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Ole Spiermann

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International Legal Argument in the Permanent Court of International Justice

The Rise of the International Judiciary

The International Court of Justice at The Hague is the principal judicial organ of the United Nations, and the successor of the Permanent Court of International Justice (1923–46), which was the first real permanent court of justice at the international level. This book analyses the ground-breaking contribution of the Permanent Court to international law, in terms of both judicial technique and the development of legal principle.

The book draws on hitherto unpublished archival material left by judges and other persons involved in the work of the Permanent Court, giving fascinating insights into many of its most important decisions and the individuals who made them (Huber, Anzilotti, Moore, Hammerskjöld and others). At the same time, it examines international legal argument in the Permanent Court, basing its approach on a developed model of international legal argument that stresses the intimate relationships between international and national lawyers and between international and national law.

OLE SPIERMANN is Lecturer in International Law at the University of Copenhagen. He specialises in international law and international dispute settlement. He is a member of the Executive Council of the International Law Association as well as the ILA Committees on International Commercial Arbitration and Foreign Investment. Dr Spiermann is an associate with Jonas Bruun Law Firm, Copenhagen.

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The future will be ours.

B. C. J. Loder, 1920

I should like to compare our decisions to ships which are
intended to be launched on the high seas of international
criticism.

Max Huber, 1927

The drawback of an experiment, carried on on this scale, is
that it must succeed.

Åke Hammarskjöld, 1935

The Permanent Court of International Justice was the most
important link.

J. Gustavo Guerrero, 1946

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Foreword

From the point of view of international courts and tribunals we live in paradoxical times. There is more activity than ever in the professional memory of the present generation of international lawyers. Some at least of the cases – not only before the International Court but also (and perhaps even more so) before the WTO Dispute Settlement Body, the various human rights and international criminal courts and the *ad hoc* tribunals and commissions – are of considerable importance. The cumulation of cases is developing the jurisprudence of specific areas of international law in a rapid way. And yet there is a pervasive sense that the whole ‘system’ is insecure, uncertain in its constitutional underpinnings, erratic in the political support for it and largely unrelated to key issues facing the world at this time.

This being so, a study of the foundations of international decision-making by the first permanent international court is of renewed interest. The Permanent Court of International Justice was not seen by its members or by governments as a prelude or an overture to something else; it was the beginning of a distinctive and permanent institution. It faced its own problems of the elaboration of international judicial technique and the development of the law amidst political uncertainty and a wavering mandate. Dr Spiermann clearly identifies the focus of the work as ‘the use of international legal argument outside the *Buchrecht*, that is, in practice’. Its significance for us is enhanced given the close continuity between the Permanent Court and the International Court, not just in terms of formal rules (the Statute of the new Court being a virtual copy of the old) but also in terms of the practice – the ‘received stock of concepts’ and techniques which were not received from elsewhere but had to be invented, the ways of handling advisory and contentious cases that developed as a result. These emerged from the *practice* of the

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Permanent Court. How they did so, and the tensions and disagreements faced by the participants in the process, form the core of this splendid book.

These days, our expectations of doctoral theses have been lowered to fit the one size that funding bodies will allow. They are in many cases rather apprentice works than master pieces even in the original sense of that term. But Dr Spiermann's work transcends the limits of the genre, and will be of permanent value. His careful account, based on substantial archival research and on new sources of insight, permits an evaluation of the Permanent Court which is both balanced and positive. At the same time, practice is related to theory: the work makes a contribution to thinking about the underpinnings of international legal reasoning and its relation to the law we are all first taught, national law from one or another country and the accompanying national legal traditions. For beyond the historical account of the Permanent Court there is also a subtle theory about the 'sources' of international law, which has sprung, as Dr Spiermann argues, from '[t]he national lawyer's need for international law'. The dynamic between international and national here is thoughtfully analysed, even if we may end where we began with a conviction that the traditions of legal thought and process intersect and cannot be captured by dualistic categories.

Dr Spiermann is to be warmly congratulated. Hereafter the history of the Permanent Court will not be able to be written except by reference to this work.

James Crawford
Lauterpacht Research Centre for International Law
University of Cambridge
28 February 2004

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Acknowledgments

This book is an extended and thoroughly revised version of a thesis submitted to the University of Cambridge in 1999 for the degree of Doctor of Philosophy. It represents the outcome of years of contemplation that began way back in 1993 in Copenhagen. The bulk of the work was carried out during my years in Cambridge, beginning in 1995 when I was enrolled in the LLM programme in international law. I stayed on for another three years as a doctorate student in that unique atmosphere of international legal research that I had come to identify with, first of all, Professor James Crawford and Professor Philip Allott.

Professor Crawford was the supervisor of my LLM thesis, 'Mrs Butterfingers' Essay on Sovereignty'. He continued as my supervisor for the first two years of my PhD research, and he also kindly helped me in the last intense weeks before submission of the thesis, and again before submission of this manuscript. His broadmindedness, efficiency and general interest in legal research provided an exceptional atmosphere in which to explore new ideas. In my last year of research, when Professor Crawford was on sabbatical, Professor Vaughan Lowe took over the supervision of my research. Professor Lowe introduced me to the welcome, though onerous, concept of archival research, which soon took me around Europe and to the United States. I have consistently been aware of what a privilege it has been to have such excellent scholars to guide me. I give them my warmest thanks.

I also thank my examiners, Professor Philip Allott and Professor John G. Merrills, for valuable criticism. The viva took place in the same rooms in Trinity College, Cambridge in which I had originally discussed the prospects of a doctorate with Professor Allott. I also wish to thank Professor Martti Koskenniemi, who read the revised manuscript of this book and provided me with much appreciated comments.

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It is with happiness that I reminisce on my visits to the Archives du Ministère des Affaires Etrangères at the Quai d'Orsay, the Bundesarchiv in Koblenz, the Harvard Law School Library in the 'other' Cambridge, the Kungliga biblioteket in Stockholm, the Library of Congress in Washington DC, the Nationaalarchief in The Hague, the National Archives and Records Administration in Maryland, the Peace Palace Library in The Hague, the Public Record Office in London, the Rigsarkivet in Copenhagen, the Universitäts- und Landesbibliothek Münster and the Zentralbibliothek in Zurich. Thanks also to the staffs at the League of Nations Archives in Geneva, the Squire Law Library in Cambridge, the Yale University Library in New Haven, the Memorial Hall of the M. Adachi Foundation in Kyoto and the Minnesota Historical Society in St Paul.

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The present work is dedicated to Karina, who I thank last and most.

Copenhagen
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