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0521836859 - International Legal Argument in the Permanent Court of International
Justice: The Rise of the International Judiciary

Ole Spiermann

Excerpt

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PART 1

**The Permanent Court of International
Justice**

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1 A project of international justice

From arbitration to adjudication

As the predecessor of the present International Court of Justice, the Permanent Court of International Justice was a historic ‘melting-pot’ of ideals about international justice and, according to some, international community as well as notions of international law. It was the culmination so far of a persistent movement towards, in prosaic terms, more effective settlement of international disputes. The twentieth century had opened with a call for international justice, a growing hope of sustaining peace through international adjudication and law.¹ Although cold water was inevitably poured on the belief in international adjudication being a real, trustworthy alternative to warfare,² the century witnessed several successful projects of international justice, with more now underway. This was partly due to the legacy of the Permanent Court where international law was brought down to earth, as it were, and given a practical edge. In this context, the world, at last, experienced the rise of the international judiciary.

The Permanent Court of International Justice was preceded by the Permanent Court of Arbitration established under the 1899 and 1907 Conventions for the Pacific Settlement of International Disputes, which have been described as ‘in a sense a codification of the law of pacific settlement up to that time’.³ In Articles 15 (1899) and 37 (1907), ‘international

¹ On earlier responses to this call, see W. Evans Darby, *International Tribunals: A Collection of the Various Schemes Which Have Been Propounded and of Instances Since 1815* (London, 1900); and Hans Wehberg, *The Problem of an International Court of Justice* (Oxford, 1918), pp. 128–71.

² See H. Triepel, *Die Zukunft des Völkerrechts* (Leipzig, 1916), pp. 13–16.

³ Manley O. Hudson, *The Permanent Court of International Justice, 1920–1942* (2nd edn, New York, 1943), p. 4.

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arbitration' was defined as having 'for its object the settlement of disputes between States by judges of their own choice on the basis of respect for law'.⁴ The name of the Permanent Court of Arbitration was a misnomer, as has often been noted.⁵ In retrospect, its historical importance was to serve as a point of departure for more ambitious projects of international justice that aimed at adjudication, as opposed to arbitration. According to Hersch Lauterpacht, 'there was a tendency to deny the judicial character of arbitration, as it then existed, in order to strengthen the argument for the establishment of a true international court able to develop International Law by the continuity of its pronouncements and the permanency of its personnel'.⁶

The distinction between arbitration and adjudication related to national law: adjudication implemented ideals of a court of justice taken from national legal systems, whereas, from the perspective of those systems, arbitration was exceptional, consensual and *ad hoc*. The plans for a Court of Arbitral Justice and an International Prize Court were put before the Second Peace Conference at The Hague in an attempt to meet the standards of adjudication. The plans miscarried, however, due to

⁴ Cf. Article 3, Paragraph 2, of the Treaty of Lausanne (*Frontier between Turkey and Iraq*), Series B No. 12 (1925) at 26; and *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV)*, Series B No. 16 (1928) at 22–3. See also *Dubai-Sharjah Border Arbitration*, 91 ILR 543 (1981) at 574–5; and *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Merits), ICJ Reports [2001] 40 at para. 113.

⁵ Criticism of the name was raised at the First Peace Conference: see James Brown Scott (ed.), *The Proceedings of the Hague Peace Conferences: The Conference of 1899* (London, 1920), pp. 755–6, 775–7 and 652; cf. *ibid.*, pp. 709–17 and 597–8. And criticism of the institution was commonplace at the Second Peace Conference: see James Brown Scott (ed.), *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (London, 1920–1), vol. 1, pp. 344 and 347 and also vol. 2, pp. 234, 319, 327 and 596: 'Instead of a permanent court, the Convention of 1899 gave but the phantom of a court, an impalpable specter, or to be more precise yet, it gave us a recorder with a list' (Asser); 'In a word, the Permanent Court is not permanent because it is not composed of permanent judges; it is not accessible because it has to be constituted for each case; it is not a court because it is not composed of judges' (Brown Scott); 'What then, is this court whose members do not even know one another? The Court of 1899 is but an idea which occasionally assumes shape and then again disappears' (Martens); 'The present Permanent Court has not gone far in the direction of establishing and developing international law. Each case is isolated, lacking both continuity and connection with the other' (Choate). See also Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee (16 June–24 July 1920, with Annexes)* (The Hague, 1920), pp. 694–5 and 698.

⁶ L. Oppenheim, *International Law* (5th edn by H. Lauterpacht, London, 1935–7), vol. 2, p. 23, note 1. John Bassett Moore took issue with this view in 1917: see Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied in the United States* (2nd edn, Boston, 1947), vol. 2, p. 1580, note 3.

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disagreement over the method of electing the members of the courts,⁷ and also because of an open-ended list of sources of law to be applied.⁸ Instead, in 1908 five states established the Central American Court of Justice for ten years. It was soon accused for not abiding by the highest standards of adjudication.⁹

In 1920, a crucial step towards adjudication was launched in Article 14 of the Covenant of the League of Nations, according to which:

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

Article 14 thus envisaged a judicial body entrusted with two kinds of jurisdiction: contentious jurisdiction over ‘any dispute of an international character which the parties . . . submit to it’ and advisory jurisdiction over ‘any dispute or question referred to it by the Council or by the Assembly’. Still, it was later referred to as ‘a curious fact that the question of the exact legal character of the new Court of International Justice was never settled in an authoritative way by those who framed the Covenant’.¹⁰ The notion of an international court, although not formally an organ of the League, had been included in an early suggestion for a Covenant of a League of Nations submitted by Colonel House to President Wilson. According to House, an international court was ‘a necessary part of the machinery’ and ‘might well prove the strongest part of it’.¹¹ Room was made for an international court in some of the drafts submitted by governments. On the initiative of Lord Robert Cecil, a provision on plans for the establishment of a Permanent Court of International Justice found its way into the ‘Hurst-Miller draft’, which Wilson laid before the Commission on the League of Nations at its first meeting at the Paris Peace Conference on 3 February 1919.¹² He did

⁷ *Proceedings of the Conference of 1907*, vol. 2, pp. 619–24 and vol. 1, p. 168.

⁸ *Ibid.*, vol. 1, pp. 190–1.

⁹ Cf. Jean Eyma, *La Cour de justice Centre Américaine* (Paris, 1928), pp. 171–6; Hudson, *Permanent Court*, pp. 45–70; Jean Allain, *A Century of International Adjudication* (The Hague, 2000), pp. 88–91; and Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford, 2003), p. 677, note 43.

¹⁰ League of Nations, *The Permanent Court of International Justice* (Geneva, 1921), p. 6.

¹¹ See David Hunter Miller, *The Drafting of the Covenant* (New York, 1928), vol. 1, p. 13 and also vol. 2, p. 8.

¹² See *ibid.*, vol. 1, pp. 61–4, 67 and 69 and also vol. 2, pp. 234, 265–6, 321–2 and 348–9.

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so with the words '[a] living thing is born';¹³ the same words fitted the Permanent Court. Advisory jurisdiction was not a part of the draft until a proposal to this effect was agreed upon at a meeting between President Wilson and Lord Cecil on 18 March 1919.¹⁴ There was some effort not to allow this jurisdiction to be confused with so-called 'obligatory' or 'compulsory' jurisdiction.¹⁵

It was within the framework of Article 14 that the Statute of the Permanent Court was drawn up, initially under the guidance of a specific notion of adjudication that had been put well in the appendix to a memorandum of the Secretariat of the League of Nations. Referring to 'the Courts of Justice of the different countries', the Secretariat explained that 'arbitration is distinguished from judicial procedure in the strict sense of the word by three features: the nomination of the arbitrators by the parties concerned, the selection by these parties of the principles on which the tribunal should base its findings, and finally its character of voluntary jurisdiction'.¹⁶ In his report on the organisation

¹³ F. P. Walters, *A History of the League of Nations* (Oxford, 1952), p. 1.

¹⁴ Miller, *Drafting of the Covenant*, vol. 1, pp. 290, 297, 391 and 405–6 and also vol. 2, pp. 585, 662, 670 and 688. Cf. the French proposal, *ibid.*, vol. 2, pp. 348–9 and 353.

¹⁵ *Ibid.*, vol. 1, pp. 290, 379–80, 393, 413 and 416.

¹⁶ Advisory Committee of Jurists, *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice* (The Hague, 1920), p. 113; and also James Brown Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists* (Washington DC, 1920), pp. 12, 28, 46, 49, 68–9, 93–5, 99–100 and 137; B. C. J. Loder, 'The Permanent Court of International Justice and Compulsory Jurisdiction' (1921–2) 2 *BYIL* 6; Olaf Hoijer, *La Solution pacifique des litiges internationaux avant et depuis la Société des Nations* (Paris, 1925), pp. 480–2 and 496–7; Démètre Negulesco, 'La Jurisprudence de la Cour permanente de Justice internationale' (1926) 33 *RGDIP* 194 at 195 and 207; Åke Hammarskjöld in (1927) 33-*I Annuaire*, pp. 819 and 821; and Jean Garnier-Coignet, 'Procédure judiciaire et procédure arbitrale: étude de droit international positif' (1930) 6 *Revue de Droit International* 123 at 146. Cf. Antonio Sanchez de Bustamante y Sirvén, *The World Court* (New York, 1925), pp. 151–4; Max Huber in (1927) 33-*I Annuaire*, p. 762, note 1; John Bassett Moore, 'General Introduction' and 'Notes on the Historical and Legal Phases of the Adjudication of International Disputes' in John Bassett Moore (ed.), *International Adjudications Ancient and Modern: History and Documents, Modern Series* (New York, 1929), pp. xv and xxxviii; Oppenheim/Lauterpacht, *International Law*, vol. 2, pp. 22–3, 45 and 88–9; and Manley O. Hudson, *International Tribunals: Past and Future* (Washington DC, 1944), p. 100. In 1924, three Protocols entered into force which in Articles 12, 13 and 15 of the Covenant substituted 'arbitration or judicial settlement' for 'arbitration': cf. Paul De Vineuil, 'The Permanent Court of International Justice and the Geneva "Peace Protocol"' (1925) 17 *Rivista* 144 at 148–50; Åke Hammarskjöld, 'The Permanent Court of International Justice and its Place in International Relations' (1930) 9 *International Affairs* 467 at 472; and Åke Hammarskjöld, 'International Justice' in League of Nations, *Ten Years of World Co-operation* (London, 1930), p. 125 at p. 139.

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of a Permanent Court of International Justice submitted to the Council of the League of Nations at its second session in February 1920, Léon Bourgeois wrote: 'In addition to national Courts of Law, whose duty it is to administer the laws of each State within its territorial limits, there is room for an international tribunal entrusted with the important task of administering international law and enforcing among the nations the *cuique suum* which is the law which governs human intercourse'.¹⁷

In early 1920, the Council of the League of Nations appointed the ten members of the Advisory Committee of Jurists to formulate the first draft.¹⁸ The Advisory Committee was assisted by the Under-Secretary-General of the League of Nations, Dionisio Anzilotti, and a young member of the Secretariat, Åke Hammarskjöld (who had drafted the appendix just quoted).¹⁹ On 24 July 1920, the Advisory Committee adopted a draft-scheme which was in accordance with the specific notion of adjudication set out in the Secretariat's memorandum. Of course, the draft-scheme itself was to become a binding code of procedure, also regulating, in what became Article 38, the law to be applied. In addition, the draft-scheme contained provisions on the election of judges and compulsory jurisdiction, according to which a state should be capable of bringing a case against another state without the latter having to consent to the specific proceedings.

Thus, the Advisory Committee had succeeded in settling the issue of electing the judges.²⁰ There was to be a general election every ninth year. The candidates would be nominated by the members of the Permanent Court of Arbitration divided into 'national' groups, while the judges were elected jointly by the Council and the Assembly of the League. On Elihu Root's initiative, and inspired by the bicameral legislative process in the United States,²¹ the draft-scheme struck a balance between recognising the privileged status of the Great Powers, which then dominated the Council, and observing a principle of sovereign equality that was the institutional philosophy of the Assembly. After much debate, the Advisory Committee also adopted provisions on judges *ad hoc*.²² A party to a

¹⁷ *Procès-verbal of Council 1920-5*, p. 5.

¹⁸ On the work of the Advisory Committee, see Ole Spiermann, "'Who Attempts Too Much Does Nothing Well': The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice' (2002) 73 *BYIL* 187.

¹⁹ Van Hamel's note, 14 April 1920, League of Nations Archives 21-3833-859.

²⁰ Advisory Committee, *Procès-verbaux*, pp. 101-66.

²¹ *Ibid.*, pp. 108-9.

²² *Ibid.*, pp. 528-39, 575-7 and 720-2; and see Spiermann, 'Advisory Committee', pp. 230-5.

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dispute before the Permanent Court which did not have a judge of its nationality on the bench would be allowed to choose a person to sit as a judge *ad hoc*. The Dutch member, B. C. J. Loder, had been opposed on principle because, in his view, the institution of judges *ad hoc* ‘involved the idea of arbitration instead of justice’; he was criticised, however, by the President of the Advisory Committee, Baron Descamps, for having ‘confused national and international legal organisations; a complete analogy between these two organisations could not be established’.²³

The members of the Advisory Committee disagreed as to whether every good national judge would make a good international judge.²⁴ There would not seem to have been an exact notion of the international judge; rather, they were to be moulded from national lawyers, and to distinguish themselves from the latter, as the Permanent Court began its work. In the report of the Advisory Committee, it was stated that ‘there will be, besides Jurisconsults, great judges, who may have only encountered questions of International Law indirectly or rarely during their careers’, the focus being on ‘those judges most capable of rising above the level of national justice to international affairs’.²⁵ According to Bourgeois, ‘the Court will contain representatives of the different judicial systems into which the world is divided and . . . the judgments of the Court will therefore be the result of the co-operation of entirely different thought and systems’.²⁶

While national lawyers may have agreed, broadly speaking, on which disputes and questions were suitable for submission to an international court, and by implication also on the scope of international law, their expectations as to which solutions and answers were correct and their understanding of the content of international law would almost unavoidably have been coloured by national tendencies and traditions. It had been taken for granted when preparing the draft-scheme that ‘it would be one of the Court’s important tasks to contribute, through its jurisprudence, to the development of international law’.²⁷ President

²³ Advisory Committee, *Procès-verbaux*, pp. 531 and 532–3, respectively.

²⁴ Doubts were expressed by several members: see *ibid.*, pp. 448 (Ricci-Busatti), 449 (Descamps), 553 (Lapradelle) and 611 and 645 (Altamira), which should be contrasted with the views of Phillimore and Root, *ibid.*, pp. 191 and 448, respectively; see also Scott, *Project of a Permanent Court*, pp. 26 and 51.

²⁵ Advisory Committee, *Procès-verbaux*, pp. 695 and 707.

²⁶ *Procès-verbal of Council 1920–10*, p. 175.

²⁷ Advisory Committee, *Procès-verbaux*, pp. 534 and 695; and Scott, *Project of a Permanent Court*, pp. 68–9, 128 and 137; Jean Morellet, *L’organisation de la Cour permanente de Justice internationale* (Paris, 1921), pp. 28–9 and 135; Elihu Root, ‘The Permanent Court of

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Loder subsequently referred to 'the fact that it was the duty of the Court to build up international jurisprudence',²⁸ while in a pamphlet published by the League of Nations it was noted that '[i]t is for the Court itself to make out what is international law, and it is in this domain that the jurisprudence of the Court will have its greatest importance as a means of codifying the law of nations'.²⁹ In the words of one enthusiastic commentator: 'La jurisprudence de la nouvelle Cour permanente, composée de magistrats indépendants et compétents, pourra aussi exercer une influence très utile et féconde sur l'évolution du droit international. L'idée est ancienne, mais sa réalisation est nouvelle.'³⁰

The subject of compulsory jurisdiction had caused the Advisory Committee the most trouble.³¹ It was generally agreed that the jurisdiction of the Permanent Court should be limited to disputes between states.³² The outstanding question was whether, by becoming a party to the Court Protocol to which the Statute was appended, a state accepted the Permanent Court's jurisdiction in its future disputes, or at least in some types of dispute, so that unlike arbitration a dispute could subsequently be brought before the Permanent Court unilaterally by one state without the consent of the other party or parties. The view prevailed in the Advisory Committee that it had to start not with Article 14 of the Covenant but at the point where the work of the Second Peace Conference had come to a standstill.³³ Article 34 of the draft-scheme entrusted

International Justice' (1923) 17 *American Society Proceedings* 1 at 6; D. G. Nyholm, 'La Cour permanente de Justice internationale' in P. Munch (ed.), *Les Origines et l'oeuvre de la Société des Nations* (Copenhagen, 1924), vol. 2, p. 241 at pp. 254–5; and A. de Lapradelle, *Influence de la Société des Nations sur le développement du droit des gens* (Paris, 1932–3), 1re leçon, p. 21. In the same token, it should be stressed that the Advisory Committee had submitted a proposal on Conferences for the Advancement of International Law: see Advisory Committee, *Procès-verbaux*, pp. 497, 519–20 and 747–8; and Spiermann, 'Advisory Committee', pp. 227–8 and 252–3.

²⁸ Series D No. 2 (1922) at 89 and see also Advisory Committee, *Procès-verbaux*, p. 294.

²⁹ League of Nations, *Permanent Court*, pp. 10 and 17 (which publication was in substance a reproduction of a paper prepared by Åke Hammarskjöld: see *ibid.*, p. 3, note 1). It was stated explicitly that the rejection of the proposal on Conferences for the Advancement of International Law 'largely increases the importance of the rôle of the Court in creating International Law by its jurisprudence': *ibid.*, p. 17. See also Bourgeois in *Procès-verbal of Council 1920-8*, p. 165.

³⁰ Hoijer, *Solution pacifique*, p. 515.

³¹ Advisory Committee, *Procès-verbaux*, pp. 224–93, 541–4, 582–3 and 651–2 and see Hammarskjöld to Van Hamel, 15 July 1920, Hammarskjöld papers 480.

³² Advisory Committee, *Procès-verbaux*, pp. 204–17.

³³ *Ibid.*, pp. 15–19 (Descamps) and also, in particular, *ibid.*, pp. 43 and 696–7 and Advisory Committee, *Documents*, pp. 7–23 and 113–19. See also Spiermann, 'Advisory Committee', pp. 197–8 and 201.

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the Permanent Court with ‘jurisdiction (and this without any special convention giving it jurisdiction) to hear and determine cases of a legal nature’. Such compulsory jurisdiction had not, however, been approved by all members of the Advisory Committee. The notion failed the test of realities in the mind of the Japanese member, Minéitcirô Adatci,³⁴ and shortly afterwards it was turned down in the Council as being contrary to Article 14 of the Covenant.³⁵ As Professor Manley O. Hudson put it, compulsory jurisdiction ‘was the outstanding feature of the draft-scheme to occupy the attention of the Council and the Assembly’.³⁶ The Council’s amendment, a step away from adjudication and back towards arbitration, was publicly regretted by leading members of the Advisory Committee, namely B. C. J. Loder and Lord Phillimore.³⁷ Similar criticism was raised in the Third Committee of the First Assembly, to which the Council referred the draft Statute. But compulsory jurisdiction made no re-entry into the Statute, which was appended to the Protocol of Signature Relating to the Statute of the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations signed on 16 December 1920. While the final Article 34 of the Statute provided that ‘[o]nly States or Members of the League of Nations can be parties in cases before the Court’, according to Article 36:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force.

The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

³⁴ *Ibid.*, pp. 541–3.

³⁵ See Annex 118 in *Procès-verbal of Council 1920-10*, p. 161 and also *ibid.*, p. 21.

³⁶ Hudson, *Permanent Court*, p. 191; and see also League of Nations, *Permanent Court*, p. 10.

³⁷ See Loder, ‘Permanent Court’, pp. 20–6; and Lord Phillimore, ‘The Third Committee: The Permanent Court of International Justice’ in Lord Robert Cecil and Lord Phillimore (eds.), *The First Assembly* (London, 1921), p. 147 at pp. 167 and 170; and also Phillimore in *Hansard*, HL, vol. 69, col. 107, 16 November 1927.

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The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Consequently, states could give their consent to the Permanent Court's contentious jurisdiction in two different forms. As laid down in the first paragraph, a so-called 'Special Agreement' could be concluded with particular reference to submitting an existing dispute to the Permanent Court, or the dispute could fall within a generally defined category of disputes contained in a compromissory clause which had been agreed to beforehand, often as part of a larger treaty regime. The broadest compromissory clause was the so-called 'Optional Clause' contained in the second paragraph.³⁸ It was a compromise reached in the First Assembly following a Brazilian delegate's fierce criticism of the decision depriving the Permanent Court of its compulsory jurisdiction.³⁹ The Optional Clause was not made an integral part of the Statute and so did not provide for compulsory jurisdiction proper.

The Statute contained no provisions on the Permanent Court's advisory jurisdiction expressly provided for in Article 14 of the Covenant. A provision drafted by the Advisory Committee developing the distinction

³⁸ Technically speaking, the Optional Clause was Part B of the Court Protocol of 16 December 1920, in essence a reproduction of Article 36(2) of the Statute: 'The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory, *ipso facto* and without special convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court under the following conditions: . . .'. As there is no strict requirement as to form, it would seem permissible to use the expression 'Optional Clause' when referring to Article 36(2). Cf. Hudson, *Permanent Court*, pp. 451–2; and Shabtai Rosenne, *The Law and Practice of the International Court, 1920–1996* (The Hague, 1997), p. 728, but see already *Case concerning the Legal Status of the South-Eastern Territory of Greenland*, Series A/B No. 48 (1932) at 270 and *The Electricity Company of Sofia and Bulgaria* (Preliminary Objection), Series A/B No. 77 (1939) at 80.

³⁹ See *Records of Assembly: Committees* 1920, pp. 406–8 and 617. The proposal to insert provisions concerning compulsory jurisdiction in 'a special agreement' or a separate 'convention' or 'proposal' had already been advanced in a report submitted by the Italian Government to the Council, see *ibid.*, p. 498, and by Ricci-Busatti, who had not looked in vain for support: *ibid.*, pp. 380–1. The proposal was possibly inspired by the Swiss Government's amendment submitted in 1907 to the Second Peace Conference: see *Records of Assembly: Plenary* 1920, pp. 440 (Hagerup) and 490 (Motta) and also *Proceedings of the Conference of 1907*, vol. 2, pp. 66–7, 468–9, 473, 492 and 881–2; Max Huber, *Denkwürdigkeiten, 1907–1924* (Zürich, 1974), pp. 42–4 and 173–4; and Max Huber, 'Schiedsrichterliche und richterliche Streiterledigung: Ein Überblick' (1961/66) 56 *Die Friedens-Warte* 105 at 110 and 114.