to deny jurisdiction, in the absence of prior consent, and those cases where the Court was virtually compelled to accept jurisdiction because of some form of prior agreement to the Court's compulsory jurisdiction (i.e. compromissory clauses or the optional clause). In the former instance, while this might still be construed as an improper use of the Court, it is unlikely that these submissions damage the Court or its authority because the Court is left with an escape position. That is, the Court is not faced with having no reasonable alternative but to assert its jurisdiction over a state that simply refuses to participate. In the latter instance however, the Court is left with little choice but to assert its jurisdiction because of the prior consent of the parties. It is in these instances where the Court has encountered the recent difficulty of state defiance.

A. Submission Style: A Typology of Submissions

We can divide all of the submissions made to the Court into two major categories and four subcategories, based upon the intended use made of the Court by the applicant(s): The first major category is where the party or parties genuinely desire and expect a resolution of the dispute - we shall call these "legal submissions." The other major category of submissions is where no resolution is expected but where the submitting state is attempting to make political use of the Court for the state's own benefit - we will call these "political submissions."⁷⁴

Legal submissions can be divided further, into those submissions where the desired outcome is a judicial resolution and those where the desired outcome is any kind of mutually agreeable resolution to the problem, as through bargaining. The former we will call "adjudicatory submissions" and the latter will be called "bargaining submissions."⁷⁵

Political submissions also can be divided into two sub-categories. The first category, characterized by the U.S. submissions against the Warsaw Pact states, we will label "symbolic submissions." In symbolic submissions a state attempts to enlist the *symbolism* of the Court and legal dispute settlement against another state. In these instances the Court is free to deny jurisdiction, upon refusal of the respondent state to participate, because there is no prior state consent to the Court's jurisdiction. The submitting state has, nonetheless, gained politically because it has appeared to desire a legal solution to the problem. In other words, the submitting state has juxtaposed itself, as a law-abiding state, against the respondent, as a non-law-abiding state.

74. See, Coplin & Rochester, *supra* note 6, at 538.

75. For a discussion of the role of the Court in the international bargaining process, see, e.g., Coplin, *International Organizations in the Future of the International Bargaining Process: A Theoretical Projection*, 25 J. INTL. AFF. 87.

The second kind of submission we call a "leverage submission." In this instance the submitting state uses the Court itself as an "ally" against the respondent state.⁷⁶ Leverage submissions differ from symbolic submissions because of the presence of compulsory jurisdiction. The Court is relatively unable to deny jurisdiction because of a state's unwillingness to participate, because there has been prior consent to the Court's jurisdiction.⁷⁷

Both symbolic submissions and leverage submissions indicate an attitude on the part of submitting states that is not indicative of a desire for either a legal or a bargaining resolution of the dispute.⁷⁸ Though it is difficult to judge motive initially, once it becomes clear that the respondent state will not submit to the Court's jurisdiction, further pursuit of the case by the applicant can only serve political ends. It has been sufficiently demonstrated in recent cases that when defiance occurs, the judicial settlement, should it be rendered, has little impact upon the dispute. The dispute has not been settled. As our major category name indicates, these become purely political submissions intended for self-gain. As such, they are damaging to the Court. Submissions to the PCIJ all fall into our category of legal submissions, as do most of those in the early years of the ICJ. Those political submissions that were made in the early years of the ICJ were all of the symbolic variety. Unfortunately, in recent years the ICJ has been faced with a number of submissions that seem to be of the leverage variety. Respondent states have been unwilling to submit to the Court's jurisdiction, even though there was prior consent, and the Court has found itself increasingly facing the problem of accepting jurisdiction in the face of defiant states.

Political submissions are likely to occur in any political system where a legal edifice exists but where there is no common understanding amongst states to submit important disputes for third-party adjudication, and where there is a lack of mutually understood norms, rules and principles governing dispute settlement. This may occur because no common understanding ever existed in the system or because the common understanding that once existed has eroded.

The legitimacy which states attach to international organizations today is less than it was during the pre-World War II period. . . . the legitimacy necessary for the ICJ and U.N. to develop distributive roles is insufficient and accounts for the unwillingness of contemporary states to accept the distributive function of these organizations. ⁷⁹

76. Coplin & Rochester, *supra* note 6 at 533.

77. We are presuming here that the dispute can be construed as a legal matter and not purely a political issue. In the latter instance, of course, the Court is free to deny jurisdiction. See, Statute of the International Court of Justice, Art. 36, para. 6.

78. There are times when a leverage submission will result in a judgment by the Court as in the Iran Hostages Case and in the Nicaragua case, but the judgment does not necessarily solve the dispute since, as in both of these cases, the offending state continued to defy the Court's orders.

79. Coplin, *supra* note 76, at 298-299.

The erosion of common understandings of proper methods for dispute settlement may be caused by the entry of new states to the system (systemic changes), by changes in the perceptions of states regarding the level of acceptable conflict in the system and the desirability of eliminating or controlling conflict,⁸⁰ or it may result from a change in attitude concerning where in the system distributive decisions should be made. According to Coplin,

In the pre-World War II period, the higher percentage of joint submissions can be interpreted as an indication of a greater willingness on the part of the participants to allow the organizations to make distributive decisions.⁸¹

Though Coplin may be correct in his interpretation of joint submissions, we can see from the Scott/Carr Category I cases that there is really little difference between these unilateral submissions brought under the optional clause and joint submissions. This then, raises the number of cases under ICJ jurisdiction that might be said also to be indicative of a desire on the part of states to have the Court make distributive decisions. Additionally, the recent *Gulf of Maine* case⁸² is one where the United States and Canada quite obviously desired a distributive decision by the Court, albeit in the more narrow forum of Chambers.⁸³ Clearly there are times when states in the contemporary system do want the Court to make distributive decisions. States are unwilling, however, to have distributive decisions forced upon them *without an immediate expression of their consent*. It might safely be said that the Court *can* play a distributive role whenever both parties wish it to do so, but it can *never* play such a role when one of the conflicting states objects. As Susan Strange has pointed out, "the world lacks a . . . world court to act as the ultimate arbiter of legal disputes that also have political consequences."⁸⁴ Perhaps, after all, what we are witnessing in the defiance of the ICJ is nothing more than proof that "the political" always takes precedence over "the legal" when the two realms conflict. States are unlikely to seek legal resolution over issues that are of high political significance or "salience" as Coplin calls it.

VI. CONCLUSION

It is not revelatory to state that the international system has changed

80. For a discussion of variations in systemic tolerances of conflict, see Haas, *Regime Decay: Conflict Management in International Organizations, 1945-1981*, 37 INT'L ORG. 81 (1983).

81. Coplin, *supra* note 76, at 298.

82. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. Rep. 246 (Oct. 12) reprinted in 23 I.L.M. 1197 (1984).

83. For a discussion of this case, see Schneider, *The Gulf of Main Case: The Nature of an Equitable Result*, 79 AM. J. INT'L L. 539 (1985).

84. Strange, *Cave! hic dragones: A Critique of Regime Analysis*, 36 INT'L ORG. 479, 487 (1982).

considerably since World War II. The classic balance of power system gave way to bipolarity in its various forms. There has also been a great proliferation of states in the post-war system, creating not only more actors, but widening the existing wealth and power disparities as well. Of these factors, the best indicator of likely defiance seems to be "power differential," since the most recent instances of defiance have occurred between states of great power disparity. Interestingly, *where* the power lies does not seem to be a significant determinant of which states defy the Court - The United States⁸⁵ and Iceland⁸⁶ merely represent the power extremes of a wide spectrum of states that have exhibited defiance toward the ICJ. Nor should this be surprising, for it is precisely in arrangements of great power disparity where a state might resort to a political leverage submission. Weak states stand to gain as they otherwise could not in direct confrontation with powerful states. Powerful states can gain without appearing to bully the weak. In both instances the submitting states are risking little, since they are reasonably sure that the respondent state will refuse to come before the Court.

When compulsory jurisdiction is part of this formula, states of all kinds see the opportunity for gain through leverage submissions. The only real loser is the Court itself. Beginning in the 1970s the ICJ clearly entered a period for which there is no parallel in the PCIJ. It is a period characterized by a generally low submission rate, by a high rate of political leverage submissions involving high salience issues amongst those cases submitted, and by an extremely high rate of defiance of the Court.

We have argued that the contemporary period is a natural outgrowth of "politics as usual" in a system of sovereign states. We have also argued that the apparent progress toward compulsory jurisdiction and judicial settlement during the PCIJ years and the early years of the ICJ, was chimerical and attributable primarily to a temporary attitude about judicial settlement brought on by the legal idealism following the two world wars.

It should be clear by now that, given the absence of the necessary state attitudes to make compulsory jurisdiction work, and given the political role into which the Court has been pressed by conflicting states, we believe that visionary insistence on continuing or strengthening the Court's compulsory jurisdiction can only further damage the efficacy of the Court as an international dispute settlement mechanism. The case history of the PCIJ, alas, offers no remedy for an ailing Court.

85. Nicaragua, *supra* note 1.

86. Iceland refused to comply with an exchange of notes with The Federal Republic of Germany and the United Kingdom done on July 19, and March 11, 1961 respectively. Fisheries Jurisdiction (U.K. v. Iceland; FRG v. Iceland), 1974 I.C.J. Rep. 3, 175 (July 25).