CHAPTER 3

THE HISTORY OF INTERNATIONAL ADJUDICATION

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For decades, international law scholars have cited with approval HLA Hart's inclusion of international law in the general category of "law" in his classic work, *The Concept of Law* (Oxford: Clarendon Press 1961). Hart was the renowned Oxford scholar of jurisprudence who critiqued his nineteenth-century predecessor, John Austin, for, among other errors, dismissing international law as nothing more than "positive morality."[1] Hart's defense of international law was, however, hardly robust. While he acknowledged that international law qualified as law, he also found it to be only a kind of "primitive" law. One of the reasons Hart gave for international law's lower status included the lack of a judicial system in which the courts have compulsory jurisdiction. Hart raised this point for the first time in Chapter 10. In the nine preceding chapters he never mentioned the necessity for sophisticated legal systems to have courts with compulsory jurisdiction. Only when he reached international law did he focus on this particular condition of advanced legal systems.

The international legal system has courts and other means of adjudication and has always had such means. What the system lacks are courts with general, compulsory jurisdiction over states. Not only does international law lack such courts, international law scholars ceased advocating for general compulsory jurisdiction more than 30 years ago. For around a century, from the 1880s to the 1980s, scholars emphasized the need for international courts with compulsory jurisdiction. These scholars, together with peace activists, strove to convince governments to create international courts. Then the effort ended.

This chapter on the history of international adjudication will show that courts and tribunals have been part of international law since the emergence of modern international law with the rise of the state system in the mid-seventeenth century. Courts and their role within international law have also been a persistent part of the theoretical debates about the nature of international law. From an early emphasis on arbitration, support grew for the creation of courts with general compulsory jurisdiction. By the late twentieth century, the theoretical trend shifted toward interest in courts with special subject matter jurisdiction, including human rights, trade, law of the sea, and international crime. Interestingly, the rise or "proliferation" of specialized courts has resulted in quite wide-reaching compulsory jurisdiction in specialized areas, as Karen Alter discusses in the next chapter. At the same time, the shift away from a focus on a strong hierarchical judicial system to a more horizontal one may also be leading to fragmentation in the law and a weakening of international law's identity as a unified legal system.

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[1] J Austin, *The Province of Jurisprudence Determined* (first published 1954, London: Weidenfeld and Nicolson 1998) 127, 140–2.

1 Early History of International Adjudication

Formal processes of inter-group dispute resolution long pre-date the rise of modern international law in 1648. David Bederman describes the practice of arbitration among the Greek city states and communities within the Roman Empire: "The institution of settling disputes by the decision of a third party was begun, reputedly, by the Olympian gods."[2] In analyzing this ancient practice, he does not inquire into why it arose but does consider why it functioned. He indicates that it was the "reasoned character" of awards that "was essential for their legitimacy and enforcement."[3] He also acknowledges the link between religious faith and arbitration but concludes that the production of reasoned opinions gets the credit for the success of inter-group dispute resolution.[4] The facts indicate, however, that both faith and reason were in play.

Both faith and reason plainly influenced the architects of international law who advocated arbitration as an alternative to war. Several of the Spanish Scholastics, Dominican priests writing in the fifteenth and sixteenth centuries during the decline of papal authority over secular politics, urged that arbitration substitute for decision-making by the Pope on such issues as whether resorting to war complied with the Just War Doctrine.[5] Hugo Grotius, whose 1625 treatise, *On the Law of War and Peace*, is the founding text of modern international law, was a devout Christian, indeed a Protestant theologian. Grotius offered arbitration as an alternative to war that could provide for peaceful settlement of disputes among rulers who no longer recognized a common political or religious leader.

Grotius made his case for arbitration in part by citing Christ's teaching respecting peace, but also by citing the teachings of other traditions.[6] He cited the Greek historian Thucydides for the proposition that "[i]t is not lawful to proceed against

[2] D Bederman, *International Law in Antiquity* (Cambridge University Press 2001) 82. Loosely analogous developments can also be seen in early periods of Middle Eastern history, in the Far East, and in the rise of Islam. A Giustini, "Compulsory Adjudication in International Law: The Past, the Present, and Prospects for the Future" (1985) 9 Fordham Int'l L. J. 213, 217. For a discussion of continuity in the history of international dispute resolution, see CG Roelofsen, "International Arbitration and Courts" in B Fassbender and A Peters (eds), *The Oxford Handbook of The History of International Law* (Oxford University Press 2012) 145–69.

[3] Bederman, note 2, at 84.

[4] Bederman, note 2, at 85.

[5] ME O'Connell, "Arbitration and the Avoidance of War: The Nineteenth-Century American Vision" in C Romano (ed.), *The United States and International Courts and Tribunals* (Cambridge University Press 2009), at 24–5.

[6] H Grotius, *De Jure Belli ac Pacis Libri Tres* (1646, FW Kelsey, tr., Oxford University Press 1925, reprinted 1995) bk II, ch xxiii, sec. 8 and bk III, ch. xx, sec. xlvi–xlviii.

one who offers arbitration just as against a wrongdoer."[7] Grotius also supplied precedents to bolster his argument, such as the 12th century treaty concluded by the Kings of Castile and Navarre in which they agreed to submit their differences for resolution to Henry II of England, the King of Castile's father-in-law, and the King of Navarre's nephew.[8] In the thirteenth century, the German cities of Hamburg and Lübeck agreed to settle their disputes by arbitration, and in 1291, the cantons of Uri, Schwyz, and Nidwald, in what would later become Switzerland, also agreed to resolve disputes peacefully through arbitration.[9]

Grotius's ideas are reflected in the treaties known as the Peace of Westphalia that formally ended the Thirty Years War in Europe. After three years of negotiation, more than 300 parties adopted two treaties that committed the warring parties to principles of non-intervention, religious tolerance, and the peaceful settlement of disputes through "amicable settlement or legal discussion."[10] Should the disputing parties prove unable to agree after three years, all other parties to the treaties were to "take up arms with all council and might in order to subdue the offender."[11] The Peace of Westphalia essentially established the modern system of sovereign, co-equal states and with that, the modern system of international law.

After Grotius, Emmerich de Vattel is considered the most important writer on international law. Vattel was a practicing diplomat and brought to his book, *The Law of Nations* (1758), a practical appreciation of how the world works and, therefore, how international law could be made to work in the real world. Vattel also promoted arbitration as a practical, rational and ethical means of resolving interstate disputes. He described the methods available to ensure that the outcome of arbitrations would be honored. One method involved weak states arranging with stronger ones to act as guarantors, meaning the guarantor would go to war on behalf of the weak state if the weak state won the arbitration but the stronger state failed to comply.[12] Vattel also suggested having parties pay a performance bond to a neutral party or exchange hostages to be held until the arbitration ended and the dispute was settled.[13]

[7] Grotius, note 6, at 562.

[8] Grotius, note 6, at 562; see, Giustini, note 2, at 217 (citing G Schwartzenberger, *A Manual of International Law* (5th edn, London: London Institute of World Affairs 1967) 242).

[9] J Allain, *A Century of International Adjudication: The Rule of Law and its Limits* (The Hague, Netherlands: T.M.C. Asser Press 2000) 14.

[10] O'Connell, note 5, at 31 (citing the Peace of Westphalia, 1648).

[11] O'Connell, note 5, at 31.

[12] E de Vattel, *The Law of Nations or the Principles of Natural Law, Applied to the Conduct and the Affairs of Nations and of Sovereigns* (1758 edn, CG Fenwick, tr., Washington D.C.: Carnegie Institute of Washington 1916) 193–4.

[13] De Vattel, note 12, at 189–92.

2 The Golden Age of Arbitration

Vattel's practical advice proved useful to the founders of the United States. The Americans managed through war to create an independent sovereign state but realized that to maintain their independence, they would need international law and peaceful processes. In the Jay Treaty of 1794, the United States and Great Britain agreed to use arbitration to settle the disputes remaining from the War of Independence. The Jay Treaty provided for the creation of three mixed commissions, composed equally of nationals of the two countries, to settle matters that were left outstanding after a process of negotiation.[14] Between 1794 and 1804, 536 arbitral awards were made under the Jay Treaty, beginning with the St. Croix River Arbitration of 1798, which delineated much of the Canada–United States boundary.[15] The use of arbitration among states grew steadily thereafter so that the nineteenth century can been seen as a kind of golden age of arbitration.

The Jay Treaty's provision for arbitration was a result of practical necessity and familiarity with the writing of Grotius and Vattel by America's founding fathers. The use of arbitration, especially to settle a boundary, was also an inspiration to the developing global peace movement. The peace movement had begun through the efforts of pacifist religious communities—Quakers, Mennonites, Anabaptists—and Christian anti-war leaders. International law and processes such as arbitration gave the peace movement secular and practical alternatives to war. While less prominent today, the peace movement continues and may be counted as the most sustained effort by non-state actors to influence public policy in the global sphere.[16]

The movement's early efforts to promote alternatives to war consisted of speaking tours and essay competitions, but these led to direct pressure on governments by petitions, letter-writing campaigns, and meetings with governmental officials.[17] Following the creation of peace societies in several US states, Britons formed the British Society for the Promotion of Permanent and Universal Peace. Similar societies followed in France and Switzerland. The various US organizations consolidated into the American Peace Society (APS) in 1828 under the leadership of William Ladd. In 1838, the APS secured a resolution from the Legislature of the

[14] International Court of Justice, "History" at <http://www.icj-cij.org/court/index/php?p1=1&p2=1> accessed July 7, 2012.

[15] O'Connell, note 5, at 32. Roelofsen seems to underplay the importance of the Jay Treaty by, for example, not citing the sheer number of awards. Roelofsen, note 2, at 160.

[16] See e.g., LS Wittner, *Rebels Against the War: The American Peace Movement* (Philadelphia, PA: Temple University Press 1984); D Cortright, *Peace: A History of Movements and Ideas* (Cambridge University Press 2008).

[17] Allain, note 9, at 13–14.

Commonwealth of Massachusetts that was forwarded to the US president, calling on him to lead in forming an international congress to codify international law and to establish a court for the settlement of international disputes.[18]

While the APS fragmented over the issue of abolishing slavery, there were efforts to consolidate the movement internationally. The first international peace conference met in London in 1843. The delegates agreed to advocate for compulsory arbitration clauses in bilateral and multilateral treaties to settle disputes over treaty interpretation and application.[19] As the international movement grew in numbers and strength, more of its proponents became elected officials, both in the US and Europe. This allowed the movement to "assail governments from within" and gain more direct—and perhaps more effective—influence.[20]

The international peace movement may even claim some credit for the establishment of the landmark *Alabama* Claims arbitration of 1872, which addressed US charges that Britain violated its neutral duties by failing to prevent the building and outfitting of ships for the Confederacy during the US Civil War. Arbitrators from Brazil, Italy, Switzerland, Great Britain, and the United States sitting in Geneva awarded the United States $15.5 million in damages, which Great Britain paid in full just one year later. This award—and, indeed, the arbitral process itself—energized the peace movement and motivated states to engage in arbitration to settle more disputes.[21] The single most important fact about the *Alabama* Claims was the example of a great power voluntarily entering into arbitration with a weaker state over an important issue and abiding by the result. Following the award, the US House of Representatives unanimously passed a motion requesting that the president ensure that arbitration clauses be included in future treaties.[22]

In 1873, the Russian Tsar acted as sole arbitrator in a dispute between Peru and Japan, the *Maria Luz case*, which Japan won. The decision helped demonstrate the universality of international law and the rise of internationally protected human rights.[23] In 1874, the Italian Chamber of Deputies passed a resolution promoting arbitration as:

> an acceptable and frequent mode of solving, according to the dictates of equity, such international questions as may admit of that mode of arrangements, as well as to introduce

[18] Allain, note 9, at 11.

[19] Allain, note 9, at 13.

[20] Allain, note 9, at 20.

[21] Cortright, note 16, at 49. According to Grewe, there were varying numbers depending on the classification criteria. Conciliation and arbitration can frequently look quite similar. It is safe to say, however, that arbitral awards were copious and the number grew throughout the 1800s. See O'Connell, note 5, at 37 (citing W Grewe, *The Epochs of International Law* (M Byers tr. & ed., Berlin: De Gruyter 2000) 519).

[22] O'Connell, note 5, at 37.

[23] AAM Stuyt, *Survey of International Arbitrations* no. 104 (Dordrecht: Martinus Nijhoff 1990), 107; see also Roelofson, note 2, at 163–4.

opportunely into any treaty with those Powers a clause to the effect that any difference of opinion respecting the interpretation and execution of those treaties is to be referred to arbitration.[24]

In 1889, the Universal Peace Congress was organized again, almost 50 years since the previous congress. Significantly, the discussion clearly shifted from arbitration to international courts. The Congress occurred at a time when the "peace through law" movement was gaining political and intellectual support. Adherents of this movement believed that international judicial bodies were effective alternatives to war, and permanent courts were predicted to be a particularly effective mechanism to settle international disputes.[25] The American peace movement was particularly enthusiastic about courts, inspired by the US Supreme Court's effectiveness in settling disputes between the semi-sovereign states of the Union.[26] With this model in mind, permanent courts were viewed as more effective than arbitral tribunals because they could "respond quickly to international crises, generate accumulated jurisprudence that would somewhat reduce the uncertainties attendant on adjudication, and attract, by virtue of their accumulated prestige, a good level of compliance."[27] The possibility of developing international law was a common theme among those who advocated for international courts in preference to arbitral tribunals. The Russian legal scholar Kamarowsky, for example, in *Le Tribunal International* (1887) proposed a voluntary court of international justice, which would not only settle international disputes between states but also aid in the codification and promulgation of international law.[28]

US President and Chief Justice of the Supreme Court William Howard Taft raised another advantage of courts over arbitration, again illustrated by the US Supreme Court. At the core of the court is the centrality of the law rather than the desire to achieve some agreed-upon solution acceptable to both sides: "[A court] has the authority to decide questions according to right and justice, and it does."[29] This was, in Taft's view, the primary shortcoming of international arbitration and the best argument for a world court. The campaign for a permanent international court with compulsory jurisdiction thus grew out of both positive experiences with arbitration but also its limitations.

[24] Allain, note 9, at 14 (citing L Levi, *War and Its Consequences: Economical, Commercial, Financial, and Moral; With a Proposal for the Establishment of a Court of International Reference and Arbitration* (1882) 74–5).

[25] Y Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary" (2009) 20 EJIL 73.

[26] DD Caron, "War and International Adjudication: Reflections on the 1899 Peace Conference" (2000) 94 AJIL 4, 10.

[27] Allain, note 9, at 77.

[28] JH Ralston, *International Arbitration, from Athens to Locarno* (Palo Alto, CA: Stanford University Press 1929) 125–6.

[29] Ralston, note 28, at 102–3.

Of course there were setbacks on the road to establishing international courts. US President William McKinley had been a strong proponent of arbitration and other means for the peaceful settlement of international disputes. When Spain offered to settle the United States' claims respecting Cuba, however, McKinley declined. Instead, the United States went to war with Spain in 1898, and subsequently acquired its first colonies.[30] Anger within the peace movement and beyond over the Spanish-American War did re-energize the movement, but victory in the war was another sign of the United States' growing military power, a fact that brought with it the belief that the United States did not need arbitration—it could impose its will on other states by force or the threat of force.

Russia, by contrast, was a declining military power, as Tsar Nicholas II well knew. Concerned about the proliferation of new military technologies and knowing that Russia was unable to keep pace, the Tsar called for a conference in The Hague in 1899 on arms limitations. Twenty-six states attended, including Austria-Hungary, Germany, France, Great Britain, Italy, and the United States. The peace movement succeeded in having arbitration and peaceful settlement of disputes added to the agenda.[31]

3 From Arbitration to Courts

Working from the writing of William Ladd earlier in the nineteenth century,[32] Ivan Bloch produced a multi-volume treatise calling for a permanent international court; all six volumes were published in full in 1898.[33] The work was so influential that Tsar Nicholas, who initiated the 1899 Conference, was said to have read it in its entirety and even had several conversations with Bloch.[34] Bloch did not think simply that international adjudication *could* be an alternative to war. He argued that the technologies of war rendered armed conflict so horrifying and destructive, the leaders of nations needed to be persuaded that international adjudication *must* be used to avoid war.[35]

Informed by the peace-through-law movement, including Bloch and his associates, many of the proposals by various national delegations at the First Hague Peace Conference included plans for an international court. Elihu Root, who would found

[30] O'Connell, note 5, at 39.

[31] O'Connell, note 5, at 21 n. 60.

[32] W Ladd, *Essay on a Congress of Nations for the Adjustment of International Disputes Without Resort to Arms* (first published 1840, Oxford University Press 1916).

[33] Caron, note 26, at 11.

[34] Caron, note 26, at 11.

[35] Caron, note 26, at 12.

the American Society of International Law in 1906, was US Secretary of War in 1899. He did not attend the Hague Conference but sent instructions with the US delegation to propose the establishment of a permanent international court.[36] Root had been a successful lawyer in New York City before taking up government service. He was a pragmatist and appreciated the ability of courts to settle disputes efficiently and effectively. He admired the way the US Supreme Court settled disputes among the states of the Union and believed an international court could perform in the same manner respecting sovereign state disputes. Root did not see arbitration as capable of producing the type of results that the Supreme Court produced—a court was needed for that.[37]

Perhaps due to the lack of a supreme court in Britain at this period, prominent British legal scholars approached the international court idea more cautiously than Root. Sir Henry Maine, a prominent British international law professor at Cambridge, was not entirely convinced that a permanent court would be the panacea the peace movement claimed. He well understood the limitations of arbitration, particularly ad hoc tribunals that were slow to be established and lacked reliable means for enforcing awards. Maine also believed, however, that a permanent international court would have similar challenges: "[T]he want of coercive power is, in fact, the one important drawback which attends all attempts to improve International Law by contrivances imitated from the internal economy of states... like the administration of law by organized tribunals."[38] Yet in the end, Maine supported the creation of a permanent court, because even with its limitations, it would be better than reliance on ad hoc arbitration.[39]

Indeed, the British were the first at the Hague Conference to present a proposal for international dispute resolution. It included a permanent international arbitral tribunal—a proposal supported by the Americans and the French, although the French wanted only consensual jurisdiction with arbitrators chosen by the states.[40] The Russians wanted compulsory arbitration with respect to certain pre-designated disputes. These four delegations worked together to come up with a compromise proposal that could be widely accepted. The British proposal for a permanent international court was dropped, as was the less ambitious goal of a permanent arbitral

[36] RP Anand, *Studies in International Adjudication* (Dobbs Ferry, NY: Oceana Publications 1969) 2 (citing E Root, *Instructions to the American Delegates to the Hague Peace Conferences*, J Brown Scott (ed.) (Oxford University Press 1916) 79–80).

[37] Root saw arbitration as focused too much on diplomacy rather than law. He saw the need at the Second Peace Conference for a more judge-based, permanent tribunal. See E Root, "The Hague Peace Conferences, Address in Opening the National Arbitration and Peace Congress" in R Bacon and J Brown Scott (eds), *Addresses on International Subjects* (Cambridge, MA: Harvard University Press 1916) 142.

[38] Caron, note 26, at 12 (quoting HS Maine, *International Law: The Whewell Lectures* (London: J. Murray 1888) 213).

[39] Caron, note 26, at 12.

[40] Caron, note 26, at 15.

tribunal. Even in its diminished form, the Germans remained steadfastly opposed to the proposal for arbitration. For them, arbitration was a delaying tactic that gave rivals time to prepare for war.[41] Yet the Germans, in the end, agreed to an arbitral tribunal, under the condition that it would be tested before being established on a permanent basis. Some delegates credited the peace movement for helping to soften Germany's position.[42]

While no permanent court was established, to the disappointment of the peace movement, the delegates to the 1899 Peace Conference agreed in the Hague Convention on the Pacific Settlement of International Disputes (I) to establish the Permanent Court of Arbitration (PCA), consisting of a registry, a Permanent Administrative Council made up of diplomatic representatives from state parties, and a list of arbitrators from which states could select should they voluntarily submit a dispute to arbitration. James Brown Scott famously wrote that the PCA "is not permanent, because it is not composed of permanent judges; it is not accessible because it has to be formed for each individual case; and finally is not a court, because it is not composed of judges."[43] However, despite its modest goal of encouraging states to submit disputes to international arbitration, it did signify progress toward a permanent judicial body with compulsory jurisdiction.[44] As the first permanent arbitral body with jurisdiction to hear any type of inter-state legal dispute, it was hailed as a major accomplishment.[45] After the establishment of the PCA in 1903, Britain and France concluded a general arbitration treaty that served as a model for similar instruments among other states, using the PCA as the third-party dispute settlement mechanism.[46]

More importantly, the various dispute resolution mechanisms established in 1899 and later at the Second Hague Peace Conference in 1907 did have some success. Proponents of peaceful settlement have long cited two cases in particular as successes under the Pacific Settlement Conventions. The 1909 *Deserters of Casablanca* arbitration settled a dispute between France and Germany in which France tried to prevent Germany's consul in Morocco from taking French Foreign Legion deserters out of the country by ship.[47] In the 1906 *Dogger Bank* case, a commission of inquiry found that the Russian Navy's attack on British fishing vessels could not be defended under a claim of mistake. The Russians argued that they believed the British vessels were Japanese torpedo boats. The claim could not be sustained in light of the facts,

[41] Caron, note 26, at 16.

[42] Caron, note 26, at 16.

[43] J Brown Scott, *The Hague Court Reports* (Oxford University Press 1916) xiii.

[44] See EA Posner and JC Yoo, "A Theory of International Adjudication" (Boalt Working Papers on Public Law, March 3, 2004) 7 at <http://escholarship.org/uc/item/oh7602tx> accessed July 7, 2012.

[45] WE Butler, "The Hague Permanent Court of Arbitration" in MW Janis (ed.), *International Courts for the Twenty-First Century* (Dordrecht: Martinus Nijhoff 1992) 44.

[46] Allain, note 9, at 31.

[47] *Deserters of Casablanca* (France v. Germany), at <www.pca-cpa.org/showfile.asp?fil_id=188> accessed July 18, 2012.

and Russia agreed to pay significant compensatory damages. This inquiry probably averted a retaliatory attack and even an armed conflict between the parties.[48]

The 1899 Conference also had the result of moving the issue of peaceful settlement of disputes fully onto government agendas. Instead of the creative and committed members of the peace movement advocating for more robust means of peaceful settlement of disputes, politicians and civil servants took up the issue. This shift may well account for why courts with universal compulsory jurisdiction were never finally established.[49] After the 1899 Conference, the peace movement had lost some of its momentum. Still, several developments stimulated interest in expanding the results of the 1899 Conference, including US President Theodore Roosevelt's successful mediation of the Russo-Japanese War and the Dogger Bank inquiry. Activists began lobbying for another peace conference.[50]

In 1907, states gathered for the Second Hague Peace Conference. Again the British and American delegations brought plans for a world court. Elihu Root joined the American delegation this time,[51] and arrived in The Hague with the goal of bringing "about in the Second Conference a development of the Hague tribunal into a permanent tribunal... The court should be of such dignity, consideration, and rank that the best and blest jurists will accept appointment to it, and the whole world will have absolute confidence in its judgments."[52] The proposal had wide support among the delegations but floundered on the issue of the selection of judges. The small powers wanted equal authority to appoint judges as the great powers; the great powers, however, would not accept this proposal.[53]

There was also a move to revive compulsory jurisdiction for the PCA. Elihu Root said in his instructions to the 1907 delegates that while states might be reluctant to bring cases before arbitrators, "subject to all the considerations and influences which affect diplomatic agents," they may be more inclined to resort to courts, whose judges decide "questions of fact and law upon the record before them under a sense of judicial responsibility."[54] Once again, Germany blocked the proposal, arguing that commitments to arbitrate should be created through bilateral treaties, not a multilateral one.[55] The most that advocates of compulsory jurisdiction could manage

[48] MW Janis, "The International Court" in MW Janis (ed.), *International Courts for the Twenty-First Century* (Dordrecht: Martinus Nijhoff Publishers 1992) 16.

[49] Butler, note 45, at 24.

[50] See RN Lebow, "Accidents and Crises: The Dogger Bank Affair" (1978) 31 Nav. War. Col. Rev. 66.

[51] M Pomerance, *The United States and the World Court as a Supreme Court of the Nations* (Dordrecht: Martinus Nijhoff 1996) 54–5.

[52] Anand, note 36, at 3 (citing E Root, *Instructions to the American Delegates to the Hague Peace Conferences*, J Brown Scott (ed.) (New York 1916), at 8–9).

[53] Anand, note 36, at 4.

[54] E Root, "Instructions to the U.S. Delegation to the Second Hague Conference 1907" (1907) U.S. Foreign Relations 1135.

[55] Butler, note 45, at 26.

was a sort of default jurisdiction for the PCA in disputes over contract debts where the parties had agreed to arbitrate, but had not specified an alternative to the PCA.[56]

This default clause as well as the Convention of 1907 Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts[57] was prompted by the British, German, and Italian blockade of Venezuelan ports when Venezuela suspended payment on debts. The European creditor nations had won an award in the PCA, the *Venezuelan Preferential* case,[58] and so apparently had the right to impose the blockade. The delegates to the 1907 Conference agreed, however, that the Drago Doctrine holding the resort to armed force inappropriate to collect a public debt would be the rule going forward.[59] The rule has been in effect for over 105 years and constitutes a clear example of effective legal restraint against resort to force and the impact of law on state behavior.

Regarding the goal of transforming the PCA into a real court, however, the Hague Conference delegates had less to show for their efforts. They did agree to the formation of one actual court in a specialized area of international law. They agreed to form a permanent prize court, but then never actually created it.[60] Very likely the prize court was not established for the same reason that the delegates had managed to agree to its formation in the first place. By 1907, the taking of prizes was coming to an end. The beginning of the end had occurred as far back as 1856, when parties to the Paris Declaration on Maritime Law had agreed to end the practice of commissioning private persons to carry out actions on the high seas such as combating pirates. By World War I, most naval powers had ended the practice of sharing revenues from the sale of captured ships even with their own officers. National admiralty courts could handle the few prize cases that arose.

Root was understandably disappointed with the modest results of the 1907 Conference. He turned his efforts to the Americas and helped Central American states establish the Central American Court of Justice (CACJ) in 1908.[61] The Central American Court was the first permanent court for the settlement of inter-state disputes.[62] The hope of its founders was that, as a dispute settlement body of last resort, the very presence of the court would prevent the escalation of disputes. Indeed,

[56] Hague Convention for the Pacific Settlement of International Disputes of 1907 (I), Art. 53.2.

[57] Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, October 18, 1907, 36 Stat. 2241.

[58] *Venezuelan Preferential Case* (Germ, GB, and Italy v. Venezuela) (1904) Scott Hague Court Rep 123–8.

[59] Allain, note 9, at 29.

[60] O'Connell, note 5, at 40.

[61] FL Grieves, *Supranational and International Adjudication* (Champaign, IL: University of Illinois Press 1969) 22; see also PC Jessup, 2 *Elihu Root* 50 (1937); see also E Root—Biographical (*Nobel Prize*) <www.nobel.se/peace/laureates/1912/root-bio.html> accessed July 7, 2012.

[62] HM Hill, "Central American Court of Justice" in *Max Planck Encyclopedia of Public International Law* (Rudolf Bernhardt (ed.), vol. 1, Oxford University Press 1992) 41–4.

according to William I. Buchanan, High Commissioner of the Court, who represented the United States at the court's inauguration, "[a]n entire absence of business for the court would be the highest justification for its creation."[63] The CACJ had broad jurisdiction that included a right of individuals to bring cases against states, including states of which they were not nationals. Of the ten cases heard by the CACJ, individuals brought five.

The CACJ statute stipulated that the court would remain in existence for only ten years unless the state parties agreed to renew it. For the first several years, renewal seemed likely, but in 1916, the United States ended its support for implementation of the CACJ's decisions. This change of policy proved to be the court's undoing.[64] Root's influence in Washington had waned, with the election of the new president, Woodrow Wilson. Wilson had been a professor of government at Princeton University and proved himself to be far more interested in governance institutions than courts. Wilson defied the peace movement and entered World War I on the side of Britain. After the war, the US delegation to the Paris Peace Conference contained no prominent advocates for international courts.

Britain's Lord Phillimore also turned away from international courts at the Peace Conference. He presented a draft in Paris for a new organization without any plan for a court, despite the UK's vigorous support of a world court at the Hague Conferences. The French plan did include a court and specified that it should have broad jurisdiction.[65] Many in the United States continued to support a court and Wilson's adviser, Colonel House, included a world court in his draft plan. The court would have "jurisdiction to determine any difference between nations which has not been settled by diplomacy, arbitration or otherwise."[66] President Wilson, however, remained indifferent—if not hostile—to the idea of a world court. Wilson did not like lawyers and did not share the passion of other prominent Americans to extend the concept of a superior court modeled on the US Supreme Court to the international community. Wilson's own subsequent drafts of a post-war plan, although based on that of House, omitted any reference whatsoever to an international court. An Anglo-American synthesis, the Hurst-Miller Draft of February 2, 1919, included an international court, but "[g]reat care was taken not only to avoid creating an international court with supranational power, but also to avoid creating even a very strong international court."[67]

In the end, the Treaty of Versailles, which formally ended World War I and provided for the post-war order, did include a reference to a court. The plan's

[63] Report of William I Buchanan, High Commissioner, Representing the President of the United States to Attend the Inauguration of the Court of Justice for Central America, U.S. Foreign Relations 1908, at 247.

[64] Allain, note 9, at 92.

[65] Grieves, note 61, at 49.

[66] Grieves, note 61, at 49.

[67] Grieves, note 61, at 51.

principal institution, however, was the League of Nations. Among the League's many tasks spelled out in the treaty was the establishment of a Permanent Court of International Justice (PCIJ). The only other decision on the contentious issues that had surrounded discussions of courts in the past was the provision that the court "be competent to hear and determine any dispute of an international character which the parties thereto submit to it."[68] In February 1920, the Council of the League organized a commission of ten prominent jurists, including Lord Phillimore and Elihu Root, to draft the statute of the new court. The draft was adopted in December 1920 and entered into force in 1921. The court began work on its first cases in 1922.[69]

4 Toward Compulsory Jurisdiction

The two most difficult issues in drafting the PCIJ Statute for the Committee of Jurists were the selection of judges—the issue that had prevented agreement to a court in 1907—and the issue of compulsory jurisdiction. The US Supreme Court has compulsory jurisdiction in disputes between states. Indeed, courts of last resort within states generally have compulsory jurisdiction in the matters over which they have jurisdiction. In 1920, a number of states took the position that the new world court should also have compulsory jurisdiction over the subjects of international law in their legal disputes.

From the first serious discussions of a world court in the 1870s, there seemed to be a growing trend in favor of compulsory jurisdiction.[70] By the time of the drafting of the PCIJ statute, Lord Phillimore appeared to have come around to the idea of a permanent court with broad and compulsory jurisdiction. Phillimore stated that the PCIJ should be a "Court of Justice in the true sense of the word, a court before which it should be possible to call States having broken the law of Nations, without having to obtain their consent in advance."[71] The Dutch jurist Bernard C. J. Loder

[68] Covenant of the League of Nations, Art. 14. The Article continues with a reference to advisory opinions: "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

[69] See Publications of the Permanent Court of International Justice <http://www.icj-cij.org/pcij/index.php?p1=9> accessed July 18, 2013.

[70] See CW Jenks, *The Prospects of International Adjudication* (London: Stevens & Sons 1964) 13.

[71] Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee June 16 to July 24, 1920 (first published Van Langenhuysen Brothers 1920, Clark, NJ: The Lawbook Exchange 2005) 104.

echoed this sentiment, arguing that compulsory jurisdiction was a crucial step forward from arbitral jurisdiction.[72]

Other members of the committee were not certain that the time was yet right for compulsory jurisdiction or were opposed to it altogether. Elihu Root argued that while most states would submit to compulsory jurisdiction, this was not the same thing as "accepting it in advance for all cases without exception, even those entailing principles which were differently interpreted in the different countries."[73] The more suitable venue for such cases would be an arbitral tribunal. Mineichiro Adatci of Japan, while not objecting to compulsory jurisdiction theoretically, considered that the premature adoption of such a clause at the outset of the League of Nations experiment could be risky for the future of dispute settlement.[74] Eventually the jurists reached a compromise, known as the Root-Phillimore plan. The plan provided for a court with compulsory jurisdiction by means of inter-state agreements on specific categories of disputes. Articles 33 and 34 of the final version of the PCIJ statute, as accepted by the state parties, "modified" these articles:[75] states could elect to be bound by the compulsory jurisdiction of the court, either through compromissory clauses in treaties or by accepting the "optional clause." Twenty-nine states accepted the optional compulsory jurisdiction of the PCIJ, among them many of the world's great powers at the time.[76]

The drafting committee also discussed providing jurisdiction for the new court to try individuals for international crimes.[77] Baron Descamps of Belgium, the President of the Committee of Jurists, recommended that the PCIJ's jurisdiction should include criminal offenses "recognized by the civilized nations but also by the demands of public conscience [and] the dictates of the legal conscience of civilized nations."[78] The International Law Association adopted a statute for an international criminal court as a division of the PCIJ. The idea was understandable given that the drafting of the PCIJ Statute followed the attempt to prosecute the Kaiser through a provision in the Treaty of Versailles. However, the Netherlands gave asylum to the Kaiser, so he never faced prosecution despite the treaty provision.

Leila Sadat believes the proposals for international criminal jurisdiction did not go very far at this time because international law was not sufficiently developed to allow for a criminal division of the PCIJ or a distinct criminal court.[79] International

[72] PCIJ Procès-Verbaux, note 71, at 224.

[73] PCIJ Procès-Verbaux, note 71, at 308.

[74] PCIJ Procès-Verbaux, note 71, at 651–2.

[75] See L 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" (1985) 79 AJIL 28.

[76] Allain, note 9, at 13.

[77] PCIJ Procès-Verbaux, note 71, at 503.

[78] WA Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 5.

[79] LN Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* 24 (Ardsley, NY: Transnational Publishers 2001) (citing Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference (1920) 14 AJIL 95, 123).

law was still principally conceived as concerning inter-state relations. Perhaps more importantly, the peace movement was the driving force behind international courts. Its members wanted courts for war prevention. Scholars and activists had no understanding that an international criminal court could actually help prevent war.[80] On the contrary, some opponents of trials for individuals argued that an international criminal court would harm the cause of world peace. They hypothesized that when the fighting ended and soldiers were ready to lay down their arms and live in peace, the court would stir up accusations and counter-accusations, punishments and recriminations.[81]

Even without a criminal court or trial of the Kaiser, there were plenty of recriminations following World War I. By the 1920s, the League was already faltering. The US refusal to join the League is often cited among the reasons for the League's eventual failure. The US refusal can also be associated with slowing down the effort toward general compulsory judicial jurisdiction in international law. Ironically, it was Elihu Root as a member of the United States Senate who convinced other Republicans to reject President Wilson's plan for a world organization. Root opposed the League Council's authority to order member states to participate in armed conflict. This power conflicted too directly with both the US tradition of avoiding "entangling alliances" and the US's own growing military strength. Root did work for the rest of his life to convince the Senate to join the PCIJ, but the PCIJ was not viewed independently from the League and the Senate never gave its consent to join.

As these events were unfolding, Guieu describes a split among international law scholars with implications for the project of general compulsory jurisdiction. Rather than continuing to support a universal organization, some turned to regional institutions as Root had done after 1907. Alvarez, for example, vigorously promoted the Pan-American Union, and Georges Scelle advocated a European organization.[82] This diversion of energy and intellect away from universalism gained pace, of course, after World War II.

Other developments, however, supported universalism, including the perception that the PCIJ had been a success. Over the course of its brief existence, from 1922 to 1940, the PCIJ decided 66 cases—39 contentious cases and 27 advisory opinions.[83] Eight of the contentious cases were referrals by unilateral application under the

[80] See Sadat, note 79, at 25.

[81] Statement of Sir Graham Bower to the 1926 meeting of the International Law Association, quoted in Leila Sadat Wexler, "The Proposed Permanent International Criminal Court: An Appraisal" (1996) 29 Cornell J. Int'l L. 665, 672.

[82] J-M Guieu, "The Debate about a European Institutional Order among International Legal Scholars in the 1920s and its Legacy" (2012) 21 Contemporary European History 319, 319–37.

[83] General Statistics, Permanent Court of International Justice, World Courts Database, <www.worldcourts.com/pcij/eng/statistics.htm> accessed July 7, 2012.

optional clause; twelve were brought by application to the court based on jurisdiction under binding compromissory clauses.[84] In addition to resolving particular disputes, the PCIJ developed a respected body of jurisprudence. Many of its decisions are still cited by its successor, the International Court of Justice (ICJ), and other courts.[85] The decision to include an American judge, despite the failure of the United States to join the court, helped keep the PCIJ present in the United States. One of those judges, Manley O Hudson, also reported regularly on the work of the court in the pages of the *American Journal of International Law*, which no doubt helped to sustain the long-held American interest in international courts.

The PCIJ formally came to an end along with the League as a result of World War II. Blame for the war fell on the League, however, not the court. As a result, when the League was refashioned into the United Nations, the court itself was left relatively unchanged. A major effort was made to avoid the failings of the League but no effort was made to create a better world court. As early as 1938, US President Roosevelt had begun the work on creating a new international organization under a new charter that would work more effectively than the League. The court was renamed the International Court of Justice (ICJ), and, more importantly, its relationship with the world body changed. Indeed, the major change respecting the court from the League to the UN was the modification of the League Council's obligation to assist in the enforcing of PCIJ judgments and arbitral awards. The UN Security Council has discretion to assist the ICJ and no express role respecting arbitral awards.[86]

The most dramatic change, however, concerned the United States. Not only did it join the international court, it accepted the ICJ's optional compulsory jurisdiction. True, the US Senate would only give its consent following the addition of extensive reservations. That should have been a sign of the need to strengthen the commitment to compulsory jurisdiction in the post-war period. In addition, the United States was gaining even greater status as a military power after the war, becoming a super-power along with the Soviet Union. This development, too, should have signaled concern and the need for continuing advocacy for acceptance of international adjudication.

Despite the signs of trouble, the international legal community had reached a moment of consensus respecting compulsory jurisdiction. For perhaps a decade after World War II, international law literature reflected wide adherence to the importance of general compulsory jurisdiction consistent with the views of Hans Kelsen, who produced important and persuasive scholarship on why a world court was critical to the future of international law. From the inter-war period until the 1960s, Kelsen was widely regarded as the leading scholar of jurisprudence in the West. His early work focused on constitutional law, but by the 1930s he was known for his work on international law as well. Kelsen had been a critic of the League of

[84] Allain, note 9, at pp. 44–5.

[85] See, in this handbook, von Bogdandy and Venzke, Ch. 23.

[86] United Nations Charter, Art. 94.

Nations because he believed the PCIJ, not the League Council or League Assembly, should have been at the heart of the organization:

> One of the most important, if not the decisive, causes [of the demise of the League of Nations] is a fatal fault of its construction, the fact that the authors of the Covenant placed at the center of this international organization not the Permanent Court of International Justice, but a kind of international administration, the Council of the League of Nations. The Assembly of the League—its other organ—placed beside the Council, gives the impression of an international legislature... It might have been foreseen from the very beginning that a world government would not succeed if its decisions had to be taken unanimously, binding no member against his will, and if there is no centralized power to execute them.[87]

Kelsen believed that a world organization needed to begin with a competent court empowered with compulsory jurisdiction and featuring expert and impartial judges. With this centralized and essential core in place, a council would be obliged to carry out the decisions of the court. A legislative body could be established later for the purpose of creating new laws to be applied by the court and enforced by the council. Kelsen expected that the development of these institutions would take time but that such a slow, evolutionary process was required for the creation of a successful world organization.[88]

Kelsen also argued that the most important aspect of the judicial system at the heart of a successful world organization is compulsory jurisdiction. Without it, the world court would be unable to function to the extent needed to prevent the escalation of conflicts between nations. A judicial system needed to be devised that would guarantee as far as possible that all disputes among states would be subject to the future court's compulsory jurisdiction.[89] Kelsen was well aware of the opposition to compulsory jurisdiction. Some scholars again raised concerns about whether international law was adequate to answer the range of issues arising in inter-state disputes. Kelsen foresaw that the future world court would be just as capable as national courts in finding legal answers to the unlimited questions that confronted them.[90]

Despite his support for courts, Kelsen was a strong critic of the post-World War II criminal tribunals. His principal critique was that only nationals of the vanquished states were held accountable, despite clear and dramatic violations of the laws of war and human rights by nationals of the victors. The prospect of American leaders being tried before an international court became and remains a chief obstacle to US support of international criminal courts.

[87] H Kelsen, *Law and Peace in International Relations* (first published 1942, Buffalo, NY: William S. Hein & Co., Inc. 1997) 151–2. For more on Kelsen's view on international law and tribunals, see H Kelsen, *Peace Through Law* (Chapel Hill, NC: University of North Carolina Press 1944); H Kelsen, *General Theory of Law and State* (A Wedberg tr., Cambridge, MA: Harvard University Press 1945).

[88] See J von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press 2010) 201.

[89] Von Bernstorff, note 88, at 159.

[90] Von Bernstorff, note 88, at 164.

As for the sort of court Kelsen did advocate, as discussed above, some of the interest in universal institutions had already shifted to regions by the 1920s. The real challenge to Kelsen's advocacy, however, came from political science. The British academic, E.H. Carr, in his book, *The Twenty Years' Crisis 1919–1939*, argued directly against Kelsen's vision of world order. For Carr, "the view of international law as a legal system that was institutionally completed by compulsory jurisdiction was another 'distinguished international lawyer's dream of an international community whose center of gravity is in the administration of international justice.'"[91] For Carr, the legal process is fundamentally different from the political process because it blocks out the importance of power in international relations. The idea that nations are equal before the law, regardless of the asymmetries of material power, was a "fiction [which] contradicted the inherent logic of international politics, where the strength of the individual states had to be considered a crucial factor in the solution of conflicts of interest."[92] This critique of Kelsen's theory gained adherents in the United States as it amassed its own material power. The interest of US leaders in international law and institutions became eclipsed by the prominence of the political science realists.

One of the most influential realists was Hans Morgenthau, a former scholar of international law who, starting in 1948, launched an attack on international law and his one-time mentor, Hans Kelsen.[93] Morgenthau had no problem with minor treaties such as trade agreements or diplomatic exchanges. It was the UN Charter and the rules against the use of force that drew his opprobrium. In his mind, humanity's lust for material power means the only path to security is possessing more physical strength than one's opponents. A national leader has a duty to build military strength regardless of international law.

5 From General to Specialized Compulsory Jurisdiction

The shifting intellectual trends from universal law and institutions to realist material power and regionalism came just as the new UN and ICJ could have used continuing US support and leadership. The United States did little or nothing to encourage

[91] Von Bernstorff, note 88, at 220 (citing EH Carr, *The Twenty Years' Crisis 1919–1939* (London: Macmillan & Co. 1939) 186).

[92] Von Bernstorff, note 88, at 221 (citing Carr, note 91, at 188).

[93] Astonishingly, Morgenthau's book that was first published in 1948 continues to be read by nearly every student of political science in the United States today. H Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf 1948). There may be no other work that is so dominant in any other field or in political science in any other country.

other states to join the ICJ's optional compulsory jurisdiction. The United States never invoked its own acceptance of the optional clause to bring a complaint against any other state. In 1980, France withdrew from the optional clause following a case brought by two close US allies, Australia and New Zealand. Then, in 1984, Nicaragua brought a case against the United States for American use of military force against it. Nicaragua based the IJC's jurisdiction on the optional clause.

In a series of embarrassing legal maneuvers, the United States tried to keep the ICJ from taking jurisdiction.[94] The court's main decision in the case confirmed and reinforced international law's general prohibition on the use of force. The court handed a victory to the small nation, Nicaragua, against the superpower. US officials argued that the court, like other organs and agencies of the United Nations, had become biased against the United States. Their primary evidence of this was the fact the court had taken jurisdiction in the case. Contrary to the claims made by the United States in the media, the judges could not reasonably have rejected the entire case. Fifteen of sixteen judges voted to find jurisdiction on some basis. Only the US judge found no basis for jurisdiction. Nevertheless, US officials characterized the jurisdiction decision as unfair. The United States then withdrew from the court's optional compulsory jurisdiction. In the accompanying statement, it said the ICJ had been used as a political tool by Nicaragua.[95]

Well before the United States withdrew from the ICJ's compulsory jurisdiction, American interest in general compulsory jurisdiction had waned. The United States has continued to be party to more cases before the ICJ than any other state owing to the number of compromissory clauses in treaties that provide for ICJ jurisdiction.[96] Yet a return to the optional clause is never discussed. The American interest in courts as essential to law has continued, but in new directions. Just prior to the filing of the *Nicaragua* case, the United States had been a leader in the negotiation for a new, comprehensive treaty on the law of the sea. The UN Convention on the Law of the Sea (UNCLOS) III has a court with compulsory jurisdiction in certain matters. And the United States is principally responsible for the compulsory system of dispute resolution developed for the World Trade Organization (WTO) in 1994.[97] The WTO's Dispute Settlement Body hears more inter-state disputes under international law than any other court.

[94] US officials learned that Nicaragua planned to file a case and just a few days before it did so, the United States tried to "amend" its optional jurisdiction acceptance by excluding cases relating to Central America. See e.g., A Chayes, "Nicaragua, the United States, and the World Court" (1985) 85 Colum. L. Rev. 1445.

[95] "US Withdrawal Another Blow to 'World Court'" *Financial Times* (London, October 15, 1985) 10.

[96] In 1987, it invoked one of these treaties to take Italy to the court to settle a claim by US nationals of unlawful expropriation, Elettronica Sicula S.p.A. (ELSI) 1887 ICJ (*US v. Italy*). The case was heard by a chamber of the court composed of five judges selected by the parties. Iran, Germany, and Mexico have all taken the United States to court since the *Nicaragua* decision.

[97] RZ Lawrence, "The United States and the WTO Dispute Settlement System," Council on Foreign Relations CSR No. 25, March 2007, <www.cfr.org/content/publications/attachments/WTO_CSR25.pdf> accessed July 7, 2012.

In Europe, the European Court of Human Rights and the European Court of Justice have compulsory jurisdiction, as do other specialized and regional international courts. The United States has generally avoided commitment to human rights courts that might look into US conduct, but has been a driving force behind the international criminal court phenomenon for international trials of non-Americans. Today, the greater interest and enthusiasm in the world of international adjudication is around international criminal courts. These courts have grown up in the wake of the human rights revolution after World War II and the acceptance in international law of greater rights and duties for individuals. As discussed earlier, however, these courts have their roots in steps leading to the post-World War I call for a trial of the Kaiser and other Germans, as well as the post-World War II criminal courts.

6 Conclusions

What explains the departure from the long struggle for a court of general, compulsory jurisdiction? And what are the implications for international law practically and theoretically? Of utmost concern is that without some supranational court or means of recourse, decisions of the various international courts could be inconsistent with and even contradict one another. International law, like all law, is built in part on precedent. Without a superior court, conflicting decisions can harm the continued development of international law, and its perception as authoritative in international affairs.[98]

Yet, it may be that given the opposition of powerful states to strong central institutions of international law, the only path forward has been an indirect one leading to the same result. And there is, of course, the ICJ, which has helped to resolve competing legal concepts. Scholars have argued that the non-hierarchical proliferation of international courts and tribunals is the only way—and perhaps a good way—to increase third-party legal settlement of international disputes. It may be the case that many courts can work consistently and cooperatively to build jurisprudence and respect for international law.[99]

One may wonder how HLA. Hart would assess international law in the second decade of the twenty-first century. He could point to the fact international law still

[98] See e.g., G Hafner, "Risks Ensuing from the Fragmentation of International Law," Official Records of the General Assembly, 55th Session, Supplement No. 10, 321 (UNDoc A/55/0).

[99] B Kingsbury, "Forward: Is the Proliferation of International Courts and Tribunals a Systemic Problem?" (1999) 31 J. Int'l L. & Pol. 679, 686. Moreover, former ICJ Judge Thomas Buergenthal submits that this proliferation actually has a socializing effect on states, leading to ever-growing acceptance of the jurisdiction of international courts and tribunals.

lacks a general system of compulsory adjudication or to the impressive variety of regional and subject matter specific courts. These courts often have some compulsory jurisdiction, providing a patchwork of obligations to go to court that could eventually become comprehensive, especially if state obligations attendant to countermeasures ripen into an obligation to go to binding dispute resolution.[100]

Still, an essential purpose of international law and of its courts is the control of violence and especially prevention of war. Since the adoption of the United Nations Charter, there have been more than 300 armed conflicts. At the time of writing, armed conflicts are either under way or could break out in Afghanistan, Azerbaijan, Congo, Mali, Palestine, the Philippines, Somalia, Sudan, Syria, and Yemen. The state of the world cries out for a reinvigorated peace movement, one that renews the campaign for international law and institutions—perhaps even for a world court with general compulsory jurisdiction.

Research Questions

1. Is it detrimental to a legal system to lack a superior court with general compulsory jurisdiction? If so, is it merely a theoretical problem for international law given the growing areas of special subject matter compulsory jurisdiction? Or is the very fact of robust specialized courts a point of concern for the coherence of international law?
2. Are there indications that as the United States declines relative to other military powers, its traditional interest in general, compulsory jurisdiction will re-awaken? Are there other loci of support emerging for general compulsory jurisdiction?
3. What explains the decline in interest in compulsory jurisdiction in the world today? Is it the decline of the peace movement; the shift of interest among scholars to regional and specialized courts; the general view that the ICJ is successful without general compulsory jurisdiction; the view that the ICJ is not successful; the view that the ICJ is not worthy of general compulsory jurisdiction, or some other reason or reasons?

Suggested Reading

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[100] ME O'Connell, "Controlling Countermeasures" in M Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Dordrecht: Martinus Nijhoff 2005) 49.

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