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Professor Walther Schücking at the Permanent Court of International Justice

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Abstract

In 1930, it was seen as critical by many to have a German jurist elected to the bench of the Permanent Court of Justice, and this was indeed achieved by the election of Walther Schücking. It may seem a paradox that in the following years where, in many cases, the Permanent Court exercised self-restraint and embraced arguments based on state sovereignty, probably the greatest supporter of notions of international organization and community to be associated with the work of the Permanent Court, namely Walther Schücking, occupied a permanent position on the bench. But then his 'optimism' was simply an extrapolation of the state on to the international level, leaving key values such as state sovereignty essentially unaffected. The interest in Schücking's contributions to the work of the Permanent Court lies not least in the fact that, even today, many lawyers approach international law in manners similar to his.

1 The *Zukunftsjuristen*

Prior to his election to the Permanent Court of International Justice in 1930, Walther Schücking was well known among German-speaking international lawyers as an ardent supporter of the notion of international organization.[1] In Schücking's own words, *'[w]o sind denn diese Zukunftsjuristen des Völkerrechts? Ich kenne an allen deutschen Universitäten nur einen, nämlich den Professor Walther Schücking in Marburg*'.[2] In a

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1 See Schücking, 'Die Organisation der Welt' in W. van Calker *et al.* (eds), *Staatsrechtliche Abhandlungen: Festgabe für Laband* (1908), at 533 and also Potter, 'Origin of the Term "International Organization"', 39 *AJIL* (1945) 803, at 805.

2 W. Schücking, *Der Staatenverband der Haager Konferenzen* (1912), at 8, note 1: '[w]here are these international jurists who have their eyes fixed on the future? In all the German universities I know of but one, namely, Professor Walther Schücking of Marburg'.

lawyer's version of *chrysopoeia*, or transmutation into gold, Schücking gave to the Hague Peace Conferences the name of a '*Weltstaatenbund*',[3] while the Permanent Court of Arbitration made him submit that '*[d]er stolze Friedenspalast, der dort von tausend fleißigen Händen aufgeführt ist, ist nur das Symbol einer neuen Zeit*'.[4] Commenting on the Covenant of the Legal of Nations, Schücking argued that '*[l]'époque de désorganisation de la communauté des États européens . . . touche à sa fin*',[5] the Statute of the Permanent Court representing, among other texts, '*un développement du droit constitutionnel*'.[6]

These statements indicated a gap between practice and theory difficult to bridge, not least in the first part of the 20th century. In 1919, Schücking had attended the Paris Peace Conference without being able to impress the diplomats with his lofty ideals.[7] His seat in the *Reichstag* had not resulted in him gaining experience with the League organs. Instead, his enthusiasm about the League found scholarly expression in the commentary on the Covenant which he published with Professor Hans Wehberg.[8]

This contribution seeks to introduce readers to Schücking's major confrontation with international law as practice, i.e., his time as a judge at the Permanent Court of International Justice. The Permanent Court 'entered upon its duties at The Hague on February 15th, 1922'[9] as a groundbreaking institution that had to build its own reputation. Its decisions did not immediately attract the attention of academics, nor were they necessarily applauded by diplomats and statesmen. Today, the legacy of the Permanent Court rests not least in international law being 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.

Walther Schücking sat on the Permanent Court twice in the 1920s as a judge *ad hoc* appointed by Germany, first in the maiden contentious case before the Permanent Court, *The Wimbledon*, and later in another contentious proceeding concerning German–Polish relations in Upper Silesia. At the general election on 25 September 1930, Schücking was elected to a permanent seat on the bench. Schücking referred to his election to the Permanent Court in the following way:

> Dieser äussere Erfolg meiner Lebensarbeit kommt mir noch immer ganz märchenhaft vor, denn leider Gottes ist es in dieser Welt doch keineswegs die Regel, dass die Pioniere einer Idee

[3] See Schücking, *supra* note 1, at 610 and also Schücking, *supra* note 2.

[4] *Ibid.*,at p. ix: '[t]he stately Peace Palace, which has been built there by a thousand industrious hands, is merely the symbol of a new age'.

[5] Schücking, 'Le développement du Pacte de la Société des Nations', 20 *RdC* (1927) 353, at 354 and also 368–369, 379–380, and 397–398. Cf. *ibid.*, at 433 and 450.

[6] *Ibid.*, 360 and see *ibid.*, 362–363.

[7] Cf. Schücking, 'Der Völkerbundsentwurf des Deutschen Regierung', in P. Munch (ed.), *Les origines et l'oeuvre de la Société des Nations* (1923), i, at 138; for the text of the German draft see D. Hunter Miller, *The Drafting of the Covenant* (1928), ii, at 744–761.

[8] W. Schücking and H.Wehberg, *Die Satzung des Völkerbundes* (2nd edn, 1924). It should be noted, however, that, like most Germans, Schücking recommended a revision of the Covenant: see, e.g., W. Schücking, *Die Revision der Völkerbundssatzung im Hinblick auf den Kelloggpakt* (1931), at 40.

[9] *Case of the SS Wimbledon*, PCIJ Series A No. 1 (1923), at 20.

> in ihrem Leben auch schliesslich den äusseren Erfolg davon tragen und dass ihr Idealismus sozusagen mit harten Gulden baren Geldes bezahlt wird, von allen ideellen Werten des Erfolges abgesehen.[10]

As a judge *ad hoc*, Schücking had gained useful experience and rather firm views as to the composition of the bench. In his view, the ideal was to have on the bench persons '*die sowohl eine ausgedehnte wissenschaftliche Kenntnis des Völkerrechts wie eine praktische Erfahrung in bezug auf aussenpolitische Dinge haben*'.[11] Looking back on the Permanent Court as it was composed in the 1920s, it was Schücking's impression '*dass die richterlichen Ziviljuristen für den Gerichtshof viel gefährlicher sind als die Professoren, weil sie weder aus praktischer politischer Tätigkeit noch aus fachwissenschaftlich völkerrechtlicher Vergangenheit eine Ahnung von den Problemen haben, über die sie zu Gericht sitzen*'.[12] In his view, judges with judicial experience were indispensable, yet it would be disastrous to repress the professors (*die Berufsgelehrten*). He added that:

> *Der sicherste Beweis liegt in den Erfahrungen, die man mit der Präsidentschaft gemacht hat. Der erste Präsident Loder ist an sich ein glänzender Jurist gewesen, der als solcher deshalb auch aus dem Advokatenstande in das höchste Tribunal in Holland übernommen worden war. Aber die Führung seiner Präsidentschaft ist nicht nur aus Gründen seiner allzu autoritativen Formen sondern auch deshalb im Gerichtshof auf erbitterten Widerstand gestossen, weil nicht alle Richter ihm die nötige Sachkunde zubilligen konnten. Gegenwärtig wird der Gerichtshof im stärksten Maße von 2 Persönlichkeiten dirigiert, die beide Berufsgelehrte gewesen sind, nämlich Anzilotti und Huber. Bei der gegenwärtigen Zusammensetzung des Gerichtshofs könnte ich mir überhaupt nicht denken, wie dieses Tribunal nur einigermaßen funktionieren sollte, wenn diese beiden Persönlichkeiten nicht vorhanden wären, obgleich ich auch Anzilotti ein wenig kritisch gegenüberstehe, weil er bei reichem wissen und glänzendem Scharfsinn fraglos sehr zu Spitzfindigkeit neigt.*[13]

As a theorist, Schücking approached international law from an 'optimist' point of view that has dogged internationalists throughout history, considering an ever closer approximation to national systems as the evolutionary logic of any international system.

[10] Reproduced in O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (2005), at 390: '[t]his outward success of my life work still strikes me as something fabulous and unreal, as it is unfortunately not at all the way of this world that the pioneers of an idea reap its outward success in their own life time and that their idealism is repaid, as it were, in hard gold, disregarding for the moment the non-material value of the success'.

[11] See *ibid.*, at 295: 'who have both extensive scientific knowledge of international law and practical experience of international affairs'.

[12] *Ibid.*: 'that judges from civil law are much more dangerous for the Court than the professors, as they have neither past practical political occupation, nor scientific work in international law which could give them an idea of the problems on which they sit in judgment'.

[13] *Ibid.*, at 295–296: '[t]he best proof lies in the experience that one has had with the presidency. The first president, Loder, was actually a brilliant jurist; therefore, he was also admitted from the Bar to the highest court in the Netherlands. However, his presidency met with fierce opposition on the bench not only on account of his all too authoritarian style but also because not all judges believed that he had the expertise needed. At present, the Court is forcefully presided over by two personalities, who have both been professors, namely Anzilotti and Huber. In its current composition, I could not at all imagine how this tribunal should function, even just reasonably well, in the absence of these two personalities, although I am also a little critical about Anzilotti. While he has profound knowledge and a brilliant mind, it is beyond question that he is inclining towards being too subtle.'

In general terms, and though there are many variations on the 'optimist' theme, there are two sides to this approach. On the one hand, the international law of the past tends to be disparaged, or at least not as highly regarded as that of the future. It is often identified with general international law. On the other hand, the international law of the future is associated with the highest of aspirations. Each period of the 20th century has known its modish writers who tried to look behind state sovereignty, searching for a better, more 'legal' code of international law. On this view, rather than being profoundly and richly influenced by its history, international law is subject to a rapid evolution that makes the past look uninteresting. It is assumed that international law will take on many of the characteristics of national law. The upshot of 'the international community' is certain aspects of international relations that remind the internationalist of a 'community', that is, a model state. Although most 'optimists' would, like Schücking, refrain from labelling the international community a state, there is hardly any possible root for the notion of an international community other than one's conception of a national community, and perhaps various sub-communities, those being the legally relevant communities known. By implication, the notion of an international community easily becomes a reflection of the conception of the (world) state and the key value associated with it, i.e., state sovereignty.

This was clearly brought out by Schücking's contributions as a judge, among which four examples have been chosen for this introduction to his judicial career. Schücking was only too often in opposition to the international lawyers' approach to international law that had been framed by majorities of the Permanent Court in the 1920s, an approach not confined to national legal reasoning and values such as state sovereignty.

2 *The Wimbledon*

The first judgment of the Permanent Court was delivered in *The Wimbledon*, a politically sensitive case between the Principal Allied and Associated Powers and Germany. The case arose out of an incident which took place in March 1921 at the western approach to the Kiel Canal. German authorities had refused the *S.S. Wimbledon*, flying the British flag, access to the Kiel Canal on its way to Danzig because it carried weapons intended for a belligerent (Poland technically being in a state of war with Russia). The four Principal Allied and Associated Powers, France, Italy, Japan, and the United Kingdom, instituted proceedings before the Permanent Court under Article 386(1) of the Versailles Treaty.[14] They contended that Germany, despite being a neutral in

[14] According to this provision, '[i]n the event of violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these articles, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations'. The Permanent Court pronounced that '[i]t will suffice to observe for the purposes of this case that each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags': *Case of the SS Wimbledon, supra* note 9, at 20. The Polish Government intervened under Art. 63 of the Statute: see *ibid.*, at 13.

the Russo-Polish war, had been under a treaty obligation to give free access to the *S.S. Wimbledon*. This contention was based on Article 380 of the Versailles Treaty, providing that '[t]he Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality'.

As there was no judge of German nationality on the bench, Germany had appointed Walther Schücking as judge *ad hoc* for these proceedings. Ultimately, Germany did not prevail and Judge *ad hoc* Schücking, in his début on the bench, appended a dissenting opinion, just like Judges Max Huber and Dionisio Anzilotti. When assessing Judge *ad hoc* Schücking, one ought to bear in mind that, as evidenced in the first annual report of the Permanent Court, his then inadequate English and French language skills had prevented him from participating in the oral deliberations.[15]

In the *motifs* of the Permanent Court's judgment supported by a majority of nine, the substantive argument began as follows:

> The Court considers that the terms of article 380 are categorical and give rise to no doubt. It follows that the canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of states other than the riparian state is left entirely to the discretion of that state, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world.[16]

This opening hinted at the basic tension that divided the judges in *The Wimbledon*. On the one hand, there was the case of textual treaty interpretation and a 'clear' text. Before the Permanent Court, the Principal Allied and Associated Powers had relied on Vattel's first principle of treaty interpretation, according to which 'it is not permissible to interpret what has no need of interpretation'.[17] The dissenters agreed that if a literal interpretation was given to Article 380 the German authorities had been under an obligation to give access to the *S.S. Wimbledon*.[18] However, as the above-quoted passage from the *motifs* indicates, the 'clear' text derogated from state sovereignty under which the use of 'an internal and national navigable waterway' was 'left entirely to the discretion of' Germany, a sovereign state.

Judge *ad hoc* Schücking's dissenting opening was rooted in theory. It opened in the following way:

> The right to free passage through the Kiel Canal, in my opinion, undoubtedly assumes the form of a *servitus juris publici voluntuaria*. This conception, which for centuries has proved extremely useful in international law, is, it is true, at the present time the subject of controversy amongst writers on international law, but its importance has in fact been increased by the peace treaties

[15] See [1922–25] PCIJ Series E No. 1, at 171; M. Huber, *Denkwürdigkeiten, 1907–1924* (1974), at 279; and also van Eysinga, 'Walther Schücking als internationaler Richter', 35 *Die Friedens-Warte* (1935) 213, at 214; and Hammarskjöld, 'Persönliche Eindrücke aus Walther Schückings Richtertätigkeit', 35 *Die Friedens-Warte* (1935) 214, at 216.

[16] *Supra* note 9, at 22.

[17] E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (Washington, DC, 1916), at 199 (originally published 1758) as quoted in *The Wimbledon*, PCIJ Series C No. 3 (add.), at 68.

[18] See *supra* note 9, at 39 (Judges Anzilotti and Huber) and 44 (Judge *ad hoc* Schücking).

> following the World War. For in these treaties many legal situations have been created which can be placed in no other category than that of servitudes of international law.[19]

This line of reasoning reflected a certain willingness on Schücking's part to subject the will of contracting parties to dictates of legal theory. Judge *ad hoc* Schücking's approach was markedly different from that of the other dissenting opinion submitted by Judges Anzilotti and Huber, both with an academic past, according to which 'for the purpose of the interpretation of contracts which take the form of international conventions, account must be taken of the complexity of interstate relations and of the fact that the contracting parties are independent political entities'.[20] In this connection, Huber later said about Judge *ad hoc* Schücking, '*[t]rotz seiner parlamentarischen Tätigkeit war Schücking seiner geistigen Art nach durchaus Professor, und zwar von ziemlich stark doctrinärer Art*'.[21]

Judge *ad hoc* Schücking's approach gave weight to state sovereignty as evidenced by the passage that immediately followed:

> According to the teaching of writers on international law, all treaties concerning servitudes must be interpreted restrictively in the sense that the servitude, being an exceptional right resting upon the territory of a foreign State, should limit as little as possible the sovereignty of that State.[22]

This was not the only argument invoked by Judge *ad hoc* Schücking in justifying Germany's measures despite the text of Article 380, yet it was the first argument.

Schücking also invoked principles of neutrality as part of general international law.[23] International law acknowledged various conflicts of interests between belligerents and non-belligerents for which common solutions were needed. The traditional position may be summarized in a formula balancing the interests of the various national sovereigns. So long as a non-belligerent does not seriously interfere with the activities or interests of a belligerent, for example by tolerating another belligerent's transport of military material across its territory, the neutral is entitled to have its territory and activities respected by the belligerents.

As hinted at in the opening of the *motifs*, the majority had not completely rejected as irrelevant the view advocated by Judge *ad hoc* Schücking that the text of Article 380 of the Versailles Treaty derogated from state sovereignty. According to the *motifs*, it was 'of a very controversial nature, whether in the domain of international law, there really exist servitudes analogous to the servitudes of private law', yet it did not reject the principle of restrictive interpretation articulated in the dissenting opinion of Judge *ad hoc* Schücking. According to the majority:

> the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which

[19] *Ibid.*, at 43.
[20] *Ibid.*, at 36.
[21] Huber, *supra* note 15, at 278–279.
[22] *Supra* note 9, at 43.
[23] *Ibid.*, at 45–47.

> produces such a limitation. But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.[24]

This was an empty gesture, of course, the Permanent Court having already held that the text was 'clear'.

The basic dilemma underpinning the *motifs* was different in kind: it had the form of a conflict between 'international engagements' undertaken towards some states as part of the Versailles Treaty, on the one hand, and obligations owed to other states under general international law, on the other. Being unwilling to settle for this conflict, the majority challenged the German Government's position in general international law, relying on 'the precedents' afforded by the Suez Canal and, in particular, the Panama Canal. The judgment drew heavily on the view of 'the United States and the nations of the world' regarding the obligations of the former as a neutral sovereign over the Panama Canal.[25] In conclusion, it was held that the two 'precedents' served to 'invalidate in advance' the application of arguments based on neutrality to the Kiel Canal.[26]

The dissenters happily commented on the Suez and Panama Canals, which they saw as being governed by special treaty regimes that were more explicit, and 'clear', on neutrality than the Versailles Treaty. In the same breath, the dissenters held that these regimes provided no precedent as to general international law. For his part, Judge *ad hoc* Schücking concluded that 'it would appear open to objection to apply *de plano* to the Kiel Canal conceptions of international law which have been developed in connection with the Suez and Panama Canals, when . . . the use only of this Canal has been internationalised'.[27]

According to Max Huber, substantial amendments to the *motifs* were adopted at the final reading of the draft.[28] This was possibly due to the criticisms raised in the dissenting opinions. The joint dissenting opinion of Judges Anzilotti and Huber only dealt with the Suez and Panama 'precedents'. The *motifs*, however, at least in their final form, fused the neutrality argument based on the two 'precedents' with an argument concerning territorial sovereignty. This second argument was entertained only by Judge *ad hoc* Schücking, and only in a somewhat haphazard manner, stating that '[t]he existence of such a consensus of opinion . . . does not seem to me to be sufficiently proved'.[29] Yet it was a crucial argument. It buttressed the majority's overall reasoning, adding immediately after the neutrality argument that the Suez and Panama Canals were:

> merely illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such

[24] *Ibid.*, at 24–25.
[25] *Ibid.*, at 27–28.
[26] *Ibid.*, at 28.
[27] *Ibid.*, at 46, and see also Judges Anzilotti and Huber, *ibid.*, at 39–40.
[28] Huber, *supra* note 15, at 287.
[29] *Supra* note 9, at 45–46.

> waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.[30]

The effect of the Permanent Court's view was clear as it ruled that 'the passage of neutral vessels carrying contraband of war is authorised by Article 380, and cannot be imputed to Germany as a failure to fulfil its duties as a neutral'.[31] Article 380 being part of a regime with the 'objective' character that the entire territorial setting is vested with under general international law, the corresponding rights of Russia under the law of neutrality were reduced accordingly, even though Russia was not a party to the Versailles Treaty. In the opening of its substantive reasoning, on holding that the status of the Kiel Canal had been changed from 'an internal and national navigable waterway' to 'an international waterway', the Permanent Court appeared to think of that change as an 'objective' fact, as opposed to the mere product of relational obligations and rights restricted to the parties to the Versailles Treaty.

3 Customs Union

Some years later, and shortly after Judge Schücking had become a permanent member of the bench, the Permanent Court heard the most politically sensitive dispute to be referred to the Permanent Court. By 1931, the Great Depression had reached its peak. European statesmen remained incapable of quick action, while Germany and Austria planned to assimilate their tariff policies and enter into a politically sensitive customs union. The plan created considerable anxiety, especially within the French Government, as movements in both Germany and Austria worked towards full political union. On the initiative of the British Government, the Council requested an advisory opinion as to whether the planned customs union was compatible with the obligations undertaken by Austria in Article 88 of the Saint-Germain Treaty and in a Geneva Protocol of 1922 not to 'compromise' or 'threaten' its 'independence' without the consent of the Council. It was regarded as a case of urgency by all the governments involved, and also by the Permanent Court.

The *Customs Regime* opinion was a watershed in the history of the Permanent Court because it significantly damaged the Permanent Court's reputation. This was partly due to the obscurity of the *motifs*, although perhaps it was partly a consequence of a decline in enthusiasm among commentators and politicians for the institution as such.

Before the Permanent Court, the pleading governments advanced some highly principled arguments as to Austria's independence. Representing the German Government, Professor Viktor Bruns drew a clear distinction between independence and sovereignty, where independence '*signifie que, dans le cadre de sa compétence, l'Etat agit par lui-même, par ses propres organes*'.[32] Bruns rightly criticized the French, Italian, and

[30] *Ibid.*, at 28.
[31] *Ibid.*, at 29–30.
[32] *Supra* note 17, at 227.

Czechoslovak Governments for overlooking that distinction in their written submissions.[33] On the other hand, acting on behalf of the French Government, Professor Basdevant took the view that the term 'independence' as employed in the two treaty texts had a wider meaning than according to general international law.[34]

On the bench, which consisted of all 15 ordinary judges,[35] the conceptual issue apparently raised some difficulty. Judge Schücking, for his part, gave the word 'independence' a very technical interpretation, which interestingly involved the principle that '*il faut interpréter les textes de manière à ne pas étendre les restrictions à la liberté d'action du débiteur au-delà du minimum encore compatible avec le texte*'.[36] Eventually, however, the three opinions to which the proceedings gave rise would seem to have followed Bruns, defining 'independence' in opposition to a state's being subject to another state (not to its being subject to international law).[37] Moreover, the crucial issue was not the meaning of 'independence' but whether this independence would be 'compromised' or 'threatened' by the planned customs union. On this point, the pleadings had been haphazard, almost as if the governments had been shy of the issue. The bench divided into three groups. Judge Schücking and six other judges signing the joint dissenting opinion essentially declined to calculate the dangers to Austria's independence. This was considered a 'political' question.[38] The dissenting opinion seemed to have been strongly influenced by Judges Hurst and Kellogg, with whom Judge Schücking has been said on this occasion to have co-operated.[39]

In contrast, the question of dangers to Austria's independence was explicitly addressed in the separate opinion that Judge Anzilotti appended, relying on considerations of 'a political and economic kind'.[40] Seven other judges reached the same conclusion as Judge Anzilotti, namely that the planned customs union would endanger Austria's independence. However, the *motifs* were marred by disagreements among the seven judges. While they opened by describing the position of Austria as 'a sensitive point in the European system' and 'an essential feature of the existing political

[33] *Ibid.*, at 219–237, referring to the various memoirs: *ibid.*, at 119–122 and 128 (French Government), 156–157 (Italian Government), and 166–167 (Czechoslovak Government); cf. *ibid.*, at 53 (German Government).

[34] *Ibid.*, at 394–395 and 399–406; see also *ibid.*, at 451 and 468.

[35] In an order, the Permanent Court had decided that there was no reason for the appointment of judges *ad hoc* by Austria and Czechoslovakia, since 'all governments which, in the proceedings before the Court, come to the same conclusion, must be held to be in the same interest for the purposes of the present case': *Customs Regime between Germany and Austria (Protocol of March 19th, 1931)*, PCIJ Series A/B No. 41 (1931), at 89–90.

[36] See Spiermann, *supra* note 10, at 318–319. For a similar view see the memorial submitted by the Austrian Government, PCIJ Series C No. 53, *supra* note 17, at 86–87. Wehberg quoted Schücking for having suggested that '*alle politischen Streitfragen*' should be submitted to arbitration and settled on the basis of '*Billigkeit*', see Wehberg, 'Das Gutachten des Weltgerichtshofs in der Zollunionsfrage', 31 *Die Friedens-Warte* (1931) 301, at 302.

[37] *Supra* note 35, at 45–46, 57, and 77.

[38] *Ibid.*, at 82 and also 75.

[39] See C.-B. Schücking, 'Walther Schücking: Ein Lebensbild' in Institut für Internationales Recht, *Fünfzig Jahre Institut für Internationales Recht an der Universität Kiel* (1965), at 174, 191.

[40] *Supra* note 35, at 68.

settlement',[41] the dangers to which Austria's independence was exposed were not elaborated on in public.

The *Customs Regime* opinion has generally been regarded as a misfortune for the Permanent Court.[42] Professor Hans Morgenthau was almost alone in seeing the opinion as an attempt to find a legal solution for a political dispute.[43] Most commentators considered that it imposed a political solution on a legal dispute. This view had already gained some ground before the advisory opinion was delivered,[44] and it was fuelled by the combination of Judge Anzilotti's boldness, the obscurity of the *motifs,* and the dissenters' scarcely veiled accusations.[45] Judge Schücking took the view that:

> *die Sache nach meinen Dafürhalten für uns noch verhältnismässig günstig ausgegangen. Die formelle Niederlage hat unserer Regierung den Rückzug erleichtert, der aus politischen Gründen auch bei einem Obsiegen notwendig gewesen wäre. Auf der anderen Seite war das Gutachten des Weltgerichtshofs mit 7 gegen 8 Stimmen für uns ein moralischer Sieg. Das Ansehen des Gerichtshofs selbst hat freilich durch das völlige Auseinanderfallen und die Herausstellung eines französischen Blocks in der Welt sehr gelitten.*[46]

The *Customs Regime* opinion was a monument to judicial self-restraint, with the dissenting opinion indicating the approach to dominate in the years that followed. The approach went hand in hand with a notion of state sovereignty. In his individual note submitted for purposes of the deliberations, Schücking had written: '*it est vrai que le mot "souveraineté", de nos jours, est assez discrédité, mais c'est seulement parce qu'on a combiné aux temps de l'absolutisme et de l'étatisme exagéré par la philosophie de Hegel une conception qui pose l'Etat au-dessus du droit. Evidemment, une telle conception est impossible dans notre époque d'interdépendance des Etats. Mais, au lieu d'abolir la notion de la souveraineté, il faudrait lui donner un contenu raisonnable.*'[47]

[41] *Ibid.*, at 42 and also 45.

[42] E.g., Borchard, 'The Customs Union Advisory Opinion', 25 *AJIL* (1931) 711, at 715 f; Hudson, 'The World Court and the Austro-German Customs Régime', 17 *Am Bar Assn Jl* (1931) 791, at 793; Váli, 'The Austro-German Customs Regime before the Permanent Court, considered with Reference to the proposed Federation of Danubian States', 18 *Grotius Transactions* (1932) 79, at 88–92; Brierly, 'The Advisory Opinion of the Permanent Court on the Customs Régime between Germany and Austria', 3 *ZaöRV* (1933) 68, at 74; and de Lapradelle, 'Les Vies et les Oeuvres: In Memoriam Edouard Rolin-Jaequemyns, Albéric Rolin, Elihu Root', 19 *Revue de Droit International* (1937) 3, at 6.

[43] See H. Morgenthau, *Politics among Nations* (5th edn, 1973), at 408; cf. Morgenthau, 'Positivism, Functionalism, and International Law', 34 *AJIL* (1940) 260, at 280 and 282.

[44] See Borchard, 'The Theory and Sources of International Law', in *Recueil d'etudes sur les sources du droit en l'honneur de François Gény* (1934), iii, at 328, 353.

[45] *Supra* note 35, at 75.

[46] See Spiermann, *supra* note 10, at 321: 'in my opinion the case had a relatively favourable outcome for us. The formal defeat has made the retreat of our government easier, a retreat which would also have been necessary for political reasons in case of victory. On the other hand, the opinion of the World Court with seven votes against eight was a moral victory for us. The standing of the Court itself has certainly suffered from the complete disintegration and the manifestation of a French block.'

[47] *Ibid.*, at 317, n 92.

4 Danzig

The Versailles Treaty had separated the city of Danzig from Germany and made it 'a Free City' in order to give Poland access to the sea, while providing local self-government. In exercising its autonomy the Free City had agreed not to discriminate against Polish nationals, and in 1932, at its 23rd session, the Permanent Court responded to a request for an opinion on the proper interpretation of the principle of non-discrimination.

In elaborating upon this principle, the Polish Government pleaded that various treaties and also the Danzig Constitution were relevant.[48] According to Article 103 of the Versailles Treaty, the Constitution was placed under the guarantee of the League of Nations. But, in respect of Poland, the Permanent Court held that the Danzig Constitution 'is and remains the Constitution of a foreign State', thus being a matter 'of domestic concern' to Danzig. Accordingly, and referring to 'the ordinary rules governing relations between States', '[t]he general principles of international law apply to Danzig subject, however, to the treaty provisions binding upon the Free City'.[49] This line of reasoning was, of course, an expression of the dualist view, just like in a number of other rulings of the Permanent Court. However, the opinion of the Permanent Court was rather more about shaping the Free City of Danzig in the image of a sovereign state.[50] Dualism came to the Permanent Court's mind only because the Free City was seen as a fully-fledged sovereign entity, a state.

Since 1922 the Free City had been on the list prepared by the Permanent Court of states entitled to appear before it, yet the legal consequences were not clear.[51] The Permanent Court in its old composition had not taken a clear stand in any of its three decisions concerning the Free City, the first being the *Postal Service* opinion delivered in 1925 at the seventh session. Then, because the Polish Government and the Free City had both assumed that states could rely on a general principle of restrictive interpretation, a passionate discussion had taken place as to whether the Free City was a state.[52] Due to internal disagreement, however, the majority of the Permanent Court had side-stepped the issue, holding that 'the rules as to a strict or liberal construction of treaty stipulations can be applied only in cases where ordinary methods of interpretation have failed'.[53]

[48] See *supra* note 17, at 106–110 and 245.

[49] *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ Series A/B No. 44 (1932), at 23–25 and also 31. Similarly, *Consistency of certain Danzig Legislative Decrees with the Constitution of the Free City*, PCIJ Series A/B No. 65 (1935), at 50 and also, previously, *Free City of Danzig and International Labour Organization*, PCIJ Series B No. 18 (1930), at 15. It ought to be added that in the *Treatment of Polish Nationals* opinion this was said in the context of 'the compulsory arbitration [*juridiction arbitrale obligatoire*] of those organs', that is, the organs of the League: see *Danzig opinion*, at 22.

[50] Eager support for this view was found in the pleadings of the Free City: see *supra* note 17, at 80–84, 174, and 326–330; cf. the Polish Government, *ibid.*, at 115–116, 245, and 359–361, but see *ibid.*, at 108–109 and 234.

[51] PCIJ Series E No. 1 (1922–1925), at 260 and see M.O. Hudson, *The Permanent Court of International Justice, 1920–1942* (2nd edn, 1943), at 393–594.

[52] See PCIJ Series C No. 8, at 371, 397, and 408–409 (Polish Government); *ibid.*, at 428, 435–437, and 486 (Free City); and *ibid.*, at 413, 420, and 454–455 (Polish Government).

[53] *Polish Postal Service in Danzig*, PCIJ Series B No. 11 (1925), at 39.

Judge Schücking had not found the pleadings submitted by governments particularly helpful, as he wrote in 1931 to a German diplomat:

> *Über diesem letzten Prozess waltet kein glücklicher Stern, namentlich ist die Danziger Sache weder in den Schriftsätzen, noch in der mündlichen Verhandlung so gründlich und umfassend vertreten worden, wie das die Wichtigkeit und die besondere Schwierigkeit der Angelegenheit erfordert hätte. Wenn ich auch mit dem Danziger Richter, Herrn Professor Bruns, in der besten Harmonie und in weitgehendster wissenschaftlicher Übereinstimmung in der Auffassung der Probleme zusammenarbeite, so ist der Erfolg leider sehr zweifelhaft. Wir werden in den Weinnachtsferien daheim die ausführlichen schriftlichen Gutachten ausarbeiten, die schon am 8. Januar in Haag einlaufen müssen. Erfreulicherweise steht mir dazu auch hier ein vortrefflicher Apparat zur Verfügung.*[54]

While in relation to the League, the Free City was treated as a '*sui generis*' entity, in relation to Poland it was a state. In the two proceedings that resulted in advisory opinions at the 23rd session, this double-sided conception of the Free City was not directly challenged by the dissenters on the bench; but the dissenters gave more weight to the Versailles Treaty under which the Free City was established,[55] and so they appeared to agree with the Polish Government in conceiving of the Free City as being *sui generis* also in relation to Poland. The dissenters did certainly not subject the rights of the latter to a restrictive interpretation on the ground that, as a state, Danzig enjoyed sovereignty.

As for the majority, Judge Schücking included, the status of the Free City had grown in importance because the Permanent Court in its new composition adhered on many occasions to a principle of restrictive interpretation, according to which the interpretation which is less onerous to the obligated state should be preferred.[56] It would seem to have been this principle that was echoed when in the *Treatment of Polish Nationals* opinion the Permanent Court explained that '[t]he State is at liberty, either by means of domestic legislation or under a convention, to grant to minorities rights over and above those assured by the Minorities Treaty'.[57]

That line accompanied the Permanent Court's interpretation of the ban on discrimination due to nationality contained in Article 33 of the Paris Convention, which Poland and the Free City had entered into in accordance with Article 104 of the Versailles Treaty, paragraph five of which laid down that the future treaty should 'provide

[54] See Spiermann, *supra* note 10, at 337: '[t]he latest proceeding did not take place under a lucky star, that is, the Danzig case, which neither in the written pleadings nor in the oral pleadings was given the thorough and extensive treatment that the importance and particular complexity of the matter demanded. Even though I work together with the Danzig judge, Professor Bruns, in the best spirit of harmony and on the basis of a shared scientific view on the problems, it is unfortunately unlikely that our efforts shall meet with success. During the Christmas vacation we shall draft the detailed written opinion, working at home. The opinion must be handed in at The Hague already on 8 January. Fortunately, I have also here an excellent apparatus at my disposal.'

[55] See *Access to, or Anchorage in, the Port of Danzig of Polish War Vessels*, PCIJ Series A/B No. 43 (1931), at 149–150 and PCIJ Series A/B No. 44 (1932), at 45–46 and 53–54.

[56] See also on behalf of the Free City, PCIJ Series C No. 56, at 395 and 174; cf., however, see the brilliant argument advanced by Prof. de Visscher on behalf of the Polish Government: *ibid.*, at 265.

[57] PCIJ Series A/B No. 44 (1932), *supra* note 55, at 40.

against any discrimination within the Free City of Danzig to the detriment of citizens of Poland and other persons of Polish origin or speech'. Article 33 consisted of two parts. The first part provided for reciprocity, so that the 'provisions' of the Minorities Treaty binding upon Poland were made applicable to the Free City in respect of its minorities. According to the second part, the Free City should 'provide, in particular, against any discrimination, in legislation or in the conduct of the administration, to the detriment of nationals of Poland and other persons of Polish origin or speech, in accordance with Article 104, paragraph 5, of the Treaty of Versailles'.

As for the first part of Article 33, the Permanent Court noted that it referred to 'not national treatment, but the régime of minority protection'.[58] The second part of Article 33 was characterized by the Permanent Court as 'a further guarantee' of the obligations undertaken in the first part, nothing more. According to the Permanent Court, the Free City was prevented from discriminating only between Polish nationals and other foreigners, not between Polish nationals and Danzig citizens.[59] It was at this point that the Permanent Court referred to the sovereignty of the Free City, and to it being 'at liberty, either by means of domestic legislation or under a convention' to grant a better position to foreigners. If neglecting such references to state sovereignty, and the restrictive interpretations that might follow, in the views of some, the *motifs* would be jejune, leaving one with the assurance that the interpretation given to Article 33 'cannot be said to be unreasonable or unjust'.[60] In particular, the argument that the Polish Government had been wrong because making 'a very important addition [to Article 33], namely, a standard of comparison' would seem to have been shorthand for the Polish Government not having adopted the standard of comparison that gave Article 33 the narrowest scope possible.[61]

It is true that at an early point, referring to the *German Settlers* opinion, the Permanent Court held that 'the prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law'.[62] That, however, was not indicative of the reasoning in 1932, which did not take the rationale behind minority protection very far.[63] It had been suggested by the Polish Government that if the Permanent Court opted for the narrow standard of comparison, namely other foreigners as opposed to Danzig citizens, it would be possible for the Free City to exclude all Polish nationals from its territory.[64] The Permanent Court admitted that this would be 'irreconcilable' with the rationale for having a Free City. But it held that the 'admission of foreigners to the territory of a State is a question which is not necessarily connected with the legal status of persons within its territory'.[65]

[58] *Ibid.*, at 34–35 and also 38–39.

[59] *Ibid.*, at 29–30 and also 34–35, 36–37, and 41.

[60] *Ibid.*, at 40 and also 28.

[61] Cf. *ibid.*, at 29. Thus, there was a 'natural' standard of comparison ingrained in the discrimination ban, fitting it into a scheme of minority protection as opposed to a 'special régime' of national treatment: *ibid.*, at 29 and 37.

[62] *Ibid.*, at 28.

[63] *Ibid.*

[64] See also PCIJ Series C No. 56, *supra* note 56, at 123 f, 129–131, 255–260, and 272 f.

[65] PCIJ Series A/B No. 44 (1932), *supra* note 55, at 41.

Here the Permanent Court's *motifs* came to an end. They were supported by a majority of seven, including two Germans, namely Judge Schücking and Judge *ad hoc* Bruns (who had been nominated by the Free City).[66] Shortly afterwards, Schücking wrote the following to a colleague:

> *Nach meinen persönlichen Erfahrungen beim Weltgerichtshof aus dem grossen Prozess zwischen Polen und Danzig, bei dem es sich um die Rechtsstellung der polnischen Staatsbürger in Danzig handelt, würde es besonders nützlich sein, wenn der Begriff der égalité du traitement oder des traitement national, wie andere Verträge sagen, das vielfach Ausländern zugesichert ist, einmal historisch, dogmatisch und rechtspolitisch untersucht würde. Man ist in den neuesten Verträgen vielfach von dieser Formel wieder abgekommen, weil sie zahlreiche Zweifel in sich birgt, denn in der Regel wird der Staat nicht darauf verzichten und es liegt schliesslich in der Bedeutung der Staatsbürger als eines wesentlichen Elementes des Staatsbegriffs, dass der Staat doch immer wieder einen grundsätzlichen Unterschied macht zwischen seinen eigenen Bürgern und den Staatsfremden, die er zugelassen hat*.[67]

5 Oscar Chinn

The Permanent Court was influenced by the decaying political climate of the 1930s in various ways.

The Permanent Court's workload was very much influenced by the decay,[68] Germany's new government withdrawing two cases in 1933.[69] A likely example of the decaying political atmosphere influencing the Permanent Court's work was the *Legislative Decrees* opinion about changes in criminal law in Danzig that threatened the *Rechtsstaat*. It must have been difficult not to hear a voice in that decision seeking to teach the (uninstructable) National-Socialists a lesson.[70]

At the time there emerged a more positive attitude among theorists towards a concept of *jus cogens*, that is, the view that there are rules from which no treaty may

[66] Cf. PCIJ Series D No. 2, Add. 3 (1936), at 17–23 and 26–31.

[67] See Spiermann, *supra* note 10, at 338: 'According to my personal experience at the World Court in the big proceedings between Poland and Danzig concerning the law regulating the treatment of Polish citizens in Danzig, it would be particularly useful to submit the concept of *égalité du traitément* or national treatment, as other treaties would have it, a right guaranteed to a great number of foreigners, to a combined historical, dogmatic, and political analysis. This concept has fallen out of use in many of the newest treaties because it gives rise to much doubt as the state generally does not renounce its rights. Finally, it seems to go to the very heart of the meaning of citizenship as one of the essential elements of the concept of state that the state time and again draws a fundamental distinction between its own citizens and the foreigners that it has admitted to its territory.'

[68] See Hudson, 'The Twelfth Year of the Permanent Court of International Justice', 28 *AJIL* (1934) 1, at 18, Hudson, 'The Thirteenth Year of the Permanent Court of International Justice', 29 *AJIL* (1935) 1, at 1; and Hudson, 'The Eighteenth Year of the Permanent Court of International Justice', 34 *AJIL* (1940) 1, at 16–22.

[69] *Case concerning the Administration of the Prince von Pless*, PCIJ Series A/B No. 59 (1933) and *Case concerning the Polish Agrarian Reform and the German Minority*, PCIJ Series A/B No. 60 (1933).

[70] *Consistency of certain Danzig Legislative Decrees with the Constitution of the Free City*, PCIJ Series A/B No. 65 (1935).

derogate.[71] This trend was encouraged by some judges on the bench, among whom Judge Schücking featured prominently, as evidenced by his dissenting opinion in the *Oscar Chinn* case. The Belgian Congo had since 1885 been regulated by the General Act of the Conference at Berlin, but in 1919 a number of states, but not all parties to the older Act, had derogated from it by adopting the Saint-Germain Convention revising the General Act of Berlin. In this connection, Judge Schücking found it opportune to say that '[t]he Court would never, for instance, apply a convention the terms of which were contrary to public morality'.[72] Another dissenter, Judge van Eysinga, saw the Berlin Act as an example of 'a highly institutionalized statute, or rather a constitution established by treaty, by means of which the interests of peace, those of "all nations" as well as those of the natives, appeared to be most satisfactorily guaranteed'.[73] According to Judge van Eysinga, 'a régime, a statute, a constitution' was opposite to a '*jus dispositivum*', that is, 'a number of contractual relations between a number of States, relations which may be replaced as regards some of these States by other contractual relations'.[74]

To his friend, Professor Wehberg, Schücking wrote:

> *M. E. kann an diesem Urteil nicht Kritik genug geübt werden aus folgendem Grunde. Es ist in meinem Augen sehr traurig, dass das Gericht nicht gewagt hat, in eine Untersuchung darüber einzutreten, ob die Konvention v. S. Germain, auf welche die Parteien sich gestützt, überhaupt gültiges Recht ist oder nicht. M. E. war es evident, dass die Kongo Akte nicht durch einen Teil der Vertragsstaaten aufgehoben oder abgeändert werden konnte, weil ihre Wortlaut nur gemeinsame Revision vorsieht und weil es sich bei ihrem Inhalt (Neutralität!) um Normen handelt, bei denen eine Aufhebung in kleineren Kreise für die Beziehungen gewisser Staaten inter se überhaupt undenkbar ist. Wenn zudem die Siegerstaaten in demselben Jahr, in dem sie im Pact versprechen, die internat. Verpflichtungen scrupulös einzuhalten, ganz munteranbar sich die Kongoakte in S. Germain revidieren, um sich von lästigen Fesseln für die einzelstaatliche Souveränität zu befreien, so war das einfach ein Scandal, der als solcher vom Gerichtshof gebrandmarkt werden musste. Der Gerichtshof musste sich weigern, diese faule Konvention anzuwenden. Ich spreche hier wirklich nicht aus Rechthaberei, aber warum geht der Gerichtshof einer*

[71] Cf. H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), at 168–169; Rousseau, 'De la compatibilité des normes juridiques contradictoires dans l'ordre international', 39 *RGDIP* (1932) 133; von der Heydte, 'Glossen zu einer Theorie der allgemeinen Rechtsgrundätze', 33 *Die Friedens-Warte* (1933) 289, at 297–298; de Visscher, 'Contribution à l'étude des sources du droit international' in *Recueil, supra* note 44 iii, at 389, 394; Ray, 'Des conflits entre principes abstraits et stipulations conventionelles', 48 *RdC*(1934) 635, at 702; Verdross, 'Les principes généraux du droit dans la jurisprudence internationale', 52 *RdC* (1935) 195, at 205–26; and L. Le Fur, *Précis de droit international public* (3rd edn, 1937), at 186–187. The positive attitude was partly related to criticism of the Versailles Treaty: see Verdross, 'Anfechtbare und nichtige Staatsverträge', 15 *Zeitschrift für öffentliches Recht* (1935) 289, at 291–292; and E.H. Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to the Limits of Legal Imagination in International Affairs* (1946), at 188, n 1. On the conception as such see Verdross, 'Forbidden Treaties in International Law', 31 *AJIL* (1937) 571, at 571, n 3; and also H. Lauterpacht, *The Function of Law in the International Community* (1933), at 318; and A.D. McNair, *The Law of Treaties: British Practice and Opinions* (1938), at 112–113. Cf. H. Lauterpacht, 'The Chinn Case', 16 *BYrbk Int'l L* (1935) 164, at 165–166.

[72] *The Oscar Chinn Case*, PCIJ Series A/B No. 63 (1934), at 150 and see Verdross, 'Principes généraux', *supra* note 71, at 243–244.

[73] PCIJ Series A/B No. 63 (1934), at 133.

[74] *Ibid.*, at 133–134.

> *Untersuchung dieser Frage aus dem Wege? Die Sondervoten von Eysinga und mir beweisen doch, dass alle diese Fragen im Gerichtshof aufgetaucht sind. Vielleicht hätte man uns widerlegen können und aus der Kongoakte ableiten, dass doch partielle Modificationen im engeren Kreise möglich seien, vielleicht hätte man beweisen können, dass trotz eines Verbotes partieller Abänderungen im engeren Kreise die betr. Verträge unter den Zuwiderhandelnden gültig und nur durch die dritten Staaten anfechtbar seien, aber wenn man diese Probleme totschweigt, so muss jeder Unbefangene den Eindruck haben, dass man nicht den Mut gehabt hat, an die Dinge heranzugehen, weil man dann die Ungültigkeit der Konvention von S. Germain hätte schlussfolgern müssen, an der etliche Grossmächte beleidigt. Ich mache mir schwere Sorge, dass die moralische Autorität des Gerichtshofes abermals einem schweren Stoss erlitten hat. Was soll überhaupt aus dem Völkerrecht werden, wenn es niemals ein jus cogens geben kann, dessen Überschreitung durch Individualverträge einfach nichtig ist, selbst wenn die Parteien selbst sich auf Unabänderlichkeit verpflichtet hatten. Die ganze Frage ist von ungeheurer Bedeutung für die Zukunft des Völkerrechts.*[75]

It is true that the main focus of Judge Schücking's concept of *jus cogens* differed from what was laid down in Article 53 of the Vienna Convention on the Law of Treaties, in that the Berlin Act could be changed if all parties to it agreed.[76] However that may be, the question of *jus cogens* had not been raised by any of the parties to the *Oscar Chinn* case,[77] and there was no general support for the analogy drawn by Judge Schücking, according to which '[i]t is an essential principle of any court, whether national or international, that the judges may only recognize legal rules which they hold to be valid'.[78] As defined by the parties, the case had to do with the interpretation of the Saint-Germain Convention, as opposed to its validity.

[75] See Spiermann, *supra* note 10, at 362–363: '[i]n my opinion, this judgment cannot be criticized too much for the following reasons. It is in my eyes very sad that the Court did not dare to engage in an analysis of whether the Saint-Germain Convention on which the parties relied was valid law at all or not. In my opinion, it was evident that the Congo Act could not be repealed or changed by some of the parties because its wording only foresaw a collective revision and because according to its content (neutrality), it had to do with norms which it was completely unthinkable that a smaller group could have repealed in their relationships *inter partes*. When the victorious states, in the same year as they promised in the Covenant unscrupulously to keep the international obligations in the S. Germain, completely revised the Congo Act, freeing themselves from the tiresome restrictions put upon the sovereignty of the single state, it was simply a scandal, which the Court should have branded as such. The Court should have refused to apply this faulty convention. I am not herein really speaking about *Rechthaberie*, but why did the Court avoid an analysis of this question? The dissenting opinions of van Eysinga and I show that these questions all surfaced in the Court. Perhaps one could come to a different conclusion, deducing from the Congo Act that partial modifications in smaller groups were permissible, [or] perhaps one could prove that despite a ban on partial changes in smaller groups the treaty in question was valid as between those contravening it and so could only be challenged by third states, but since this question was passed over in silence, any impartial person must get the impression that one did not have the courage to tackle the question because one would then have had to conclude that the Convention was invalid, in opposition to quite a few Great Powers. I worry that once again the moral authority of the Court has suffered a serious blow. What is to become of international law in the first place if there is no *jus cogens*, the transgression of which simply entails the invalidity of specific treaties, even where the parties have bound themselves not to change it. This whole question is of supreme importance for the future of international law.'

[76] PCIJ Series A/B No. 63 (1934), at 148–149.

[77] *Ibid.*, at 80, and also President Hurst, *ibid.*, at 122–123.

[78] *Ibid.*, 149.

6 Concluding Reflections

When commemorated by the Permanent Court on the occasion of his death in 1935, Walther Schücking's position as a *Zukunftsjurist* was referred to by President Hurst:

> Morally, . . . he had contributed towards the creation of the Court long before it actually existed. For the constitution of this tribunal was foreseen and advocated in the remarkable works on the Hague Conferences published by him before the war. Moreover, his whole attitude as a statesman and lawyer was always inspired by the ideal peace through justice, a phrase which worthily expresses the mission of the Court.[79]

Still, Schücking's contribution to the Permanent Court demonstrated that international adjudication is not about transmutation of the achievements of diplomats and statesmen into gold; rather it is about the welding of base metals.

Schücking did not become a leading figure in the history of the Permanent Court, perhaps in part because his contributions were later in time than those of such a towering figure as Max Huber. Schücking and Huber shared a past in theory. According to Schücking, Huber's work might have been a consequence of Schücking's *Die Organisation der Welt*, yet he saw Huber as being too sceptical.[80] Conversely, Huber saw himself as someone who had been and continued to be '*in vielen Fragen weit weniger optimistisch und draufgängerisch*'.[81] It may seem a paradox that in the 1930s where, in many cases, the Permanent Court exercised self-restraint and embraced arguments based on state sovereignty, probably the greatest 'optimist' to be associated with the work of the Permanent Court, namely Professor Schücking, occupied a permanent position on the bench. But then optimism is simply an extrapolation of the state on to the international level, leaving key values such as state sovereignty essentially unaffected.

Unlike Judge Huber, who had taken part in founding an international lawyer's approach to international legal argument, separate from national legal argument, traditions, and concepts, Judge Schücking turned out to be a defender of state sovereignty, invoking a principle of restrictive interpretation on a regular basis. His notion of international organization was a projection of national law onto international law, as illustrated by the notion of *jus cogens* with its 'constitutional' ring. However, rather than drawing any significant conclusions from the general projection, when it came to the use of international legal argument in specific cases, the national lawyer focused on defending the state and its unfettered powers within a national legal system. This is the price to be paid by 'optimists' finding that no world state has yet materialized.

[79] PCIJ Series C No. 77, at 164–165.

[80] Schücking, *supra* note 2, at 33.

[81] See Spiermann, *supra* note 10, at 389: 'in many questions much less optimistic and energetic'.