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The Jurisprudence of the Permanent Court of International Justice Between *Utilitas Publica* and *Utilitas Singulorum*

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I Introduction

Every society has its own legal order, adapting to the specificity and needs of that society. And every legal order, albeit to a varying degree, has two main layers of legal regulation. One goes to protect the interests of the whole of the society as an organized community. This is the layer of public interest. It is never wholly absent in any society, lest that society does indeed not exist at all. In every society there are some common interests and some public weal, i.e. some centripetal forces of cohesion. There is therefore always a part of the legal order which gives expression to these types of interests common to the members of the society. On the other hand, there is a part of the legal order which seeks to serve the interests of each single member of the society. This part of the law grows with the degree of civilization, progressively recognizing a “private autonomy” to any of its single members. Roughly speaking, one has here the two layers of public and private law (*jus publicum* / *jus privatum*). The interests lying at the bottom of each of these layers are different: the interests of the whole on the one side (*utilitas publica*); the interests of the single members on the other (*utilitas singulorum*).¹ The content of each legal order can be analyzed as a taking of stock of these two layers and also as an inquiry into

¹ On this issue, from a historical standpoint, see e.g. M. Kaser, “Ius publicum und ius privatum”, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, vol. 103, 1986, pp. 1 ff., 24 ff.; A. Steinwenter, “Utilitas publica, utilitas singulorum”, *Essays in Honor of P. Koschaker*, vol. 1, Weimar, 1939, p. 84 ff.; J. Gaudemet, “Utilitas publica”, *Revue historique de droit français et étranger*, vol. 24, 1951, p. 465 ff.; E. Polay, *Differenzierung der Gesellschaftsnormen in antiken Rom*, Budapest, 1964, p. 316 ff. For the Middle Ages, see M. Sbriccoli, *L'interpretazione dello Statuto*, Milan, 1969, p. 445 ff.

their dynamic relationships. It must moreover be noted that “community” is a relative matter. The point is not always to qualify by this concept the State or the universal international community (all States and also sometimes all human beings, as well as sometimes also all living creatures). The community of a number of riparian States is also a community; the community of States bound by a treaty is also a community; etc. What is decisive here is that a “whole” opposes the single members, and thus two sets of distinct interests differentiate themselves.

As we have just hinted at, international law is no exception to this general statement about the complexion of legal orders. It has always had its common concerns and also its concern for the weal of the single members. The “international community” has always loomed somewhere behind the protection of the sovereign rights of the States.² It is true that the “egoistic” wing on the rights of the single States and the powers flowing from their sovereignty has for a long time taken pride of place in the legal analysis of international law.³ However, the common concerns have been present all the time and have been strongly rediscovered since World War II. Doubtlessly, the layer of public law is more developed and better visible in the collectivities taking the name of States. These are communities where common organs take care of the implementation of the general weal and where the national feeling of the members of the society gives some inner cohesion to the collectivity. This is not so in international society. But even here, one observes as a matter of empiric reality the existence of a series of common concerns. These are questions of peace and territory in the 19th century, later questions concerning common assets (e.g. international rivers), still later questions of international cooperation (through the international organizations since 1919), and today issues of human rights, disarmament, protection of the environment, etc.⁴ To be sure, the relative weight and the type of interaction between the two legal layers differ in international law and in municipal law. However, the gist of the matter remains the same, namely that there are these two branches of the law and that they are in constant interaction.

It stands to reason that the two branches of the law mentioned above are conceptually distinct and fulfil different functions in the legal order, but also that they are intimately linked one with the other. In many cases, the protection of private interests represents also a public interest; and vice versa. A collectivity

2 See recently the analysis by E. Jouannet, *Le droit international libéral-providence*, Brussels, 2011.

3 W. Friedmann, *The Changing Structure of International Law*, London, 1964.

4 See e.g. B. Simma, “From Bilateralism to Community Interest in International Law”, *RCADI*, vol. 250, 1994-VI, p. 217 ff.

can prosper only if its single members live in a satisfactory environment and can unfold their lives. Thus, for example, the recognition of liberties and individual rights for the members is not only an interest of the latter, but also a collective interest. Conversely, the individual can only prosper if the collectivity in which he lives is strong enough to properly display its functions. The sacrifices he concedes for the benefit of the collectivity, e.g. through the paying of taxes, are at least to some extent also in his own best interest. These interrelationships between the two layers do not dissolve their conceptual polarity and difference; they add a further level of inquiry as to the effects of the one on the other.

It is not out of place to try to read the case law of the PCIJ (1921–1939/1946)⁵ in the light of the two mentioned layers, in order to see which of its pronouncements relate to the first and which ones relate to the second.⁶ The choice of the PCIJ flows from two considerations. First, the PCIJ existed in a time, which is still perceived today as a sort of heyday of State sovereignty. Indeed, among the most famous dicta of the Court are the ones relating to the sovereignty of the State, namely in the *Lotus* case of 1927. The layer of common interests is generally unrolled in legal doctrine by beginning with the ICJ, with the *Reparations for Injuries* or the *Genocide Convention* advisory opinions of 1949 and 1951. It is therefore not out of order to cast light on the fact that the “common interest”-limb was already largely present in the jurisprudence of the PCIJ. Second, the case law of the PCIJ is reasonably concise to fit the imposed spatial limitations of the present contribution. If I was to venture into the ICJ, I would have either to section the analysis or alternatively to exceed in length.

Before plunging into the analysis, it may be useful to recall that the distinction into the two *utilitates* is not always straightforward, since there are legal institutions which are straddling over the two continents, even if they seem sometimes rooted more prominently in the one than in the other. Three short examples of this matter of fact may be given. First, there is the institution of diplomatic protection, recognized by the PCIJ for the first time in the *Mavrommatis Concessions* case (1924).⁷ This institution is rooted first of all in a singular utility, in that it allows a State to protect its interests and those of its citizens, when considered important enough to mobilize public expenditure

5 On this court the main piece in the legal literature remains M.O. Hudson, *The Permanent Court of International Justice, 1920–1942, A Treatise*, New York, 1943.

6 On the issue, in the literature, see to some extent W.E. Beckett, “Les questions d’intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de Justice internationale”, *RCADI*, vol. 39, 1932-1, p. 131 ff.

7 PCIJ, ser. A, no. 2, p. 12.

and action. But, at the same time, diplomatic protection was also portrayed as a device to enforce the minimum standard of treatment of aliens, i.e. as a device to enforce some “human rights law”-standards *avant la lettre*. This latter aspect relates neatly to public utility. Second, the PCIJ affirmed in the *Chorzow Factory* case (1927 and 1928)⁸ that declarations made during negotiations and not finally embodied in an agreement cannot be used as an argument for its reasoning or be held to constitute a legal bond. This statement protects the freedom of the State during negotiations and thus reflects first of all a singular utility. But there is also an aspect of public utility. The overall aim is to keep negotiations alive as a functioning institution, in view of their importance for international cooperation and for the maintenance of international peace. This functionality could be jeopardized if States were afraid to enter into public consultations, by reason of the fact that binding obligations could ensue for them even without their will, or worse, if they were reluctant to formulate a proposal, in view of the same danger. In order to secure for the negotiations all the flexibility needed, some limitation on the legal treatment of proposals not followed by an agreement seems important. But this is a public utility issue. Third, the PCIJ recognized that a State could acquire a territory by way of acquisitive prescription, under conditions precisely stated (*Eastern Greenland* case, 1933).⁹ The singular utility side is obvious: a State will acquire rights and thus satisfy its territorial interests. But there is also a public utility side: the acquisition of rights and correlative loss of rights by prescription is based on the public interest of legal security and termination of disputes. The latter aspect is emblematically stated in the formula ‘*interest rei publicae, ut sit finis litium*’.¹⁰ Many other examples to the same effect could be given. We will therefore mention in the following pages the legal institutions and arguments of the PCIJ where the one or the other utility prevails, sometimes also venturing into the mention of correlative shares of the other utility in the question at stake.

The analysis will follow quite largely a chronological line. A word of warning may be added. The reader should possess some degree of knowledge of international law. Otherwise, he or she should consult for example the *Encyclopedia of Public International Law* (Max Planck) on a series of concepts we will be mentioning without venturing into explanations as to their meaning (for example: “minimum standard of treatment”). Finally, and this goes almost without saying, the list of utilities given in the next two sections is merely illustrative and

8 PCIJ, ser. A, no. 8, p. 19; and ser. A, no. 13, p. 62.

9 PCIJ, ser. A/B, no. 53, p. 44 ff.

10 *Codex Justinianus*, 7, 52, 2 (Caracalla); 2, 4, 10 (Philip); 3, 1, 16 (Justinian).

does neither exhaust the jurisprudence nor the relevant utterances of the PCIJ. However, the most important issues will hopefully be mentioned.

II The PCIJ and *Utilitas Publica*

1. *International Waterway*. The first case at the PCIJ quite symbolically already cast into the limelight a collective interest (whereas the first case of the ICJ featured a singular interest, in the *Corfu Channel* case). Not only did it cast it into the limelight, but the Court even decided the case by giving full expression to that collective interest. Thus, in the *Wimbledon* case (1923),¹¹ the Court interpreted article 380 of the Treaty of Versailles as embodying a collective interest for international shipping, i.e. the free passage in the Kiel Canal for ships of all the States parties (public or private). Thus, this canal had become an “international waterway” and was partially extracted from the domestic jurisdiction of Germany. This international concern régime had the remarkable consequence that Germany lost the right to take unilateral restrictive measures even in case of a state of war – a very significant restriction on its sovereignty.¹²

2. *Minimum Standard of Treatment*. In more than one case, the PCIJ defended the “minimum standard” rather than the “national standard” of treatment of aliens.¹³ The Court expressed it that way, e.g. in the *Certain German Interests* case (merits, 1926),¹⁴ and later in the *Peter Pazmany* case (1933).¹⁵ It did so even in the specific context of minorities, as the *Minority Schools in Albania* advisory opinion (1935)¹⁶ shows. There is here the Kantian idea of a certain “absolute” international duty to concede a minimum standard of treatment to aliens (or minorities, by reason of conventional duties), notwithstanding how a State treats its own nationals. In other words, the ill treatment of your own citizens does not give you the right to mistreat also the citizens of other States; or: the ill treatment of a class of persons does not create the right to ill treat further classes of persons. It stands to reason that this minimum civilization standard

11 PCIJ, ser. A, no. 1, pp. 22–23.

12 Thus, a minority of judges was not prepared to go that far: Diss. Op. Anzilotti / Huber, *ibid.*, p. 35 ff., and Diss. Op. Schücking, *ibid.*, p. 43 ff.

13 On the issue, see A. H. Roth, *The Minimum Standard of International Law Applied to Aliens*, Ph.D. University of Geneva (thesis no. 69), The Hague, 1949.

14 PCIJ, ser. A, no. 7, p. 33.

15 PCIJ, ser. A/B, no. 61, p. 243.

16 PCIJ, ser. A/B, no. 64, p. 17.

of treatment is considered a public international interest and is protected as such by the PCIJ.

3. *Check on abuse and fraud.* The PCIJ checked that the law was correctly applied and sought to curb any fraud or abuse in the application. Thus, in the *Certain German Interests* case (merits, 1926),¹⁷ it verified to what extent the sale of an industrial plant was made *in fraudem creditorum* or represented an abuse of rights. What is here at stake, from the vantage point of the Court, is the credibility of the proceedings initiated in front of it and the authority of the law itself. The Court is the guardian of these assets: *jura novit curia*. Conversely, any excessive leniency in this regard may have as a consequence a loss of credibility and of authority for the Court, and for international law. This would be contrary to a public interest of international society or community.

4. *Non-derogation.* In the *Rights of Minorities in Upper Silesia* case (1928),¹⁸ the PCIJ made a highly interesting excursion into a type of peremptory norm predating the special régime of article 53 / 64 VCLT. It recognized that a minority protection convention contained in its first section provisions which could not be derogated from by the parties. The régime was one for a minimum of protection and the relevant provisions were thus "intangible".¹⁹ Conversely, the provisions in the second section of the agreement allowed the parties to add protections for the minorities, but not to diminish the protections contained in the first section. Any interpretation of the provisions of the second section must thus take account of this relation of priority conceded to the provisions of the first section. Beyond this particular case, the PCIJ often recognized the régime for the protection of minorities as a fundamental common concern of the then international community, essentially linked with the well-being of peoples and with the maintenance of international peace. One may here recall, among others, the *German Settlers in Poland* opinion (1923), where the Court stressed the "international interest" in the protection of the relevant persons;²⁰ the *Acquisition of Polish Nationality* opinion (1923);²¹ the *Graeco-Bulgarian Communities* opinion (1930),²² where the link with international

17 PCIJ, ser. A, no. 7, p. 34 ff.

18 PCIJ, ser. A, no. 12, p. 30 ff.

19 On the concept of intangibility, see O. de Frouville, *L'intangibilité des droits de l'homme en droit international*, Paris, 2004.

20 PCIJ, ser. B, no. 6, p. 19 ff.

21 PCIJ, ser. B, no. 7, pp. 14-17.

22 PCIJ, ser. B, no. 17, p. 19.

peace was explicitly made; or the *Treatment of Polish Nationals in the Territory of Danzig* opinion (1932).²³ The link with public utility is here manifest.

5. *Fluvial Community*. In the *River Oder Commission* case (1929),²⁴ the PCIJ affirmed that it had to interpret the relevant convention in the light of general principles of international fluvial law, whose gist was a 'certain community of interests among the riparian States'. This community is a community of law and of equality among all States bordering on an international river. The Court thus emphatically rejects any idea of a "Harmon doctrine", whereby each riparian State is wholly sovereign and can do whatever it wants over the section of the river traversing its own territory. On the contrary, the Court stressed duties of cooperation and of consultation among the riparian States, which are at the present time part and parcel of general international law. The public utility is here the one of the 'community of riparian States' and accounts for a rational and mutually beneficial administration of the common good entrusted to them. The interests of that collectivity can enter into sharp contrast with the interests of a single riparian. The issue is then one of interpretation: in some contexts the individual interest will prevail, but in many others the common interest will have to be given precedence. A public utility is here sharply cast into the limelight. Some individual or dissenting opinions also prominently feature in this category, such as namely a Diss. Op. of Judge Van Eysinga, who considers that the legal act by which the régime of the Congo basin was created was of a constitutional and peremptory nature.²⁵

6. *Territory and boundaries*. In a series of cases, the PCIJ insisted on the fact (as would later do the ICJ) that the fixation of boundaries between States is a matter where the certainty and finality of the delimitation effectuated is of a central interest. Thus, in the *Jaworzina* opinion (1923),²⁶ the PCIJ buttressed the competence of the Allied Conference of Ambassadors to arbitrate on the final course of a boundary, stressing among others that no section of the boundary was to be left without clear determination. In the *Mossul* case (1925),²⁷ which was based on a similar legal question, the Court added the importance to find a final and binding solution to the dispute. The issue is one of eliminating a class of disputes which easily lead to friction and war (*interest rei publicae, ut sit finis litium*). The same scheme can be found in the *Monastery of St.-Naoum* opinion

23 PCIJ, ser. A/B, no. 44, p. 22 ff.

24 PCIJ, ser. A, no. 23, pp. 26–27.

25 *Oscar Chinn* case (1934), PCIJ, ser. A/B, no. 63, p. 131 ff.

26 PCIJ, ser. B, no. 8, p. 20 ff.

27 PCIJ, ser. B, no. 12, pp. 19–20.

(1924).²⁸ One knows how much the modern international law recognizes the importance of the stability of boundaries, e.g. through the *uti possidetis*-principle or through exceptions to ordinary régimes, such as article 62, § 2, of the VCLT. Boundaries are one of the most sensitive issues of international security. There is a salient and powerful public interest in keeping stability in this area, upon which many of the wheels of international law of peace rest.

7. *Integrity of an international legal régime.* The PCIJ had occasion to limit references to municipal law, which could have jeopardized the proper functioning of an international legal régime. In particular, if the reference in a treaty was for regulation of a question by municipal law, the manifest danger would have been to end up with a series of different and even divergent regulations, installing inequality among the States and hampering a unitary functioning of the legal régime. Thus, in the *Exchange of Greek and Turkish Populations* opinion (1925),²⁹ the Court refused to interpret the relevant Lausanne Convention of 1923 as operating a reference to municipal law (so that the word 'established at' would have to be interpreted according to the law on domicile in the Turkish national system). Such an interpretation would have created practical problems and inequalities between the two parties, since the reference would have been to changing sets of national legislation. This was also contrary to the aim of a proper and swift implementation of the Convention, which the Court considered a paramount aspect of the conventional regulation. The public interest was here to maintain the unity and the proper functioning of the convention as a common enterprise. This common interest opposed the singular interest of Turkey in the particular situation. This interest was not only common to the two parties, but of more general reach: the different States of the international community had an obvious interest to eliminate as quickly as possible a seed of discord and of possible armed conflict in the Mediterranean.

8. *Nemo iudex in re sua.* In the *Mossul* opinion (1925),³⁰ the PCIJ had to consider how the Council of the League of Nations had to vote on a competence which was granted to it under a treaty distinct from the Covenant of 1919. The Court held that the Council had to function according to the rules under the Covenant and therefore that since the issue was one of deciding on a dispute, the special rules of article 15, §§ 6 and 7, of the Covenant had to be applied. The consequence was that the votes of the representatives of the parties to the dispute were not to be counted when computing the unanimity as required

28 PCIJ, ser. B, no. 9, pp. 14–15.

29 PCIJ, ser. B, no. 10, p. 19 ff.

30 PCIJ, ser. B, no. 12, pp. 31 ff., 32.

by the general rule under article 5 of the Covenant. The unanimity had to be considered as being reached if all the other representatives, except those of the parties in dispute, voted in favor of the proposal. The Court adds a general reason for this interpretation, which is also the basis of the special rule under article 15 of the Covenant: nobody shall be judge in its own cause; *nemo iudex in re sua*. There is a manifest public utility behind the rule. First, a decision shall be able to be taken; if the right of veto of every party to the dispute was recognized, practically no decision could ever be taken, thus wholly sterilizing an important social function of the Council in settling disputes. Second, when parties vote in their own cause, there is a sense of manipulation, as opposed to the idea that justice “must also be seen to be done”. This also affects the public perception and therefore the effectiveness of the outcome, as well as the authority of the decision-making process in the medium and long run. However, all of these are public utilities.

9. *Interest rei publicae, ut sit finis litium*. As already mentioned, the termination of disputes is an important public interest, since it serves the preservation of public peace. The PCIJ put stress on this issue several times. In the *European Commission of the Danube* opinion (1927),³¹ it considered that a dispute had been resolved by a treaty on the basis of a pre-war regulation, rather than to adopt a reading leaving a gap in the resolution of the dispute. Much later, the PCIJ laid stress on the finality and executory character of an arbitral award: *Société Commerciale de Belgique* (1939).³² One may here also recall the territorial and boundary disputes already mentioned above (see under no. 6).

10. *Effectiveness of international action*. In the *Interpretation of the Graeco-Turkish Agreement* opinion (1928),³³ the PCIJ insisted on an interpretation which would further the effectiveness of international action, as compared with legal constructions that would decrease such effectiveness. In particular, it refused to construe the relevant provisions in such a way as to hamper the action of the Mixed Commission handling the disputes relating to the exchange of populations between the two States whose affairs were under consideration. The Court also stressed that the spirit of the agreements is to render as easy and swift as possible the implementation of the task of the Commission, which had to operate in conditions of significant urgency. This effectiveness of international action is rooted in a public utility. It is linked with the proper working of an international institution in the interest of the solution of a thorny dispute and of the maintenance of peace in the region. A variant of this interest

31 PCIJ, ser. B, no. 14, pp. 26–27.

32 PCIJ, ser. A/B, no. 78, pp. 161 ff., 178–179.

33 PCIJ, ser. B, no. 16, pp. 18, 24.

is to be found in the case law of the PCIJ seeking to strengthen the jurisdiction of international organizations (by analogy to what the ICJ would do, e.g. in the *Reparations for Injuries* opinion of 1949 or the *Certain Expenses* opinion of 1962). Thus, for example, in the *Employment of Women During the Night* opinion (1932),³⁴ the Court carefully selected an interpretation of the relevant texts that would expand the domain of jurisdiction of the ILO to regulate the matter under consideration. This course can be seen e.g. in the reasoning of the Court relating to the question as to whether the regulatory power of the Organization extended only to manual workers or also to other classes of employees. The Court referred here to the object and purpose of the relevant agreement. It held that, in that light, it could not be considered that the jurisdiction of the ILO was so narrowly limited as to exclude the latter class of persons³⁵ (one may notice that the argument is negative: it is not reasonable to suppose that ...).

11. *Effectiveness of treaties.* The interpretation of agreements was the great issue over which the PCIJ was constantly called to express itself. It pursued in this area a legal policy of protecting the conventional bonds against unilateralism, exceptionalism, and other weakening devices. It was at pains to keep strong the concept that an agreement is based on a common enterprise, impressing it with a sense of mutual trust and of mutual duties. First, the PCIJ was vigilant to protect the integrity and equilibrium reached through an agreement against any upsetting mechanisms. Thus, in the *Polish War Vessels in the Port of Danzig* opinion (1931),³⁶ the Court refused to expand the reach of a conventional regulation which concerned the access to the port for commercial ships and not for warships. It rejected the invitation to interpret into the relevant convention an expansion of the obligations of one State party, in the absence of any clue in the convention as to an agreement on the privileged treatment of warships. Such an expansion would have upset the equilibrium within the convention and also limited considerably sensitive territorial rights of one party. Second, in the *Free Zones* case (1932),³⁷ the PCIJ refused to accept the unilateral cancellation of rights acquired by agreement, namely the free zone-rights Switzerland had accepted after the offer made by the powers convening at the Vienna Conference of 1815. Third, the Court refused to countenance interpretations leading to absurd results. Thus, in the *Status of the Memel Territory* case (merits, 1932),³⁸ the Court refused an interpretation

34 PCIJ, ser. A/B, no. 50, p. 372 ff.

35 *Ibid.*, p. 374.

36 PCIJ, ser. A/B, no. 43, p. 140 ff.

37 PCIJ, ser. A/B, no. 46, pp. 148–149.

38 PCIJ, ser. A/B, no. 49, p. 317.

which would have allowed the President of a Directorate to freely violate the Statute of the Memel Territory to the detriment of Lithuania, at least for such a time as he would have benefited from the favor of the parliamentary chamber. This would have entirely upset the general economy of the relevant agreement. The Court came back on this issue in the *Diversion of Water from the Meuse* case (1937).³⁹ It here rejected an argument of the Netherlands which would have had as a result the unlawfulness of a new water canal when laid on the existing one, whereas its lawfulness would have been secured if it was established near the old one, even if only by a few meters. Fourth, the Court refused to countenance a special sense of words, if thereby the extent of the rights and obligations incurred would have been upset. Famously, in the *Legal Status of Eastern Greenland* case (1933),⁴⁰ the Court refused to take the word 'Eastern Greenland' as meaning 'Greenland' altogether. In the *Lighthouses* case of 1934,⁴¹ the Court considered that an intention to restrict a contractual régime to the lighthouses intended to remain in Turkish hands could not be presumed; the presumption had rather to be that the scope of the régime applicable had remained unaltered. The Court came back on this issue, in another context, in the *Lighthouses (Crete and Samos)* case of 1937:⁴² the relevant provision contained a clause of general reach, without any restrictions or exceptions, covering all territories detached from Turkey during the Balkan wars. There was nothing in the text allowing distinguishing between different territories. Thus, the Court refused to engage in such a course. Fifth, the Court always tried to interpret the provisions at hand in such a way as to avoid creating a legal gap. In the *Peter Pazmany* case (1933),⁴³ the Court emphatically rejected an interpretation that would have created a gap as to the régime of "public" goods, not covered by the proposed and rejected construction. The care of the Court to protect the conventional régimes against maneuvers of different types is not rooted only in a private interest of the parties. It is also an expression of a public utility, in that the treaty is the main vehicle for international cooperation. The Court understood that it had to protect this fundamental vehicle against attacks of different types, if the credibility of that vehicle for international cooperation was to be maintained as unaltered as possible.

12. *Rule of Law.* In a most peculiar opinion, the Court had to express on the compatibility of certain decrees with the constitution of the Free

39 PCIJ, ser. A/B, no. 70, p. 26.

40 PCIJ, ser. A/B, no. 53, pp. 49, 52, 63.

41 PCIJ, ser. A/B, no. 62, pp. 18–19.

42 PCIJ, ser. A/B, no. 71, p. 102.

43 PCIJ, ser. A/B, no. 61, p. 238.

City of Danzig, which was under the protection of the League of Nations.⁴⁴ The decrees emanated from the Nazi forces at power there. They were incompatible with the provisions of the Constitution of the Free City, guaranteeing the rule of law as well as a series of rights to the citizens of that town. Thus, in the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* opinion (1935),⁴⁵ the Court analyzed the matter and keenly protected principles such as *nulla poena sine lege* and other rule of law tenets. The public utility of these “rule of law”-matters need hardly be stressed.

13. *Equality of Treatment*. The Court often paid attention to steer an interpretive course that would ensure equality among the parties. Thus, in the *Diversion of Water from the Meuse* case (1937),⁴⁶ the Court refused an interpretation which would have led to recognizing a right to the Netherlands which Belgium would not have enjoyed under the same treaty (non-reciprocity). In the absence of clear terms to that effect, the Court refused to engage in the recognition of such a non-reciprocal legal situation. In more than one individual or dissenting opinion, Judges of the PCIJ moreover cautioned for a restrictive interpretation of clauses that contained an inequality of treatment. One may for example quote Judge Anzilotti in the *Lighthouses* case of 1934, where there was in his eyes an inequality between the Powers on the one side and the Balkan States on the other (under article 9 of a relevant agreement).⁴⁷ The link with public utility is again quite manifest. Inequality of the parties is always in tension with the principle of justice. It also jeopardizes the effectiveness of a solution, which, when felt as being unjust, risks being contested and possibly undone.

14. *Proper Administration of Justice*. We may close the list of our examples with the law of the PCIJ itself. The Court recognized that the ‘proper administration of justice’⁴⁸ was a paramount parameter in its application of the law. Thus, for example, the Court had to be vigilant not to allow the claimant to change radically the extent of the dispute during the course of the proceedings, since that would jeopardize the rights of the defendant State. The Court thus devised criteria as to such a transformation of the requests, and thus ultimately of the dispute brought before it: see the *Société Commerciale de Belgique* case

44 The Memoirs of the League Delegate on the spot are most interesting to read: C. Burckhardt, *Ma mission à Dantzig*, Paris, 1961.

45 PCIJ, ser. A/B, no. 65, p. 50 ff.

46 PCIJ, ser. A/B, no. 70, pp. 19–20.

47 Diss. Op. Anzilotti, PCIJ, ser. A/B, no. 62, pp. 38–39.

48 On this concept, see R. Kolb, *The International Court of Justice*, Oxford, 2013, p. 1127 ff.

(1939).⁴⁹ There is another prominent area where the Court applied this principle, namely in the context of agreements of the parties to a dispute which purported to derogate from the Statute of the Court. The PCIJ here protected the integrity of its Statute, which it treated as a type of peremptory norm to which the occasional parties to a dispute had to bow. As the Court itself put it in the case on the *Compatibility of certain Danzig Legislative Decrees with the Constitution of the Free City* (1935): “Whereas the decision of the Court must be in accordance with its Statute and with the Rules . . .”⁵⁰ Some examples of this limb of the case law may be given.

First, in the *Free Zones* case (Order, 1929) the special agreement contained a provision contrary to the Statute. The parties had jointly asked the Court to provide a non-official indication of the results of its deliberations prior to the giving of formal judgment. But under Article 54, § 3 of the Statute, the Court’s deliberations were secret. The Court therefore refused this request: “[t]he spirit and letter of its Statute, in particular Articles 54, paragraph 2, and 58, do not allow the Court ‘unofficially’ to communicate to the representatives of the Parties to a case ‘the result of the deliberation’ on a question submitted to it for a decision; as, in contradistinction to that which is permitted by the Rules (Article 32 [now 101]), the Court cannot, on the proposal of the Parties, depart from the terms of the Statute”.⁵¹

Further, the Court has always refused to allow States, even by agreement, to seek an advisory opinion. It has considered this limitation on the right to seek advisory opinions a rule of imperative law. It has refused to respond to requests which appear to be simply seeking an opinion, whether the request is unilateral⁵² or made jointly.⁵³ Moreover, in some cases, the advance interpretation of a text can be incompatible with the Court’s judicial function and consequently also with its Statute. In the *Free Zones* case (Order, 1929), the parties had asked the Court to declare whether the Versailles Treaty had abrogated, or was designed to abrogate, the free zones. The Court refused to allow itself to be boxed in by a predetermined interpretation, since the Treaty might have neither of those effects: “[t]he Court cannot as a general rule be compelled

49 PCIJ, ser. A/B, no. 78, pp. 173–174.

50 PCIJ, ser. A/B, no. 65, p. 70.

51 PCIJ, ser. A, no. 22, p. 12.

52 Case on *Certain German interests in Polish Upper Silesia*, (1925), PCIJ, ser. A, no. 6, p. 21.

53 Case on the *Interpretation of the Greco-Bulgarian Agreement of 9 December 1927 (Caphandaris-Molloff Agreement)*, (1932), PCIJ, ser. A/B, no. 45, p. 87.

to choose between constructions determined beforehand none of which may correspond to the opinion at which it may arrive . . .".⁵⁴

Finally, parties are not allowed to subordinate the binding or executory character of the judgment to conditions not recognized by the Statute. In the *Free Zones* case, (1929–1932), the special agreement provided that, if the judgment countenanced the importation of merchandise in bond or at reduced customs duties, that aspect of it would be subject to the assent of both parties. The Court considered that condition to be contrary to the Statute.⁵⁵

All these examples show that the Court protected the integrity of its Statute (and Rules) as against derogation by particular agreements. A public utility layer is here defined and enforced against a singular utility layer. It can be expressed as follows: the Statute is a legal agreement rooted in the community of all the States parties to it. Conversely, parties to a particular dispute have to take it as it stands, since they are not the masters of that agreement and can not alter it by their particular action.

III The PCIJ and *Utilitas Singulorum*

1. *Sovereignty*. The most salient example of the recognition of a particular utility is the one rooted in the sovereignty of States. Famously, the Court in the *Lotus* case of 1927 buttressed the principle of sovereign freedom of States.⁵⁶ According to this judgment, the sovereignty of States comes first; international law flows only thereafter, from the exercise of that sovereignty, notably when agreements are entered into by States in the exercise of their treaty-making power. This general picture has been called with some humor a "Lotus-society".⁵⁷ From this principle flows also the rule that restrictions of sovereignty are not presumed and that they have to be restrictively construed. The rule was stated in several PCIJ cases, but the Court never accepted it as a strict rule. Thus, in the *Wimbledon* case (1923),⁵⁸ it stated that a restriction of a territorial jurisdiction of a State must, in case of doubt, be interpreted strictly, but any clear provision in a treaty does away with the doubt and so also with

54 PCIJ, ser. A, no. 22, p. 15.

55 PCIJ, ser. A/B, no. 46, p. 161: "[I]t would be incompatible with the Statute, and with its position as a Court of Justice, to give a judgment which would be dependent for its validity on the subsequent approval of the Parties". See also PCIJ, ser. A, no. 24, p. 14.

56 PCIJ, ser. A, no. 9, pp. 18–19.

57 See P. M. Dupuy, "L'unité de l'ordre juridique international", *RCADI*, vol. 297, 2002, p. 54.

58 PCIJ, ser. A, no. 1, pp. 24–25.

the duty to interpret strictly. And the Court indeed interpreted the provisions applicable in this case in such a way as to limit in a quite sensitive way the territorial jurisdiction of Germany over the Kiel Canal. The Court came back on this issue in the *International Commission of the River Oder* case (1929).⁵⁹ It here went further than in 1923, by adding that any doubt, however slight, left by a textual interpretation could not lead to a restrictive interpretation in favor of sovereignty, but that rather all the other means of interpretation had first to be exhausted. And the Court then had recourse to general principles of fluvial law, from where a 'community of interests of riparian States' flowed! This is also the course the Court followed in the *Persons Employed in Agriculture* opinion (1922):⁶⁰ exceptions to sovereignty must be restrictively interpreted, but the main question is what the terms of the applicable provision mean and imply. This was again the answer in the *Personal Work of the Employer* opinion (1926),⁶¹ where the Court moreover gave a broad interpretation of the jurisdiction of the ILO. One therefore sees that the PCIJ applied the rule with great nuance.⁶² The manifest problem of the maxim is that a restrictive interpretation works to the benefit of one State and of its sovereignty, but also to the detriment of the other State and of its sovereignty. Why should the Court privilege one sovereignty over the other?

In a variant to the principle discussed, the PCIJ recognized that restrictions on the territorial jurisdiction of States are not to be presumed. Thus, in the *Railway Traffic* case of 1931,⁶³ the PCIJ refused to deduce from article 23, letter e), of the League of Nations Covenant a duty to open up a railway line, even if that line was of international interest. In its eyes, the provision was not specific enough to overcome the freedom of action of a State on its own territory. The same principle was applied *mutatis mutandis* in the *Polish War Vessels in the Port of Danzig* opinion (1931)⁶⁴ or in the *Memel Territory* case (merits, 1932).⁶⁵ There are other holdings directly linked with sovereignty, such as the upholding of the qualified unanimity-voting rule in the *Mossul* opinion (1925)⁶⁶ or the domestic jurisdiction-principle considered in the *Nationality Decrees* opinion

59 PCIJ, ser. A, no. 23, p. 26.

60 PCIJ, ser. B, no. 2, p. 22.

61 PCIJ, ser. B, no. 13, pp. 22–23.

62 It may be recalled that the ICJ has dropped this maxim of interpretation, holding that there is no general presumption as to restrictive interpretation in this context: *Navigational Rights* case, ICJ, *Reports*, 2009, p. 237, § 48.

63 PCIJ, ser. A/B, no. 42, p. 117 ff.

64 PCIJ, ser. A/B, no. 43, 142.

65 PCIJ, ser. A/B, no. 49, p. 313.

66 PCIJ, ser. B, no. 12, p. 29 ff.

(1923).⁶⁷ All these legal positions linked with sovereignty are also linked with singular utility. They express the domain in which a State can freely move to realize its "private" policies and interests.

2. *Diplomatic Protection*. In the *Mavrommatis Concessions* case (1924),⁶⁸ the PCIJ for the first time recognized the institution of diplomatic protection of a State in favor of its nationals having suffered damages abroad flowing from a breach of international law. The legal construction of such a protection under general international law was not yet well settled at that time. The Court thus engaged in some new ground. The institution of diplomatic protection is grounded in the first place in a power given to the State. This power enlarges its scope of legal action. The institution is therefore rooted mainly in the singular utility of the States. True, the institution also allows protecting the rights of persons. However, as a discretionary right of the State it has ever since attracted staunch criticism in this regard, as not being wholly adequate to the protection of the individual.⁶⁹

3. *Consensual Jurisdiction*. The PCIJ stressed the fact that its jurisdiction is purely consensual. It is not compulsory in the sense that a State could force it upon another State without the consent of the latter. This principle was for example emphasized in the *Rights of Minorities in Upper Silesia* (Minority Schools) case (1928).⁷⁰ The Court also acknowledged the principle of consent in other procedures for the peaceful settlement of disputes. It did so, for example, in the *Eastern Carelia* opinion (1923).⁷¹ The link with private utility is again clear. If a State had to submit to compulsory dispute settlement, and had to carry out the decisions taken against it, it would have lost the core of its sovereignty. Indeed, sovereignty is legally defined as the power to decide ultimately with regard to a certain question.

4. *The PCIJ as an 'alternative' to direct settlement*. In the *Free Zones* order (1929),⁷² the PCIJ recognized that its jurisdiction could always be halted by agreement of the States parties to a proceeding, when these States preferred some other means of settling their dispute. This power is also vested in the claimant. The Court said that the proceedings in front of it are an "alternative" (much more precisely in the French text of the judgment: un 'succédané') to

67 PCIJ, ser. B, no. 4, p. 21 ff.

68 PCIJ, ser. A, no. 2, p. 12.

69 See, already at the time of the PCIJ, S. Sfériadès, "Principes généraux du droit international de la paix", *RCADI*, vol. 34, 1930-IV, p. 482 ff.

70 PCIJ, ser. A, no. 12, p. 22.

71 PCIJ, ser. B, no. 5, p. 27, in the context of article 17 of the League of Nations Covenant.

72 PCIJ, ser. A, no. 13.

the direct agreement between the parties. This short expression contains a whole lot of information as to how the Court perceives its role and as to the type of litigation taking place in front of it. The litigation is manifestly of a purely private law type: there is a judge only if the parties (or the claimant) so demand, and only so long as the demand remains. Further, the Court is there to aid the parties to settle their dispute. It will not impose its jurisdiction in order to secure public interests in the application of the rule of law. Thus, States may settle a dispute by avoiding the application of the law and rather by creating new law, through their direct agreement. Such dispute settlement is cast in a context where the singular interest takes precedence over the public utility.

5. *Duty to make reparation.* In two extremely famous dicta, the PCIJ recognized the duty of a State having breached an international obligation to make reparation to the aggrieved State. The classic passages are to be found in the *Chorzow Factory* case (1928).⁷³ The duty to make reparation is there to reestablish the equilibrium between the parties in a legal transaction or situation, which has been disturbed by the breach of the law of one party against the other. The compensatory side of the duty casts it squarely into the realm of singular utility: the point of the legal rule is to protect the rights and the patrimony of a subject as against attacks by another subject. The private utility in the maintenance of a given situation of a subject is the matter protected by the legal rule. It stands to reason that there are also public utilities in not allowing a subject to reap advantages by the breach of legal rules, and thus in not giving it incentives to breach the law.

6. *Force majeure.* Force majeure as a circumstance precluding wrongfulness has been recognized by the PCIJ in the two quite singular cases relating to *Serbian Loans* (1929)⁷⁴ and to *Brazilian Loans* (1929).⁷⁵ If allowed, this circumstance works to the benefit of the State prevailing itself upon it. Conversely, the legal rule normally applicable will be sacrificed. At best, there can be found an equitable aspect to the rule, which could relate to some public utility. The gist of the matter remains however rooted in singular utility.

7. *Respect of credits and debts in State succession.* In the *Settlers of German Origin* opinion (1923),⁷⁶ the PCIJ held that certain acquired private rights had to be respected by the new sovereign of a territory in case of State succession. This rule goes to protect the private interests of these persons and the rights

73 PCIJ, ser. A, no. 13, pp. 29, 47.

74 PCIJ, ser. A, no. 14, pp. 39–40.

75 PCIJ, ser. A, no. 15, p. 120.

76 PCIJ, ser. B, no. 6, p. 36.

of their State of origin. The utility is fundamentally singular, the roots of the situation being largely situated in private law.

8. *Autonomy of the Will*. The PCIJ recognized that the legal subjects could create rights and duties by legal acts according to their expressed or implied will. This is an aspect of the so-called “private autonomy”. In international law, this autonomy is further buttressed by the concept of sovereignty, in which it is rooted. Thus, in the *Jurisdiction of the Courts of Danzig* opinion (1928),⁷⁷ the PCIJ recognized that the parties could by their free will confer through an international agreement directly enforceable rights on individuals.⁷⁸ This fact enlarged the ambit of their faculty to act in a legally relevant way. By the same token, the PCIJ recognized that States could resort to unilateral legal acts in order to assume certain rights or duties. Thus, in the *Free Zones* case (1932),⁷⁹ the Court emphasized that a *pro curia* statement made by Switzerland could bind that State. This statement was all but obvious at the time the Court made it – if only because of thorny questions as to the competence to bind the State by international commitments on the part of agents of that State in front of the Court. The recognition of such powers allows the States to multiply the instruments of their legal policy and thus expresses in the first place a singular utility.

9. *Acquisition of titles through Prescription*. The PCIJ held in the *Eastern Greenland* case (1933)⁸⁰ that a State could acquire a title to territory when there is an intention to act in the quality of a sovereign and when there is some effective display of public authority on a part of a territory. On the other hand, there must be a passivity or acquiescence by the State claiming concurrent titles. This acquisitive prescription allows a State to increase its territorial domain and therefore its rights. It therefore works in the first place in the singular interest of the States, even if, as already explained, the institution is also touted in exigencies of legal security, protection of legitimate expectations and equitable considerations. In regard of these latter points, public utilities come to the fore. The institution of prescription is thus a good example of a mixed legal institution, where singular and public utilities add up one to the other while pulling in the same direction.

77 PCIJ, ser. B, no. 15, pp. 17–18.

78 See the discussion in R. Portmann, *Legal Personality in International Law*, Cambridge, 2010, p. 68 ff.

79 PCIJ, ser. A/B, no. 46, pp. 169–170.

80 PCIJ, ser. A/B, no. 53, p. 44 ff.

IV Conclusion

The examples of the two utilities given may suffice to provide a vivid picture of the subject matter. A legal order is always made to respond to needs on the collective and on the individual plane. The interests the law protects are situated on these two planes. Any legal order can thus be analyzed as to the specific equilibrium it ensures between these sometimes countervailing, and sometimes converging, forces. The same is true for the case law of a judicial body.

Where is the case law of the PCIJ situated in the spectrum of the two planes and their respective forces? A summary perusal of its jurisprudence shows that it is mistaken to consider the PCIJ as being the champion of the singular utility rooted in the sovereignty of States, i.e. in the "Lotus society". The only judgment, which can be mobilized unreservedly in this direction, is precisely the *Lotus* case of 1927. For the rest of its jurisprudence, the PCIJ showed a remarkable, and for the time even unexpected, sensitivity for common concerns and for public interests. It was therefore a true "public international law"-tribunal. It was magisterially attentive to the proper needs of this particular legal order, and this to an extent no municipal tribunal could ever have reached. At the same time, the PCIJ was a highly realistic tribunal, taking keen account of the needs of States and of the necessary concessions its case law had to make to their commutative justice and sovereign freedom. It is doubtlessly the careful equilibrium between these two fundamental forces, centrifugal and centripetal, community-oriented and State-oriented, an equilibrium obtained through extremely meticulous interpretations of legal texts, which makes the heart of the Court's contribution to international society, and which explains up to this day its long-lasting success. The ICJ could then take up and over the *flambeau* at the place the PCIJ had left it, at once alive and lively.

