

Judicial imperialism and the PCIJ's interpretation of the 1923 Treaty of Lausanne (Part I)

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It is commonly accepted that the contemporary instability in certain areas of the Middle East is attributable, at least in part, to the arbitrary manner in which many boundaries were drawn by the victorious powers after the end of the First World War. Less often discussed is the role that international law and, in particular, the Permanent Court of International Justice (the 'PCIJ') played in this context. By scrutinising the PCIJ's rarely considered 1925 Advisory Opinion on the [*Interpretation of the Treaty of Lausanne*](#) this comment seeks to shed some light on the PCIJ's involvement in the settlement of the frontier between Turkey and Iraq. Beyond its relevance for the dispute at hand, the PCIJ's Advisory Opinion is a striking illustration of the difficulty to keep political and legal issues distinct. Against this background the opinion should serve as an important reminder for any international court to exercise its judicial function with extreme caution lest the respect for international law and its own judgments is put on the line. The analysis will be presented in two parts. The first part briefly considers the background of the opinion and the drafting history of the article which the PCIJ sought to interpret. The second part then presents and critiques the PCIJ's judgment.

The request of the Council of the League of Nations

The Council of the League of Nations (the 'Council') requested the 1925 Advisory Opinion concerning article 3 of the 1923 Treaty of Lausanne (the 'Lausanne Treaty') after the UK and Turkey (the 'Parties') had failed to agree on the border between Turkey and Iraq following the end of the First World War. Particularly disputed was the Ottoman Vilayet of Mosul, which British forces had occupied (most certainly unlawfully) shortly after the conclusion of the Modrus Agreement (30 October 1918) ending the hostilities between the Allied Forces and the Ottoman Empire. Due to the Parties' prolonged inability to agree on the ownership of the area, article 3 of the Lausanne Treaty postponed the settlement of this question.

Article 3 provided in relevant part:

- 1) The frontier between Turkey and Iraq shall be laid down in friendly arrangement to be concluded between Turkey and Great Britain within nine months.
- 2) In the event of no agreement being reached between the two Governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations.

Once bilateral “friendly arrangements” in accordance with article 3(1) had failed to produce a solution, the key point of contention the PCIJ was asked to decide was whether or not article 3(2) contemplated that the League’s Council could now definitively determine the course of the boundary without the consent of Turkey and the UK. Turkey argued that any definitive settlement of the boundary question by the Council would require the consent of the Parties. The UK was of the view that the boundary could be settled irrespective of the Parties’ consent.

Following the UK’s line of reasoning, the PCIJ replied that article 3 of the Lausanne Treaty clearly provided that the Council could definitively settle the dispute subject to a unanimous vote. Crucially, however, the PCIJ also stated that the votes of Turkey and the UK should be ignored for the purposes of that vote (Adv. Op., [33]). In order to arrive at this conclusion the PCIJ claimed to have done no more but to distil the Parties’ intentions from the text of article 3 (Adv. Op., [19]). Considering explicitly nothing but the article’s text alone the PCIJ concluded, first, that the Parties “conferr[ed] on the Council” (Adv. Op., [27]) extraordinary powers going beyond article 15, League of Nations Covenant (‘LONC’), which deals with the Council’s dispute settlement competences, and, second, that the Parties intended the Council to derogate from the otherwise applicable unanimity principle of article 5, LONC.

In light of article 3’s rather reticent appearance and given the PCIJ’s own admission that the “terms [of article 3] do not expressly indicate the nature of the action to be undertaken by the Council” (Adv. Op., [20]), this conclusion is surprising. It seems even more surprising in light of the article’s drafting history. Adopting the PCIJ’s own standard of interpretation – the intentions of the parties – this comment seeks to show that there are strong reasons to believe that the PCIJ transgressed the boundary between interpretation and modification in its reply to the Council’s question.

The Drafting History of Article 3 of the Treaty of Lausanne

The original proposal regarding the League’s role from which all future discussions concerning article 3 originated was made by Lord Curzon, the UK’s representative at the Lausanne Conference. In the presence of Turkey’s chief negotiator, Ismet Pasha, Lord Curzon stated on 23 January 1923 that “the League...should be...entrusted with” the “impartial examination” of the frontier dispute ([Records of Proceedings and Draft Terms of Peace](#), 361-362). In the afternoon of the same day, Lord Curzon repeated this suggestion and clarified that a “decision [by] the League of Nations...will have to be unanimous, so that no decision can be arrived at without [Turkey’s] consent” ([Records of Proceedings and Draft Terms of Peace](#), 400-401).

At this stage, the UK’s understanding of the League’s role could not be clearer. The fact that Lord Curzon considered this mechanism to constitute “arbitration by the League of Nations” ([Records of Proceedings and Draft Terms of Peace](#), 401) further reveals that the condition that the Council could not reach a decision without the consent of Turkey was held to be perfectly compatible with the idea of arbitration. This understanding was shared implicitly by every representative of the six powers represented at the meeting and explicitly by Baron Hayashi of Japan, Maurice

Bompard of France and Marquis Garroni of Italy (Records of Proceedings and Draft Terms of Peace, 403).

Ignoring that there might be a difference in meaning and *modus operandi* between political dispute settlement processes and established legal mechanisms, the PCIJ later, and in direct contradiction to the UK's submission, explicitly rejected the idea of consensual arbitration. Indeed, the PCIJ observed that the view that no decision could be reached without the consent of both Parties would be 'incompatible' with the text of article 3 of the Lausanne Treaty since it would reduce the role of the Council to that of a mediator (Adv. Op., [23, 26]).

Given that Turkey had initially rejected Lord Curzon's proposal, on 25 January 1923 Lord Curzon requested the Secretary-General of the League "to place [the case of the disputed frontier] upon the agenda of the [next] Council session" (Adv. Op., [11]). In the meantime, however, and before any action could be taken by the Council, Lord Curzon presented a draft peace agreement (Records of Proceedings and Draft Terms of Peace, 683) to Turkey on 31 January 1923. According to Lord Curzon, the draft contained no "surprise or...menace" and "nothing...of which [Turkey] have not been made fully aware" (Records of Proceedings and Draft Terms of Peace, 429).

Between January 23 and the presentation of the draft truce on January 31 the Parties did not discuss the frontier question. Consequently, one can assume that article 3(2) of the draft treaty, which determined that the boundary between Turkey and Iraq should "be fixed in accordance with the decision to be given thereon by the Council", retained the principle of consensual decision-making (Records of Proceedings and Draft Terms of Peace, 688). In light of the controversial nature of the subject matter it can be fairly assumed that a departure from that position would have qualified as a "surprise or menace." In any case, Lord Curzon's assurance that "the League would be resorted to in the manner originally proposed..." (Records of Proceedings and Draft Terms of Peace, 843) confirms that draft article 3(2) intended to give effect to Lord Curzon's initial plan. The reference to the "original proposal" can refer only to the guarantee of 23 January 1923 that "no decision can be arrived at without [Turkey's] consent" (Records of Proceedings and Draft Terms of Peace, 401). One might argue that the "original proposal" relates to the UK's earlier threat to force the issue before the Council by means of article 11, LONC. However, this interpretation makes no sense because a) the UK had already referred the issue to the Council (on 25 January) when Lord Curzon gave his assurances concerning the draft terms (on 4 February) and b) such a referral would not depend on Turkey's consent so it would be pointless to include such a stipulation in the peace treaty.

After the presentation of the draft terms on 31 January 1923, having been assured that article 3 reflected Lord Curzon's "original proposal" (Records of Proceedings and Draft Terms of Peace, 843), Turkey agreed that "the question of Mosul...[should] be settled" (Records of Proceedings and Draft Terms of Peace, 838) in accordance with "Lord Curzon's proposals" (Records of Proceedings and Draft Terms of Peace, 846). On 8 March 1923, Ismet Pasha confirmed once more in writing that "[t]erritorial questions are settled in accordance with the proposals of the Allied Powers but proposed a "less precise" version of article 3(2), which envisioned that "the dispute shall be referred to the Council of the League of Nations" (Adv. Op., [14]). The

initial draft of the Allies stated that the frontier should be “fixed in accordance with the decision” of the Council (Records of Proceedings and Draft Terms of Peace, 688). If anything, the Parties’ subsequent acceptance of Turkey’s counter-proposal, which drops the reference to “the decision of the Council”, proves that the PCIJ’s understanding of article 3 according to which the Council was granted enhanced powers (Adv. Op., [28]) to issue decisions irrespective of the Parties’ consent, is mistaken. True, “the Turkish counter-proposal in no way excluded a definitive decision by the Council” (Adv. Op., [24]). However, a) the question was not whether the Council could make a definitive decision, but whether a definitive decision could be reached irrespective of the Parties’ consent, and b) the Turkish proposal also in “no way” excludes the possibility of a consensual dispute settlement process.

Thus, concludes the drafting history of article 3(2), whose relevant parts remained unchanged until the Lausanne Treaty was signed on 24 July 1923. The drafting history appears to show that the Parties intended that any decision concerning the boundary between Turkey and Iraq would be subject to the Parties’ consent. However, as will be explained in the second part, the PCIJ reached a different conclusion.

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