UNIVERSITY OF AMSTERDAM

THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND DOMESTIC COURTS: A VARIATION IN ROLES

Jean d'Aspremont

Amsterdam Law School Legal Studies Research Paper No. 2011-21

Amsterdam Center for International Law No. 2011-09

Electronic copy available at: http://ssrn.com/abstract=1918775

Amsterdam Center for International Law

University of Amsterdam

ACIL RESEARCH PAPER NO 2011-09

THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND DOMESTIC COURTS: A VARIATION IN ROLES

Jean d'Aspremont

Forthcoming in: Malgosia Fitzmaurice, Christian J. Tams & Panos Merkouris (eds.), *The Lasting Legacy of the Permanent Court of International Justice* (Martinus Nijhoff, 2012)

Amsterdam Center for International Law
Oudemanhuispoort 4-6
NL-1012 CN Amsterdam
website: www.jur.uva.nl/acil

Electronic copy available at: http://ssrn.com/abstract=1918775

Forthcoming in Malgosia Fitzmaurice, Christian J. Tams & Panos Merkouris (eds.), THE LASTING LEGACY OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE (Martinus Nijhoff, 2012)

THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND DOMESTIC COURTS: A VARIATION IN ROLES

Jean d'Aspremont[*]

We often think of the first half of the 20th century as an epoch of the limited institutionalization of international society. It is true that – without underestimating the importance of the League of Nations in this respect –it was not until the creation of the United Nations (UN) as well as that of a multitude of regional organizations in the aftermath of the Second World War that international relations between States came to be subjected to a high degree of institutionalization.[1] Yet, this finding ought to be qualified as regards the development of adjudicative mechanisms. It is well-known that the first half of the 20th century witnessed the creation of a multitude of adjudicative bodies, whether permanent or not. Whilst the creation of the Permanent Court of International Justice (hereafter PCIJ) came to symbolize the emergence of an international judiciary[2], other bodies empowered to adjudicate international disputes were plentiful. It suffices here to mention the numerous arbitral tribunals created under the auspices of the Permanent Court of Arbitration[3], the Central American Court of Justice[4], the American-Mexican Claims Commission[5] as well as other arbitral tribunals.[6] It is

[*]Associate Professor and Senior Research Fellow, Amsterdam Centre for International Law (ACIL), University of Amsterdam. The author wishes to thank Robin Morris for his helpful comments.

[1] For some critical remarks on the ideological motives behind the early judicialization of the international Legal order, see M. Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference', in Y. Daudet (ed), *Topicality of the 1907 Hague Conference, the Second Peace Conference*, (Leiden, Martinus Nijhoff Publishers, 208), p. 127-152.

[2] See the contribution of Dr. Kate Parlett to this colloquium. See also O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press, 2005).

[3] For a rundown of these cases, see M. O. Hudson, *The Permanent Court of International Justice 1920-1942. A Treaties* (Garland Publishing, 1972), 12-36

[4] See gen. M. O. Hudson, 'The Central American Court of Justice', 26 *American Journal of International Law* (1932), 759-786.

[5] See the General Claims Convention, signed September 8, 1923, in Washington D.C. by the United States and the Mexico. The convention, which took effect on March 1, 1924, was intended to improve relations between the countries by forming a commission to settle claims arising after

Electronic copy available at: http://ssrn.com/abstract=1918775

noteworthy that the PCIJ even acted on appeal of the decisions of some of them.[7] Whatever the state of the judicialization of the international society at that time, it is important to note that these international adjudicatory bodies – with the PCIJ at their center – blanketed existing domestic courts and tribunals which were growingly called upon to apply international law. Indeed, by the turn of the century, international law gradually ceased to exclusively govern inter-State relations and grew more to regulate internal matters and issues affecting individuals.[8] Besides those rules regulating inter-State relations already requiring domestic implementation, new rules expressly necessitating domestic measures also came into existence. As a result, international law started to trickle down in domestic legal systems, thereby elevating domestic judges to a new class of international law judges. By virtue of other international adjudicatory bodies or the role of domestic courts, the PCIJ was thus far from being entrusted of any sort of monopoly on the application of international law. It is accordingly fair to say that the PCIJ operated in a multi-judiciary world made of domestic and international judicial bodies equally dealing with questions of international law.

It is against that backdrop that this paper examines some of the dynamics of the multi-judiciary world of the first half of the 20th century. It particularly zeroes in on the interactions of the PCIJ with other judicial bodies, in particular domestic judges. The first section offers a brief overview of the PCIJ's claim that it is a court of the international legal order and its use of

---

July 4, 1868, "against one government by nationals of the other for losses or damages suffered by such nationals or their properties" and "for losses or damages originating from acts of officials or others acting for either government and resulting in injustice." Excluded from the jurisdiction of the General Claims Commission were cases stemming from events related to revolutions or disturbed conditions in Mexico. (The Special Claims Commission was formed to address claims arising from events which occurred between November 20, 1910, and May 31, 1920). For more information, see http://www.lib.utexas.edu/taro/utlac/00024/lac-00024.html.

[6] See the contribution of Iain Scobbie to this volume.

[7] See *In the Appeal from a Judgment of the Hungaro/Czecoslovak Mixed Arbitral Tribunal (The Peter Pázmány University)*, Series A/B, No. 61, p. 221.

[8] According to Provost and Conforti, "The truly legal function of international law essentially is found in the internal legal system of States". See Provost and Conforti, *International Law and the Role of Domestic Legal Systems* (Dordrecht, Martinus Nijhoff, 1993) at 8; J.H.H. Weiler, "The Geology of International Law: Governance, Democracy and Legitimacy", 64 *ZaoRV* 547 (2004) at 559–661; See also A. von Bogdandy, "Globalization and Europe: How to Square Democracy, Globalization and International Law", 15 *European Journal of International Law* 885 (2004) at 889; M. Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", 15 *European Journal of International Law* 917 (2004), 917; See contra Arangio-Ruiz, "Le domaine reservé. L'organisation internationale et le rapport entre le droit international et le droit interne'. Cours général de droit international public" 225 *Collected Course* (1990-VI), 29-479, esp. 435-479.

the case-law of other international adjudicatory bodies (1). The second section examines in further detail the relationship between the PCIJ and domestic courts, contrasting it with the Court's self-proclaimed international character (2). On that occasion, it will be particularly shown that, while, on the surface, the Court stopped short of engaging with domestic courts, paying lip-service to their case-law, the PCIJ was inclined to freely interpret domestic law and actually operate as a municipal court itself. A few concluding and critical remarks are formulated, drawing on some analogies with the current dynamics in the practice of the International Court of Justice (hereafter the ICJ) (3).

1. The PCIJ and other international adjudicatory bodies

The PCIJ, as is well-know, was not the judicial organ of any international organization with universal membership and had limited institutional kinship with any institutional subject of the international legal order, in contrast to the current World Court.[9] Yet, as a treaty-based court primarily entrusted with the application of international law[10], the PCIJ did not balk, in the case on *Certain German Interests in Polish Upper Silesia*, to elevate itself into an 'organ of international law'.[11] In the *Brazilian loans* case, the Court similarly deemed it to be a 'tribunal of international law'.[12] It is also worthy of attention that, in the *Mavrommatis Palestine Concessions* case, the Court claimed that its "jurisdiction is international".[13] The contention made in the case on *Certain German Interests in Polish Upper Silesia* was meant to underpin its – equally famous – claim that "municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".[14] In the *Brazilian loans* case, the reference to the international nature of the Court was

[9] See e.g. articles 13 (peaceful settlement of disputes) and 14 (project for the establishment of a Court) of the Covenant of the League of Nations. See also articles 4-14 (elections of judges), 18 (dismissal of judges), 26 (labour cases), 32 (salaries), 33 (expenses of the Court), 34-35 (contentious cases), 37 (jurisdiction for treaty referring to a tribunal institutionalized by the League of Nations), 40 (notification of new cases), 65-67 (advisory opinions) of the Statute of the Permanent Court of International Justice.

[10] Cfr infra 2.4.

[11] *Upper Silesia Case*, Series A, No. 7, p. 19. This was also recalled by D. Anzilotti, Individual Opinion, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Ser. A/B, No. 65, p. 63.

[12] *Brazilian Loans*, Series A, No. 21, p. 124.

[13] PCIJ, *The Mavrommatis Palestine Concessions, Greece vs. Britain*, judgment of 30 August, 1924, Ser. A., No. 2, 1924, p. 34

[14] *Upper Silesia Case*, Series A, No. 7, p. 19.

intended to express a restrictive understanding of the famous adage *jura novit curia*[15] and to indicate that the Court was only supposed to know international law and was conversely not supposed to know the domestic statutes which could be applicable in a base brought before it.[16] In both cases, and albeit it subsequently came to qualify such positions[17], the CPIJ thus elevated itself to a court of international law to define its relationship with domestic law. In the *Mavrommatis Palestine Concessions* case, the international character of its jurisdiction was affirmed with a view to claim that it was not bound to attach to matters of form the same degree of importance which they might possess in municipal law, a contention which it still considered nowadays an authoritative statement in support of the more limited role of formalism in international judicial proceedings.[18]

It is not entirely clear whether the understanding of municipal law as a fact and whether the restrictive interpretation of *jura novit curia* in the finding that the Court is a 'tribunal' or an 'organ' of international law – a finding that can itself be contested – was most appropriate and strictly necessary. The same can be said of the affirmation of the international character of its jurisdiction. Indeed, in making such contentions, the PCIJ may have not realized that being a 'tribunal' or an 'organ' of international law carries negative implications as to the possibility to eschew the ascertainment of domestic law and its demotion to pure facts. For instance, the argument can be made that being a tribunal or an organ of international law simultaneously entails positive duties as well, especially the duty to pay heed to parallel judicial development within the international legal order. In other words, being a tribunal or an organ of international law does not provide such a body with the ability to function in total isolation from domestic law and may carry the duty to take into account other international judicial bodies.[19]

---

[15] J. Verhoeven, 'Jura Novit Curia et le juge international', in P.-M. Dupuy et al. (eds), *Common Values in International Law. Essays in Honour of Christian Tomuschat* (2006), 635-653.

[16] This was also recalled by D. Anzilotti in his individual opinion, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Ser. A/B, No. 65, p. 61.

[17] Cfr infra 2.4.

[18] PCIJ, The *Mavrommatis Palestine Concessions, Greece vs. Britain*, judgment of 30 August, 1924, Ser. A., No. 2, 1924, p. 34.

[19] Interestingly, the same argument as been made in the context of the controversies regarding the decision of the Court of First Instance of the European Union in the *Yusuf and Kadi* cases (2005) where the CFI took the position of a Court of International Law. See Case T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission*, 21 September 2005, [2005] ECR II-3533; Case T-315/01, *Kadi v Council and Commission*, 21 September 2005, [2005] ECR II-3649. See the decision by the ECJ in Join Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, 3 September 2008, available at

If this is true, the Court may not have strictly lived up to all the implications of the aforementioned – controversial – contention as to its status as an organ or tribunal of international law. In fact, the attention it devoted to the work of other international judicial bodies has been rather symbolic and the few references found to their case-law have rarely been conclusive in its decisions. It suffices here to mention the advisory opinion on the *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)* where it cited the *Meerauge* case decided by an Arbitral Tribunal[20], the *Lotus* case where it referred to the *Costa Rica Packet* case decided by an Arbitral Tribunal[21], the *Chorzow Factory* case where a vague reference to the jurisprudence of arbitral tribunals was made[22], the *Polish Postal Service* advisory opinion, in which the award of the PCA tribunal in the *Pious Fund* case[23] was referred to and the *Eastern Greenland* case where it made reference to the *Palmas Island* case.[24] Given the, already significant, activity of other international tribunals in the first decades of the 20th century[25], the few references listed above can look rather meager. In that sense, it may not be an exaggeration to say that the practice of the PCIJ manifested a tendency to deliberately ignore the work of other international tribunals. It is true that, information about international case-law was not as easy as it is today. However, most of these decisions were the object of publication. Moreover, it would be false to claim that the PCIJ lacked the ability to be aware of such decisions[26]. All necessary material means to access international judicial practice were put at its disposal. Access to information is thus not a credible explanation for the scant attention paid by the CPIJ to decisions of other international judicial bodies. The reason must thus be found elsewhere. One could probably venture some considerations as to the need of the PCIJ to affirm itself as the keystone of the – emerging – international judiciary and not look overly dependent on the findings of other courts and judicial bodies. It can reasonably be posited that such self-

---

http://curia.europa.eu. See gen. J. d'Aspremont and Fr. Dopagne, 'Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders', 68 *Heidelberg Journal of International Law* (ZaÖRV) (2008) 939-978. See also the remarks of J. Allain, "The European Court of Justice as an International Court", 68 *Nordic Journal of International Law* (1999) 249.

[20] Series B, No. 8, pp. 42-3.

[21] Series A, No. 10, p. 26

[22] Series A, No. 17, p. 57

[23] Series B., No. 11, p. 30

[24] Series A/B, No. 53, p. 45

[25] See the account made by M. Hudson, *The Permanent Court of International Justice – A Treatise* (Garland Publishing, 1972), 12-70.

[26] See Hudson, *The Permanent Court of International Justice – A Treatise* (Garland Publishing, 1972).

proclaimed independence must have been deemed instrumental in the consolidation of its overall authority. Yet, short of any precise knowledge of the deliberations of the Court[27], such considerations are bound to remain purely speculative. Be that as it may, whatever the motives, the impression remains that even if the PCIJ were to consider itself of a supreme nature in comparison to these other non-permanent bodies – which it probably did – its disregard for the decisions of other judicial bodies was disproportionate for an "organ of international law".

In the same vein, it is not entirely clear if the Court fully observed its self-proclaimed status as an "organ of international law" when it devised principles for the interpretation of international law. Indeed, it could be defended that, being a Court of an international character, it ought not to systematically favor the most restrictive interpretation of legal rules which preserves for most the leeway of those bound by them.[28] In that sense, the restrictive interpretation principle espoused and developed by the PCIJ over the years – as illustrated by the *Treaty of Lausanne of 1925* advisory opinion[29], the *Wimbledon* case[30], the *Right of access to the Danzig Harbour* advisory opinion[31], the *Free Zones of Upper Savoy and the District of Gex* case[32] and the *Interpretation of the Statute of Memel* case[33] - may not have been fully consistent with the claim that the Court is a organ of the international law.

There probably are other aspects of the case-law of the PCIJ which could be reconciled with the – somewhat brazen and audacious – affirmation that it is an organ of international law. I ought not to dwell upon them all here, as it would by far exceed the ambit of this chapter. Only its implications for the Court's relationship with domestic courts should draw attention. This is the object of the following paragraphs.

---

[27] See however the illuminating research carried out by O. Spiermann in *International legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press, 2005).

[28] On this principle see gen. L. Crema, "Disappearance and New Sightings of Restrictive Interpretation(s)", 21 *European Journal of International Law* (2010) 681-700.

[29] Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925 PCIJ Series B, No. 12, 7, at 25.

[30] 1923 PCIJ Series A., No. 1, at 24.

[31] Advisory opinion, 1931 PCIJ Series A/B, No. 43, at 142.

[32] 1932 PCIJ Series A., No. 22, at 166.

[33] 1932 PCIJ Series A/B, No. 49, 294, at 313-314.

2. The PCIJ and domestic courts

As stated in the introduction above, the PCIJ was not only surrounded by other international judicial bodies. It also had to share the arena with domestic courts. The relationship between the PCIJ and domestic courts was multifold and manifested itself in very diverging forms. In the following sections, mention is first made to the significant number of judges serving on the bench who had previously held positions in the domestic judiciary. In that sense it is shown how the PCIJ developed an organic link with domestic courts (2.1). It is also noteworthy that in a few cases, interpretations of international law by domestic courts came to be referred to by the PCIJ, without such references being necessarily conducive to the final decision of the Court (2.2.). The applicable law prescribed by the Statute, and in particular the elevation of the general principles of law to a source of applicable law, also brought the PCIJ, at least theoretically, to heed domestic judicial practices and a few considerations are provided (2.3). Eventually, it is noted that, in a few cases, the PCIJ backed away from its traditional conception of domestic law as a mere fact[34] and turned itself into a domestic court directly interpreting and applying domestic law, thereby taking all the trappings of a domestic court (2.4).

The following section sheds some light on a paradox. Indeed, the PCIJ, despite considering itself an organ of international law which could have theoretically overlooked judicial developments in domestic legal orders, did engage with domestic courts. In the last section of this chapter, such relationships will be confronted with the attitude of the current World Court in its relationship with other international and domestic courts.

2.1. An organic relationship: domestic judges on the bench of the PCIJ

The most natural link between the Court and domestic judiciary was an organic one in that a significant number of judges – including deputy judges – either originated in or had a stint at the domestic judiciary – including prosecutor offices – before joining the Court.[35] It suffices here to mention

[34] See infra 2.4.

[35] Some biographical element scan be found in J. B. Moore, 'The Organization of the Permanent Court of International Justice' 22 *Colombia Law Review* (1922) 497, esp 502-504. See also O. Spiermann, *International legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press, 2005), chapter 5-7.

judges Wang Ch'ung-hui[36], Charles Evans Hughes[37], Frank Billings Kellogg[38], Epitácio da Silva Pessoa[39], Bernard Loder[40] or Didrik Nyholm[41], Michailo Yovanovitch[42], or M. Beichmann[43]. The institution of *ad hoc* judges, although the judge may not necessarily be of the nationality of the State appointing him or her, also allowed the participation of domestic judges.[44]

Since there is no record of the deliberations[45], it is difficult to evaluate the manner in which the professional background of these members of the bench impacted on the substance of its decisions. Yet, according to some analysts, such compositional feature was instrumental in the variations in the Court's general way of reasoning.[46] This chapter certainly is not the place to further investigate this – mostly sociological – question. The foregoing only meant to show that the PCIJ – probably more than the current World Court[47] – was organically linked with domestic courts.

---

[36] He was Chief justice of the Chinese supreme court in 1920.
[37] He was associate Justice of the Supreme Court of the United States. After his stint at the PCIJ he became Chief Justice of the United States.
[38] He was prosecutor in the US Justice Department.
[39] He was Justice of the Supreme Federal Tribunal of Brazil.
[40] He belonged to the High Council of the Netherlands (Hoogeraad)
[41] He was a judge on the Mixed Courts in Egypt.
[42] He was president of the Court of Cassation of Serbia.
[43] He was president of the court of appeals of Trondhjem in Norway.
[44] Hudson, *The Permanent Court of International Justice – A Treatise* (Garland Publishing, 1972), p. 359 and p. 365. See also S. Rosenne, *The Law and Practice of the International Court, 1920-1996, Volume III, Procedure* (The Hague, Martinus Nijhoff, 1997), para. III.267, p. 1135.
[45] An importance source of information is however the papers written by Paul de Vineuil which is a pseudonym used by Ake Hammarskjöld, the Registar of the Permanent Court of Justice. See e.g. P. de Vineuil, 'The Permanent Court of International Justice and the Geneva "Peace Protocol"', 17 *Rivista di diritto internazionale* (1925), 145-168 or P. de Vineuil, 'Les leçons du quatrième avis consultative de la Cour permanente de Justice internationale', 4 *Collected Courses* (1923) 291; P. de Vineuil, 'Les Résultats de la troisième session de la Cour Permanente de Justice internationale, 4 *Collected Courses* (1923) 573. On the value of such an account, see O. Spiermann, *International legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press, 2005), at 157. et seq. That however did not prevent Hammarskjöld to publish articles on the CPIJ under his real name.
[46] See O. Spiermann, *International legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press, 2005) (who discusses the biographies of some of the judges and the possible implications of judges backgrounds throughout chapters 5, 6 and 7).
[47] The biographies of the current members of the ICJ are available at http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1.

2.2. A hermeneutic relationship: the use of domestic courts' interpretations of international law

In his famous opinion appended to the decision in the *Lotus case*, Judge Moore expressed the self-evident absence of *res iudicata* in international adjudication when it comes to decisions of domestic courts on questions of international law. He contended that:

> "[The] directions (provided by Article 38) merely conforms to the well-settled rule that international tribunals whether permanent or temporary are not to treat the judgments of the courts of one State on questions of international law as binding on other States, but, while giving to such judgments the weights due to judicial expression of the view taken in the particular country, are to follow them as authority only so far as they may be found in harmony with international law".[48]

While Judge Moore's affirmation is nowhere to be challenged and remains of the utmost relevance today, it is noteworthy that the PCIJ still occasionally made use of decisions of domestic judges. In several cases, the PCIJ referred to the decisions of domestic courts. Indeed, references to domestic courts were made in the *Chorzow* Case[49], *Lotus* case[50], the *Opinion on the Competence of the ILO Personal to Regulate Incidentally the Personal Work of Employer*,[51] the *Panevezys-Saldutiskis Railway* case[52], *Serbian Loans*[53]and *Brazilian Loans*[54]. However, such references did not prove of much significance and often boiled-down to pure lip-service to domestic judicial decisions.

For the reasons mentioned above[55] it is close to impossible to gauge whether the (limited) extent of the use of domestic courts' interpretation of international law was in one way or another influenced by the (limited) presence on the bench of judges having had a stint in the judiciary of their country. However, the practice of the PCIJ clearly demonstrates its

[48] Series A, No, 10, at 74.
[49] Series A, No. 9, p. 31.
[50] Series A, No. 10, 28-30.
[51] Series B No. 13, p. 20.
[52] Series A/B, No. 76, pp. 19-21
[53] Series A, No. 20, p. 47.
[54] Series A, No, 21, 124-125.
[55] Cfr supra 2.1.

averseness to rely on domestic judicial interpretations of international law in a decisive manner, a practice that is not much different from that of the present World Court.[56] This being said, it is interesting for the sake of the argument made here, that domestic case-law, regardless of its non-decisive role, was present in the reasoning of the PCIJ, thereby further accentuating the relationship between the Court and its domestic counterparts.

2.3. A statutory relationship: general principles in the case-law of the PCIJ

As is well evidenced by the the *travaux préparatoires* of Article 38 of the Statute of the Permanent Court of International Justice, general principles of law, as originally designed by Baron Descamps to prevent *non liquet*, were informed natural law principles.[57] That naturalistic understanding of general principles eventually gave ground to a compromise with the positivist position defended by Elihu Root[58]. As a result of that compromise, general principles were meant to be construed as the convergence of domestic legal traditions – although the difficulty to collect representative data of domestic traditions theoretically makes a return to the substantive law-ascertainment criteria almost inevitable.[59] There is little dispute that the reference to general principles in Article 38 of the Statute comes close to enshrine a clause empowering the PCIJ with a law-making responsibility, for the Court is expressly allowed to unearth convergences in national law which no doubts leaves it with a extremely wide margin of appreciation.[60] Particularly

---

[56] Cfr infra 3.

[57] See Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, 16 June-24 July 1920, The Hague, 1920, pp 322-325. On this debate see M. Bos, *A Methodology of International Law*, T.M.C. Asser Instituut, Amsterdam/New York/Oxford, 1984, pp. 68-75. A. Pellet, 'Article 38', in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice*, Oxford University Press, 2002, 685-689. See also the separate opinion of Judge Cançado Trindade in the case pertaining to the *Pulp Mills (Argentina v. Uruguay)* before the International Court of Justice, 20 April 2010, ICJ Rep. 2010, 3-6. On the Procès-verbaux, see gen, Jörg Kammerhofer, 'Introduction', in *Permanent Court of International Justice, Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee June 16th-July 24th 1920 with Annexes (1920)* (Reprint 2006).

[58] *Ibidem*.

[59] In the same vein, see M. Koskenniemi, 'The Pull of the Mainstream' 88 Michigan Law Review 1946 (1990), at 1950.

[60] H. Kelsen, "La Théorie Pure dans la Pensée Juridique" in C. Leben et R. Kolb (eds.), *Controverses sur la Théorie Pure du Droit* (Paris : LGDJ, 2005) at 173); H.L.A. Hart, *The Concept of Law* (OUP, Oxford, 1997, 2nd ed.) p. 136; See also Hart and A.M. Honore, *Causation in the Law* ,(OUP, Oxford, 1985) p.5 or N. Bobbio, *Essais de théorie du droit* (translated by M. Guéret) (Paris, Bruylant/LGDJ, 1998) p. 10 and p. 38; J. Raz, *Authority of Law* (Clarendon Press, Oxford,

interesting for the argument made here is the fact that domestic traditions whose convergence is accordingly to be ascertained by the CPIJ undoubtedly includes the domestic judicial practice, especially in common law countries. By virtue of its Statute and the concept of general principles, the PCIJ was thus enticed to engage with domestic judicial practices if it sought to make use of general principles of law.

It is interesting to note that, despite the extremely large leeway left to the PCIJ in the ascertainment of the applicable law by virtue of the recognition of general principles of law as a source of applicable law, the Court could have hardly used it. Indeed, as noted by Hudson, "(w)hether from a sense of caution or because of the nature of the cases which have come before it, the Court has never professed to draw upon 'the general principles of law recognized by civilized nations' in its search for the applicable law". [61] In ascertaining the rules applicable to the cases brought before it, the Court often furtively stood behind vague formulations, refraining from expressly revealing the exact source of the rule concerned, whether customary international law or general principles of law. For instance, in the *Greco-Bulgarian Communities* case, the Court referred to the general accepted principle of international'[62].

The PCIJ's tepid use of general principles of law – and thus its apparent qualms towards a self-empowerment to unearth convergences in domestic traditions – indicates that it barely engaged with domestic judicial traditions in this way. It is thus fair to say that the statutory relationship with domestic

---

1983) especially pp. 41-52. As regards international law more specifically, See R. Jennings, 'What is International Law and How do we tell it when we see it' 37 Annuaire Suisse de Droit international (1981) at 77; H. Thirlway, 'The Sources of International Law' in M. Evans (ed.), International Law, 2d ed., Oxford, Oxford University Press, 2006, 129-130; H. Lauterpacht, *The Development of International Law by the International Court*, 2nd ed. (Praeger, 1958); M. Lachs, 'Some Reflections on the Contribution of the International Court of Justice to the Development of International Law', 10 *Syracuse Journal of International Law and Commerce* (1983) 239; R. Higgins, Problems and Process: International Law and How We Use It, Oxford, Oxford University Press, 1995, at 202. A. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, 2007) 266-269 and 310-311. See however the statement of the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 1996-I, ICJ Rep. 237, Para. 18 (according to which the Court "states the existing law and does not legislate" and this is so "even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes not is general trend"). Article 38 of the Statute of the International Court of Justice also seems to lend support to a strictly cognitivistic task of international courts.

[61] M. Hudson, *The Permanent Court of International Justice – A Treatise* (Garland Publishing, 1972), at 611-612.

[62] Series B, No. 17, p. 32.

courts remained limited. Because of the inconclusiveness of the organic relationship[63], the non-decisive character of the hermeneutic relationship[64], and the paucity of the statutory relationship[65], the most important contribution of domestic courts to the work of the PCIJ was to be found elsewhere. This is the object of the following paragraphs.

2.4. A trans-mutative relationship: the application of domestic law by the PCIJ

It is unsurprising that the PCIJ was first and foremost expected to apply international law to settle the disputes that were brought before it or to answer the requests for an advisory opinion which are submitted to it. This was prescribed by its statute.[66] This also is what the PCIJ confirmed, as far as its contentious jurisdiction is concerned, by contending that its "true function" boiled down to settling disputes between States "on the basis of international law"[67]. Yet, the Court made expressly clear that it could be seized of disputes "which do not require the application of international law"[68], thereby not ruling out the application of domestic law. The same is true in relation to advisory opinions.[69] The theoretical possibility to apply domestic law was not subject to much controversy and unsurprisingly, questions of domestic law inevitably did actually arise before the PCIJ.[70] Indeed, questions of domestic law primarily emerged when appraising whether a State has lived up to its international obligations – as illustrated by the *Certain German Interests in Polish Upper Silesia* case[71] - or when ascertaining certain facts governed by municipal law – as is shown by the *Serbian loans* case[72].

Being called upon to examine municipal law on occasions, the PCIJ was bound to determine the status which it grants to the applicable municipal

---

[63] Cfr. 2.1.
[64] Cfr 2.2.
[65] Cfr 2.3.
[66] See article 38.
[67] Serbian Loans, Series A, No. 20, pp. 19-20.
[68] Serbian Loans, Series A, No. 20, pp. 19-20.
[69] See the Individual opinion of D. Anzilotti, Separate Opinion, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Ser. A/B, No. 65, p. 62-63.
[70] See the individual opinion of D. Anzilotti, Separate Opinion, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Ser. A/B, No. 65, p. 63.
[71] Series A., No. 7, 1926.
[72] Series A, No. 20. See also *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Series A/B, No. 65.

rules. The PCIJ's understanding of the status of domestic law in international judicial proceedings is well-known. In its decision in the *Certain German Interests in Polish Upper Silesia* the Court famously stated:

> "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention".[73]

Today, international judicial bodies still abide by that position[74] which is also referred to in international pleadings.[75] It is also widely shared in the international legal scholarship.[76] Construed as simple "facts", domestic rules were accordingly examined by the PCIJ in a number of cases, especially to appraise the extent of the obligations of the parties or to determine whether a State had abided by its obligations. It suffices here to mention the *Serbian Loans*[77] and *Brazilian Loans*[78] cases as well as the *German Settlers in Poland*[79], *Exchange of Greek and Turkish Populations*[80], *Greco-Bulgarian "Communities"*[81], *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*[82] advisory opinions.

Although demoted to mere facts which the PCIJ could take into account, municipal rules had inextricably to be interpreted. More precisely, while

---

[73] Ser. A., No. 7, 1926, p. 19.
[74] See International Tribunal for the Law of the Sea, "Saiga", 1 July 1999, para. 120
[75] Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion), Public sitting held on Friday 4 December 2009, CR 2009/28, p. 28.
[76] See G. Gaja, "Dualism - a Review", in J. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press, 2007) 52.
Between National and International Law, OUP, 2007, pp. 58-59; M.N. Shaw, International Law, 5th ed., p. 127; D. Anzilotti, *Corso di diritto internazionale private*, Rome, Anthenaeum, 1925, p. 57.
[77] Series A, No. 20.
[78] Series A, No. 21, pp. 123-5.
[79] Series B, No. 6.
[80] Series B, No. 10, pp. 19-20.
[81] Series B, No. 17, p. 32.
[82] Series A/B, No. 44, p. 24.

municipal law could be relied on by the PCIJ as facts, it still needed to be interpreted. Hence the question arose whether the PCIJ could engage in its own interpretation or whether it was to be bound by the interpretation provided by the domestic courts of the legal order where the municipal rule concerned had been adopted and primarily yields its legal effects.

Confronted with that question in the *Brazilian loans* case, the PCIJ took the following general position:

> "Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force.
>
> It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based".[83]

Interestingly, the special agreements on which the *Brazilian Loans* case was based provided that the Court could freely decide to disregard the interpretation of a domestic statute provided by the domestic courts of a State and engage in its own interpretation of that statute, in determining the national law of each country.[84] Yet, the abovementioned position of the PCIJ indicated a great reluctance to do so, even though expressly allowed by the agreement in which its jurisdiction was based. This led the Court to affirm that it cannot be "compelled" to disregard municipal jurisprudence.[85]

---

[83] Series A, No. 21, p. 124.

[84] Series A, No. 21, p. 123.

[85] *"But to compel the Court to disregard that jurisprudence would not be in conformity with its function when applying municipal law. As the Court has already observed in the judgment in the case of the Serbian loans, it would be a most delicate matter to do so, in a case concerning public policy – a conception the*

Despite affirming the necessity to abide by the interpretation of municipal law provided by domestic courts, the PCIJ formulated an important qualification for situations where the case-law of domestic courts is either hazy or inconsistent. The PCIJ thus went on:

> "Of course, the Court will endeavor to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law".[86]

This self-granted authorization to overturn domestic interpretation of municipal law went almost unnoticed at that time, for it was formulated in a case where the PCIJ eventually refrained from using that possibility. However, the subsequent case-law of the Court showed a growing disposition to provide its own interpretation of domestic law. Indeed, in three cases submitted to it, the PCIJ ventured in that direction, thereby bestowing upon itself the role of a domestic court and independently interpreting the applicable domestic law.

In the *Appeal from a Judgment of the Hungaro/Czecoslovak Mixed Arbitral Tribunal (The Peter Pázmány University)*[87], the PCIJ, acting as a court of appeal to a Hungarian/Czechoslovak Mixed Arbitral Tribunal, examined, interpreted and applied Hungarian law in order to determine whether The Peter Pázmány University was endowed with legal personality and whether it was entitled under Hungarian law to file a claim before the mixed tribunal. The PCIJ concluded that the University had legal personality and had the capacity to act independently, therefore fulfilling the conditions necessary to submit a claim by virtue of Article 250 of the Treaty of Trianon.[88] In that case, although there was no municipal case-law invoked, the PCIJ did not rely on the interpretation of Hungarian law made by domestic authorities and embarked on a free interpretation thereof.

---

definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself—and in a case where no relevant provisions directly relate to the question at issue. Such are the reasons according to which the Court considers that it must construe Article VI of the Special Agreement to mean that, while the Court is authorized to depart from the jurisprudence of the municipal courts, it remains entirely free to decide that there is no ground for attributing to the municipal law a meaning other than that attributed to it by that jurisprudence", Series A, No. 21, pp. 124-125.

[86] Series A, No. 21, p. 124.

[87] Series A/B, No. 61, p. 228 et seq.

[88] Ibid., p. 232.

A bit more than a year later, the PCIJ was asked by the Council of the League of Nations to appraise the consistency of two Danzig legislative decrees pertaining to criminal law and criminal procedure matters of 29 August 1935 with the Constitution of the Free City of Danzig.[89] Again, the PCIJ carried out an analysis of the meaning and scope of both the decrees and the Constitution of the Free City of Danzig as if it were a constitutional court. It concluded that the decrees were not consistent with the guarantees provided by the Danzig Constitution.[90] The Court operating as the constitutional court of Danzig is precisely what prompted Anzilotti to object that the Court should have declined to give an opinion on that matter.[91] It is interesting to note that Anzilotti also regretted that the PCIJ appears to have held that, in carrying its task as a Constitutional court, it ought not to concern itself with the jurisprudence of the courts of Danzig.[92]

In its judgment on the *Lighthouses case between France and Greece*[93], the PCIJ was called upon to determine whether the 1913 contract concluded between the French firm Collas & Michel – known as the *Administration générale des Phares de l'Empire ottoman* – and the Ottoman Empire renewing the concession for the maintenance of the lighthouses on the coasts of the Ottoman Empire was duly entered into according to Ottoman law and thus operative as regards Greece in so far as the lighthouses situated on the territory subsequently assigned to Greece. This led the Court to carry out a thorough examination of the domestic law and the constitutional practice of the Ottoman Empire.[94] The Court concluded that such a contract was valid under Ottoman law and was therefore operative towards Greece.[95]

In the three cases mentioned here, the PCIJ has thus not shied away from freely interpreting municipal law and behaves as if it were a domestic (supreme) court of the legal system whose law it was interpreting. According to one observer, the greater inclination shown by the PCIJ in the three abovementioned cases to operate as a domestic court by providing its own interpretation of municipal law directly originated in the second general

---

[89] Series A/B, No. 62, pp. 22-4.
[90] Ibid., p. 57.
[91] See the Individual opinion of D. Anzilotti, Separate Opinion, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Ser. A/B, No. 65, p. 61-63.
[92] Ibid, at 64.
[93] Series A/B, No. 65, p. 50.
[94] Ibid. 1924.
[95] Ibid., p. 28-29.

elections of judges which had produced a bench where judges thought as national lawyers.[96] Whatever the possible explanation for such a disposition, it suffices for the sake of the argument made here to point out that, while balking at engaging with domestic case-law, the PCIJ had no qualms endorsing the role of domestic courts and independently act as a domestic court. In other words, the inclination – singled out in this section – of the PCIJ to freely interpret municipal law and act as a municipal court sharply contrasts with the reluctance of the PCIJ – observed in the two previous sections – to engage with domestic courts and their judicial practice, either by virtue of the authority attached to their interpretation of international law[97] or by virtue of general principles of law[98].

3. The PCIJ and its successor: which legacy?

The foregoing has shown that the PCIJ, despite considering itself a Court of the international legal order, hardly paid its due to the case-law of other international tribunals. Indeed, as has been argued above[99], even if the PCIJ were to consider itself of a supreme nature in comparison to these other non-permanent bodies – which it probably did – its pronounced disregard for other judicial bodies' decision was out of proportion for an "organ of international law". Paradoxically, the PCIJ, despite considering itself an organ of international law which could have theoretically overlooked judicial developments in domestic legal orders, experienced fewer qualms to engage with domestic courts. Notwithstanding the inconclusiveness of the organic relationship with domestic courts[100], or the paucity of its statutory relationship with them [101], the Court did take notice of domestic interpretations of international law[102] and, above all, came to apply domestic law itself as if it had the capacity and authority of a judicial body of the domestic legal order whose rules were at stakes in the case submitted to it.[103] If these finding are correct, it is not without interest to end this brief chapter by critically appraising the attitude of the PCIJ in its relationship with other tribunals in the light of the practice of the current World Court.

---

[96] O. Spiermann, *International legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press, 2005), p. 349.
[97] Cfr supra 2.2.
[98] Cfr supra 2.3.
[99] Cfr supra 1.
[100] Cfr. supra 2.1.
[101] Cfr. supra 2.3.
[102] Cfr supra 2.2.
[103] Cfr supra 2.4.

The legacy of the PCIJ is indubitable. In particular, it cannot be contested that the PCIJ case-law has particularly marked the case-law of its successor in The Hague on a wide array of substantive and procedural issues. It surely is not the place to dwell on them here. For the sake of the argument made in this chapter, it is noteworthy that the ICJ in its first contentious decision on the merits immediately endorsed the – somewhat controversial – claim made by its predecessor in the *Certain German Interests in Polish Upper Silesia*[104] and the *Brazilian loans*[105] that it constitutes an organ or a tribunal of international law. Indeed, in the *Corfu Channel* case, the Court made the following statement:

> "The Court recognizes that the Albanian Government's complete failure to carry any out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, *of which it is the organ*, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty".[106]

Interestingly, the argument could be made that the ICJ, probably more than the PCIJ, took its self-proclaimed status as an organ of international law more seriously, albeit belatedly. It is indeed well-known that the current World Court did pay heed to the findings of other international tribunals, although sometimes reluctantly or simply as a matter of convenience, be it for interpretative[107] or evidentiary[108] purposes. It is true that, given the far more numerous international judicial bodies in the era of the ICJ, the inspiration by other courts and tribunals remains proportionally very limited. Yet, it seems that the ICJ came to accept the authority of other judicial bodies' decision, a step which the PCIJ never made.

---

[104] Upper Silesia Case, Series A, No. 7, p. 19. This was also recalled by D. Anzilotti, Individual Opinion, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Series A/B, No. 65, p. 63.

[105] Brazilian Loans, Series A, No. 21, p. 124.

[106] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949, ICJ Reports, 1049, p. 35 (emphasis added).

[107] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, para. 67 ff.

[108] See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, 26 February 2007, para. 202-230.

Whist the ICJ may have shown itself more amenable to other international tribunals' positions than the PCIJ, it seems that the exact opposite conclusion can be reached when it comes to the engagement with domestic courts. Indeed, the tendency of the PCIJ to endorse the role of domestic courts and substitute its own interpretation to that of domestic authorities – and which has been depicted in the previous sections – is a trait which the ICJ seems not to have continued and perpetuated.

This surely is not to say that there are no instances where the ICJ examined and reviewed legal rules which are not strictly speaking rules of the international legal order. Actually, such situations are aplenty in the case-law of the current World Court. For instance, the ICJ is regularly called upon to interpret the law of the UN. In doing so, the ICJ interprets the law of an autonomous legal order which is, strictly speaking and despite the international nature of its constitutive instrument, separate from the international legal order.[109] In this situation, however, its status of principal judicial organ of the UN[110] suffices to justify that the ICJ ventures into the law of the UN. Leaving aside advisory procedures specifically addressing the law of the UN, it must be highlighted that the Court is called upon to review domestic law in a variety of situations. In frontier disputes for instance, the Court will often engage with the interpretation of national law – taken in its factual evidentiary virtues – to try to establish the frontier.[111] Likewise, in case of diplomatic protection, and especially when gauging the fulfillment of local remedies[112] or establishing the nationality of the victim[113], the Court has been examining and interpreting domestic law. By the same token, in determining the possible wrongful character of the behavior of a State, the ICJ can be called upon to review and interpret domestic law with a view to determining whether the piece of domestic law at stake is not in

[109] On this debate see gen. C. Ahlborn, "The Rules of International Organizations and the Law of International Responsibility", *International Organizations Law Review* (Forthcoming), Amsterdam Center for International Law Research paper No. 2011-03 and Amsterdam Law School Research Paper No. 2011-04. See also the remarks by J. d'Aspremont and Fr. Dopagne, "Kadi: the ECJ's reminder of the elementary divide between legal orders", 5 *International Organizations Law Review* (2008) 371-379.

[110] Article 92 of the United Nations Charter.

[111] See e.g. *Frontier Dispute (Benin v. Niger)*, Judgment of 12 July 2005, ICJ Rep. 2005, *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, 22 December 1986, I.C.J. Reports 1986, p. 568, para. 30.

[112] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, ICJ Reports, para. 56 and ff.

[113] *Nottebohm (Liechtenstein v. Guatemala)*, Judgment of 6 April 1955, ICJ Rep. 1955, p. 17 ff.

itself illegal[114] or the source of a wrongful act[115] or at least the preparatory act to the breach.[116] Furthermore, when seeking to determine the legal subject to which an act is attributable, the Court can – theoretically at least – also turn to domestic law despite the latter playing only an evidentiary role for the sake of attribution.[117] The evaluation of the validity of a treaty, and especially in situation where the consent to be bound by a treaty has been expressed in manifest violation of a provision of internal law regarding competence to conclude treaties which of fundamental importance.[118]

There thus exists a fair number of instances where the Court has been (or could be) called upon to interpret and review domestic law. Interestingly, in all these cases where the Court actually engaged with domestic law, it always refrained from substituting its own interpretation to that of any body which under domestic law would have had the authority to do so. In that sense, the ICJ has never shown the same inclination as the PCIJ to play the role of a domestic supreme Court. However, interestingly, the ICJ has invoked the PCIJ's jurisprudence in this respect and, especially, the abovementioned *Brazilian loans* principle empowering the Court to set aside the interpretation of domestic Courts. Such a precedent was mentioned, for instance, in its judgments in *ELSI*[119] and in *Diallo*[120]. Notwithstanding taking note of that possibility, the Court always refused to make use of that

---

[114] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Request for Advisory Opinion), 22 July 2010, ICJ Reports 2010, para. 85-121. See in particular the famous paragraph 88. The same is true with respect to domestic case-law. See e.g. *Certain Property (Liechtenstein v. Germany)*, Judgment of 10 February 2005, ICJ Rep. 2005, p. 6; see also the case *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, application of 22 December 2008, available at http://www.icj-cij.org/docket/files/143/14923.pdf.

[115] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, para. 72 ff.; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, para. 63 and para. 112-113; *Lagrand (Germany v. United States*, 27 June 2001, ICJ Rep 2001, para. 90. See also Separate Opinion of Judge Lauterpacht, *Norwegian Loans*, 6 July 1957, ICJ Rep 1957, p. 37.

[116] On the concept of preparatory act, see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),* Judgment of 25 September 1997, para. 79.

[117] This possibility arises out of Article 4.2 of the Articles on the Responsibility of States for Internationally Wrongful Acts. See the Commentary of Article 4, Report of the International Law Commission on the work of its fifty-third session, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 42.

[118] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002, ICJ Rep. 2002, para. 258-268.

[119] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, ICJ Reports, para. 62.

[120] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, para 70.

prerogative in practice and eschewed any direct engagement with domestic courts. More often than not, the question of the influence of other domestic interpretation of domestic law has been reduced to a mere question of proof.

The foregoing shows that the ICJ has never excluded the possibility to substitute itself to domestic authorities and cases where it could have done so are aplenty. The ICJ has however shown much more self-restrain than its predecessor, thereby living up more strictly to the division of roles inherent in its similar self-proclaimed status of "organ of international law". If this is true, such a finding inevitably spawns the temptation to embark on a historical, political and sociological analysis of the difference of mindset of the two courts in this respect. Certainly, historical, institutional, political and sociological narratives would be very conducive to understand and decipher the greater inclination of the PCIJ, in comparison to its successor, to substitute itself to domestic courts. It suffices here to mention the felt necessity to establish its authority in a community of States obsessively attached to their monopoly of power on their territory, the perceived need not to leave domestic interpretation of national law corrupt the international ambitions of the Court as a world player, or more simply the intricate and subtle character of the peace edifice built after World War I which the Court was meant to be the guardian. More pragmatically, it could also be explained by virtue of a punctual and case-by-case analysis of the case-law of each court, the situations submitted to the ICJ having not required it to endorse the role of a domestic supreme court, in contrast to those with which its predecessors had to grapple. Reasons for such a discrepancy in attitude are aplenty. The task – highly speculative in nature –of unearthing them should surely not be taken on in the framework of this volume. Whatever the motives for such diverging approaches to the relationship between the World Court and domestic courts, the foregoing shows that the abundant case-law of the PCIJ, more than 65 years since its dissolution, continues to provide insights on the dynamics of our contemporary multi-judiciary world.