
Judge Max Huber at the Permanent Court of International Justice

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Abstract

A towering figure in the history of the Permanent Court of International Justice, Max Huber left his imprints on the work of the International Court of Justice as well as various fields of substantive international law. Huber did not exactly overrate the potential for international law, yet he was instrumental in defining and fleshing out an international lawyer's approach that stands as a monument to international legal thinking when put into practice. The Permanent Court outshined earlier institutions and created a heritage worth preserving and nurturing. Huber was quintessential in drafting many of the landmark decisions of the Permanent Court and, as with the awards rendered by him as sole arbitrator, they remain pertinent and relevant.

Max Huber's legacy in international law lies mainly in his contribution as a practitioner during the golden era of international adjudication. Although not estranged from positions previously held as an academic, Huber was able to break out of the conceptual straitjacket that *Buchrecht* had sewn at a time when international law was undergoing a historic transformation from theory to practice. Huber took a leading role in the Commission of International Jurists in the *Aaland Islands* case (1920) and exercised considerable influence through awards rendered as sole arbitrator in the *British Claims in the Spanish Zone of Morocco* (1924–1925) and the *Island of Palmas* (1928) cases. However, it was in the *Chambre de Conseil* of the Permanent Court of International Justice (PCIJ) between 1922 and 1930 that Huber, albeit the youngest member of the bench, was instrumental in the rise of the international judiciary.

The Permanent Court 'entered upon its duties at The Hague on February 15th, 1922',¹ as a groundbreaking institution that had to build its own reputation. Its

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

decisions did not immediately attract the attention of academics, nor were they necessarily applauded by diplomats and statesmen. In 1926, Judge Huber suggested to his colleagues that ‘the work in preparing our decisions must be such that if our critics – whether learned men or politicians – could be admitted to the private sittings of the Court, they would remain with the impression that the evolution of our judgments is really worthy of the Court’.² Using a metaphor that had a clear bearing on *The Lotus*, decided in 1927 by the casting vote of Judge Huber in his capacity as President of the Permanent Court, Huber compared ‘our decisions to ships which are intended to be launched on the high seas of international criticism’.³ With Max Huber and Dionisio Anzilotti as successive presidents of the Permanent Court, an attempt was made to build a jurisprudence and develop international law. Anzilotti, the second-youngest member of the bench, was in Huber’s own words the finest and sharpest legal mind he had ever met.⁴ Huber and Anzilotti combined eminence in scholarship with practical experience, partly derived from services rendered by them to their respective governments. On a bench composed mainly of professors and national judges, they formed perhaps the most crucial and influential partnership in the history of the Permanent Court and its successor, the International Court of Justice. They benefited from intimate cooperation with the industrious registrar of the Permanent Court, Åke Hammarskjöld.

Bearing in mind that Huber’s academic writings are treated in detail in other contributions to this symposium, Section 1 of this article focuses on the application of his sociological approach to international dispute resolution. It is followed by Section 2 concerning Huber’s attitude towards adjudication in more practical terms. Huber saw detailed and convincing *motifs* as the best response to accusations of political bias and he also left a lasting imprint on the way in which deliberations have been conducted in the International Court of Justice. Three key decisions of the Permanent Court are particularly illustrative of Huber’s approach and influence, namely the *Nationality Decrees* opinion of 1923 (Section 3), *The Wimbledon* of 1923 (Section 4), and *The Lotus* of 1927 (Section 5). In 1928, Huber took up the presidency of the International Committee of the Red Cross and his influence on the bench diminished. Despite widespread praise and encouragement, Huber did not stand for re-election in 1930 (Section 6).

1 A Sociological Approach to International Dispute Resolution

A multifaceted personality with notable achievements in other fields to his credit, Max Huber did not exactly overrate the state of or potential for international

² Reproduced in O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (2005), at 129.

³ *Ibid.*, at 248.

⁴ Huber, ‘Epilog zu den *Denkwürdigkeiten* aus meinem Leben niedergeschrieben im Haag 1925–1927’ (unpublished ms, 1959), at 7; see Spiermann, *supra* note 2, at 276, n. 339.

law. Huber's principal contribution to theory, *Die soziologischen Grundlagen des Völkerrechts*, examined international law as an embryonic system that had to be approached, *de lege ferenda*, from a broader, 'sociological' perspective.⁵ Pending further development, international law had to reflect closely the social substrate of international relations, notably the territorial setting necessary for a minimum of coexistence.⁶

In 1919, Huber distinguished international adjudication from national adjudication in the following terms:

*Das besondere staatliche Interesse dagegen in einem internationalen Konflikt hat für die zwischenstaatliche Rechtsgemeinschaft eine höhere Bedeutung; das Individuelle des Falles verlangt deshalb weitgehende Rücksicht. Lebensinteressen eines Staates können nicht ohne unmittelbare oder latente Gefahr für den Frieden geopfert werden. Das gibt der zwischenstaatlichen Rechtssprechung in vielen Fällen einen hochpolitischen Charakter, der sich nicht leicht mit einer für alle Staaten bindenden und all Streitigkeiten erfassenden Regelung verträgt.*⁷

As representative of the Swiss Government in the First Assembly of the League of Nations in 1920, Huber took part in the final phase of the drafting of the Statute of the Permanent Court. Invoking his experiences gathered earlier the same year as member of the Committee of Jurists to which the Council of the League had submitted certain preliminary questions relating to a dispute over the Åland Islands, Huber found that that dispute could have been submitted to the Permanent Court for an Advisory Opinion 'since the points referred to the Jurists were, respectively of an interlocutory or theoretical nature'.⁸ He added that '[h]ad they affected the actual conflict, the same

⁵ M. Huber, *Die Soziologischen Grundlagen des Völkerrechts* (1928), at 4–6 and 98; it was an attempt to provide an alternative to positivism: see *ibid.*, at 6 and O. Diggelmann, *Anfänge der Völkerrechtssoziologie: die Völkerrechtskonzeptionen von Max Huber und Georges Schelle im Vergleich* (2000), at 24–28, 67 and 107–108. Huber found this to be his most significant scientific contribution: see M. Huber, *Denkwürdigkeiten, 1907–1924* (1974), at 51. See also M. Huber, *Die Staatensuccession: Völkerrechtliche und Staatsrechtliche Praxis in XIX. Jahrhundert* (1898), at 4 and 26–40. In due time, Huber would appreciate the emergence of international relations as a separate discipline: see M. Huber, *Koexistenz und Gemeinschaft: Völkerrechtliche Erinnerungen aus sechs Jahrzehnten* (1956), at 5.

⁶ Huber, *Die Soziologischen Grundlagen*, *supra* note 5, at 9–10 and 45–49. As to possible ends, see Huber, 'Die Fortbildung des Völkerrechts auf dem Gebiete des Prozess- und Landkriegsrechts durch die II. internationale Friedenskonferenz im Haag 1907', *2 Jahrbuch des öffentlichen Rechts der Gegenwart* (1908) 470, at 473, Huber, 'Die geschichtlichen Grundlagen des heutigen Völkerrechts', *16 Wissen und Leben* (1922–1923) 261, at 278–281 and Huber, 'On the Place of the Law of Nations in the History of Mankind' in *Symbolae Verzijl* (1958), at 190, 193–195.

⁷ Huber, 'Die konstruktiven Grundlagen des Völkerbundsvertrages', *12 Zeitschrift für Völkerrecht* (1922–1923) 1 at 14: 'In contrast, the peculiar interest of a state in an international conflict is of greater importance to the international community. Therefore, the individuality of cases must be taken into consideration to a greater extent. Vital interests of states cannot be sacrificed without posing an immediate or latent threat to the peace. In many cases, this confers on international adjudication a highly political character, which is not easily reconcilable with the notion of a settlement which is binding on all states and comprising all disputes.' See also Huber in J. Brown Scott (ed.), *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (1920), ii, at 66, and in *33-I Annuaire* (1927), at 763–764.

⁸ League of Nations, *Records of the Assembly: Meetings of the Committees* (1920), at 387.

procedure might have proved dangerous'. Huber took a similarly unsentimental view of so-called compulsory jurisdiction of the Permanent Court: 'to make a universal agreement on compulsory jurisdiction, which would be the effect of the additional paragraph to Article 36, constituted almost as great a step in advance as the establishment of the Permanent Court'.⁹

In a decision rendered in 1924 in the *British Claims in the Spanish Zone of Morocco* case, Arbitrator Huber made room for the view that '[l]e principe de l'indépendance des États exclut que leur politique intérieure ou extérieure fasse dans le doute l'objet de l'activité d'une juridiction internationale'.¹⁰ Just two months before, the Permanent Court had ruled on its jurisdiction in the *Mavrommatis* case. It was the first time that objection had been taken to the Permanent Court's jurisdiction in a contentious proceeding. The considerations said to be pertinent in deciding on jurisdiction were those 'best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law'.¹¹ The former was in accordance with President Loder's inclination towards compulsory jurisdiction shaped in the image of national adjudication, while the latter reflected a strictly consensual test advocated, in particular, by Judge Anzilotti. The second consideration distinguishing international dispute settlement came close to Judge Huber's position. All three judges had had a hand in the rather chaotic drafting of the judgment.¹²

It is possible that Huber's view was also reflected in other decisions. In 1923, the Permanent Court delivered an Advisory Opinion in the *Jaworzina* case, which arose out of a border dispute between Poland and Czechoslovakia. In an opinion drafted principally by Judge Huber, the course of events made the Permanent Court observe that 'direct agreement between the parties regarding the points in dispute' was 'a form of settlement always preferable to the intervention of a third party'.¹³ In the specific case, the third party in question was the Conference of Ambassadors representing the Principal Allied and Associated Powers, but clearly the observation was broader in scope. In 1929, a more nuanced view was expressed in the oft-quoted statement in the first order

⁹ *Ibid.*, at 313. The final compromise consisting in an optional clause had been preceded by a proposal made by the Swiss delegation to the Second Hague Peace Conference in 1907. As for Huber's role in this respect, see Huber, 'Schiedsrichterliche und richterliche Streiterledigung: Ein Überblick', 56 *Die Friedens-Warte* (1961–1965) 105, at 110 and 114 and Spiermann, "'Who Attempts too Much does Nothing Well": The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice', 72 *BYIL* (2003) 187, at 250, n. 388.

¹⁰ *Affaire des biens britanniques au Maroc espagnol*, 2 RIAA (1924) 615 at 642 and see Huber, *Die Soziologischen Grundlagen*, *supra* note 5, at 48: 'The principle of the independence of States means that, in case of doubt, their domestic or foreign policies cannot be made the object of scrutiny of an international tribunal.'

¹¹ *Case of the Mavrommatis Palestine Concessions* (Jurisdiction), PCIJ Series A No. 2 (1924), at 16.

¹² See Huber, *Denkwürdigkeiten*, *supra* note 5, at 282–283 and Spiermann, *supra* note 2, at 195–197 and 203–205.

¹³ *Question of Jaworzina (Polish-Czechoslovakian Frontier)*, PCIJ Series B No. 8 (1923) at 56; on the drafting, see Huber, *Denkwürdigkeiten*, *supra* note 5, at 281.

in the *Free Zones* case between France and Switzerland: ‘the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement’.¹⁴ The possible divergence between the pronouncements from 1923 and 1929 may testify to Judge Huber’s diminishing influence on the bench as the decade was drawing to a close (and Huber had taken up the presidency of the International Committee of the Red Cross); or they may reflect a change in Judge Huber’s own attitude in the light of experience gathered in previous years.

2 Max Huber as Judge and President of the Permanent Court

In the context of drafting the Statute of the Permanent Court, a proposal for Conferences for the Advancement of International Law, a less ambitious name than the previous Peace Conferences,¹⁵ had materialized. The proposal was ultimately rejected by the Assembly. For Huber’s part, he had found that ‘the procedure provided for . . . was too complicated’, adding that ‘in international law it was impossible to distinguish legal and political considerations’.¹⁶ Still, Huber’s sociological approach did not envisage politicization of adjudication. Quite to the contrary, Huber wrote the following to his future American colleague, John Bassett Moore, just after their election to the Permanent Court:

I always was of [the] opinion that public opinion, including the lawyers, have a tendency to overrate the importance and effectiveness of an international judiciary for international peace, but it is nevertheless very gratifying that this opinion exists and it is our duty to give credit to it and to deepen and strengthen the esteem in which international arbitration is held in the world. The moral responsibility of the Court in deciding the first cases and in giving their argumentation is immense. The world is disgusted with politics of interest and influence and longs for an institution of real impartiality. We must not only be impartial but even try to avoid the appearance of partiality.¹⁷

Already at the preliminary session at which the Rules of Court were hammered out, Judge Huber complained about certain judges, including President Loder, automatically subjecting the Permanent Court to procedural principles taken from civil law. Huber added that

Anzilotti und ich, meistens von Moore unterstützt, vertraten den Standpunkt, daß der Internationale Gerichtshof die richterliche Unabhängigkeit und die Stabilität seiner Zusammensetzung mit der

¹⁴ *Case of the Free Zones of Upper Savoy and the District of Gex* (First Phase), PCIJ Series A No. 22 (1929), at 13.

¹⁵ See J. Brown Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists* (1920), at 80 and 134–138 and also Spiermann, *supra* note 9, at 227–228 and 252–253.

¹⁶ League of Nations, *supra* note 8, at 327.

¹⁷ See Spiermann, *supra* note 2, at 147.

*nationalen Justiz gemein habe, nicht aber sein Verfahren, in dem die Parteien souveräne Staaten sind, und daß er mit dem Massenbetrieb staatlicher Gerichte sich nicht vergleichen lasse.*¹⁸

Judge Huber would become the vanguard of an international lawyer's approach to international legal argument as applied in specific cases; one that did not construe international law in the light of any specific national legal system. Summing up his experiences of the Permanent Court's four sessions in 1923 and 1924 as to the drafting of decisions, Max Huber wrote:

*In den Fällen Marokko-Tunis, Ost-Karelien, Deutsche Ansiedler in Polen, Jaworzina, Mavrommatis und Neuilly hatte ich wesentlich am Zustandekommen des Entscheides mitgewirkt und die betreffenden Urteile zu einem erheblichen Teil, zwei davon sogar ausschließlich, redigiert. Dabei hatten die Redaktoren stets mindestens vier Fünftel der eigentlich juristischen Begründung zu geben, da die Urteilsberatung meist nur ergab, zu welchem Resultat die Mehrheit gelangt sei, während hinsichtlich der Motive zunächst nur ein Chaos zum Teil widersprechender Standpunkte sichtbar wurde, wobei sich erst noch bei der Redaktion des Urteils zeigte, daß große Teile der Begründung überhaupt erst noch zu finden waren.*¹⁹

Judge Huber's influence was only to increase as at the end of the last session in 1924 he was elected President of the Permanent Court for a period of three years. It was a position that he accepted without enthusiasm after repeated voting between Judges Loder and Moore had produced nothing but a series of ties.²⁰ Upon his election as President, Judge Huber stressed the relationship between the non-political mission of the Permanent Court and the careful drafting of motifs:

Foncièrement différente est la Justice. Ici toute balance de forces, tout opportunisme, tout marchandage sont exclus. La décision judiciaire tire son autorité non pas du fait qu'elle s'adapte bien aux exigences d'une situation particulière et momentanée, mais de ce qu'elle repose sur des raisons qui ont une valeur générale en dehors du cas concret et une force conclusive pour tous. Les institutions judiciaires reposent toutes sur deux principes d'ordre spirituel: la logique juridique, élément rationnel, et la justice, élément moral. Ces deux principes, ces deux piliers de la fonction judiciaire l'élèvent au-dessus de la mêlée où s'affrontent les intérêts et les passions des hommes, des partis, des classes, des nations et des races.

La garantie de cette élévation, de cette indépendance, repose dans la nécessité pour le juge d'énumérer les motifs qui, pour lui, commandent sa décision. Les considérants sont l'âme de la sentence. Celle-ci fait chose jugée non seulement entre les Parties, mais aussi à l'égard de la Cour. Tout jugement est pour

¹⁸ Huber, *Denkwürdigkeiten*, *supra* note 5, at 272: 'Anzilotti and I, normally supported by Moore, held the view that the Permanent Court shared with the national judiciary the judicial independence and the permanency of its bench, but not its procedure, the parties being sovereign states, and that the Permanent Court could not be compared with the mass-industry that are national courts.'

¹⁹ *Ibid.*, at 284: 'In the cases of *Nationality Decrees*, *Eastern Carelia*, *German Settlers*, *Jaworzina*, *Mavrommatis* and *Neuilly*, I had an important role in the making of the decisions; in these cases I drafted considerable parts of the decisions, on two occasions even the entire decision. In doing so a drafter had to contribute at least four fifths of the reasoning on the law, since the deliberations for the most part only served to determine the conclusion reached by the majority. With regard to the *motifs*, at first only a chaos of partly contradictory views came to light and it was only during the drafting of the decisions that substantial parts of the reasoning were elaborated.'

²⁰ See *ibid.*, at 298–304.

*une Cour un monumentum aere perennius, soit d'honneur, soit de reproche. Les considérants d'un jugement constituent la forme la plus pure et la plus redoutable de la publicité.*²¹

Nevertheless, at the very first session over which he presided, Judge Huber once again experienced chaotic drafting, and the *Exchange of Populations* opinion only materialized after Judges Huber and Anzilotti had stepped in and taken active part in the work of the drafting committee, just as in the *Mavrommatis* case.²² Against this background, President Huber instigated a more influential role for the president in the Permanent Court's work, notably by becoming an *ex officio* member of every drafting committee.²³ President Huber also encouraged the use of written notes from each member of the bench as the starting-point for deliberations, as had been used once under his predecessor, namely in the *Mavrommatis* case.²⁴ These notes were preceded only by an exchange of views as to which issues should be discussed. On the basis of the written notes, President Huber would produce a detailed questionnaire, providing a structure for the oral component of the deliberations.

Most of the cases decided by the Permanent Court in the 1920s had to do with treaty interpretation. In 1922, referring to the *International Labour Organization* opinions, Judge Huber had been talking about 'the "agricultural" question' as being 'a very interesting one, as it involves most delicate problems of interpretation of treaties', which 'is a chapter of International Law which is usually very poor even in big treatises on the Law of Nations'.²⁵ Judge Huber exercised great influence in this field. Thus, the memorable *Mosul* opinion from 1925 was a true reflection of President Huber's understanding of treaty interpretation.²⁶ In 1926, the Permanent Court delivered its fourth Advisory Opinion concerning the Constitution of the International Labour Organization. It became known for applying a principle

²¹ PCIJ Series C No. 7-I, at 18: 'Justice is fundamentally different. Here all balancing of power, all opportunism, all bargaining are excluded. The judicial decision draws its authority not from the fact that it is well-adapted to the requirements of a particular, temporary situation, but rather that it is based upon reasons that are of general value beyond the concrete case, and that are conclusive for all. All judicial institutions rest on two principles of spiritual order: legal logic, the rational element; and justice, the moral element. These two principles, these two pillars of the judicial function, elevate it above the melee in which the interests and the passions of men, parties, classes, nations and races clash.

'The guarantee of this elevation, this independence, rests in the requirement on the judge to set out the reasons that, in his view, compel his decision. These grounds are the soul of the judgment, which make the matter settled not only between the parties, but also in the eyes of the Court. Every judgment is a monumentum aere perennius for the Court that makes it, either of honour or of blame. The grounds of a judgment constitute the purest and most powerful form of publicity.'

²² See Spiermann, *supra* note 2, at 243.

²³ See PCIJ Series E No. 2 (1925–1926), at 170–171 and PCIJ Series D No. 2, Add. 1 (1926), at 248–249.

²⁴ PCIJ Series E No. 1 (1922–1925), at 171.

²⁵ See Spiermann, *supra* note 2, at 296.

²⁶ See Article 3, Paragraph 2, of the *Treaty of Lausanne (Frontier between Turkey and Iraq)*, PCIJ Series B No. 12 (1925) and (1950) 43-I *Annuaire*, at 380 and 391; but as for the result, President Huber had entertained doubt: see Spiermann, *supra* note 2, at 232–242. Huber's observation to the effect that '[I]e texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties', (1952) 44-I *Annuaire*, at 199, was quoted by the International Law Commission in the commentary to its general rule of treaty interpretation: see [1966] II *Yearbook of the International Law Commission* 220, n. 128.

of effective treaty interpretation to the constituent document of an international organization, the focus being on the ‘practical effect rather than . . . the predominant motive’.²⁷ ‘Il est à remarquer’, as one commentator observed in this context, ‘que la Cour se trouvait alors présidée par M. Max Huber, dont on connaît par ses publications, l’importance qu’il attache au rôle social dans le domaine juridique’.²⁸ However, some years later when he had just delivered his award in the *Island of Palmas* case, Judge Huber had had quite enough. He saw the *Island of Palmas* case as ‘a most interesting case from a legal point of view, a case of pure law of nations, not, as most of the cases decided by the Court, a question of interpretation of some badly drafted clauses of a convention, or a civil case, as *Chorzow*, international only by some connection with a treaty’.²⁹

That being said, a good number of the Permanent Court’s decisions laid bare the close relationship between treaty interpretation and general international law. Indeed, the secondary position of preparatory work in treaty interpretation (now Article 32 of the Vienna Convention on the Law of Treaties) was formulated by the Permanent Court in four decisions – the *Mosul* opinion, *The Lotus*, the *Danube* case and the *River Oder* case – all of which construed treaty provisions against a background coloured by the territorial setting under general international law.³⁰ Three decisions are particularly illustrative of the approach taken by Judge Huber and have been selected for analysis in the following sections.

3 Nationality Decrees

The first decision in which Judge Huber actually took part was the *Nationality Decrees* opinion delivered in 1923. The result was a clear articulation of Huber’s sociological approach to international law combined with the view also taken by Huber that the League of Nations constituted a progressive development. The request for an Advisory Opinion arose out of the promulgation of decrees in the French protectorates of Tunis and Morocco, designating certain individuals born within the territories as Tunisian

²⁷ *Competence of the International Labour Organization to regulate, incidentally, the Personal Work of the Employer*, PCIJ Series B No. 13 (1926) at 18–19. The principle of effective treaty interpretation was adopted in *Corfu Channel Case (Merits)* [1949] ICJ Rep 4, at 24 and *Reparation for Injuries suffered in the Service of the United Nations* [1949] ICJ Rep 174, at 182–183. See also Huber in (1952) 44-1 *Annuaire*, at 201.

²⁸ M. Jokl, *De l’interprétation des traités normatifs d’après la doctrine et la jurisprudence internationales* (1935), at 176: ‘It is noteworthy . . . that the Court is now presided over by Max Huber, who has made known through his publications the importance that he attaches to the role of the social within the legal domain.’ cf. Klabbers, ‘The Life and Times of the Law of International Organizations’, 70 *Netherlands J Int’l L* (2001) 287, at 296–297.

²⁹ See Spiermann, *supra* note 2, at 296.

³⁰ See Article 3, Paragraph 2, of the *Treaty of Lausanne (Frontier between Turkey and Iraq)*, *supra* note 26, at 22, *The Case of the SS Lotus*, PCIJ Series A No. 10 (1927) at 17, *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, PCIJ Series A No. 14 (1927) at 31 and *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ Series A No. 23 (1929) at 41–43 and see also *Question of Jaworzina (Polish-Czechoslovakian Frontier)*, Series B No. 8 (1923) at 41. As for the rationale, see Huber in (1950) 43-1 *Annuaire*, at 380 and 391.

and Moroccan subjects respectively. Another set of decrees had made them French subjects. Some of the affected persons (who were affected in the sense that they were conscripted into the French army) were British subjects, and the British Government brought the matter before the Council. Under Article 15(8) of the Covenant, the Council could not entertain a dispute if it arose 'out of a matter which by international law is solely within the domestic jurisdiction'. The Permanent Court was asked to advise whether this provision applied to the specific dispute.

The *Nationality Decrees* opinion explored the rationale behind Article 15(8) in terms of a sweeping principle of non-intervention under general international law that echoed Huber's sociological approach.³¹ According to the *motifs*, 'at a given point' the League's interest in being able to make recommendations gave 'way to the equally essential interest of the individual State to maintain intact its independence in matters which international law recognises to be solely within its jurisdiction'.³² 'Without this reservation', the Permanent Court added, 'the internal affairs of a country might, directly they appeared to affect the interests of another country, be brought before the Council and form the subject of recommendations by the League of Nations.' The report by the Commission of International Jurists in the *Aaland Islands* case, also drafted by Huber,³³ had been even more direct: 'Any other solution would amount to an infringement of sovereign rights of a State and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in the term "State", but would also endanger the interests of the international community.'³⁴

With a view to the dispute in question, the *motifs* stated that 'in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain'.³⁵ However, this was not the end of the *motifs*, and the true significance of the *Nationality Decrees* opinion lies in the reserved domain – 'the right of a State [*la liberté de l'Etat*] to use its discretion' – not holding up against the competence of the Council. According to the *motifs*, the reserved domain was 'limited by rules of international law', so that if a state had undertaken treaty obligations, Article 15(8) 'then ceases to apply as regards those States which are entitled to invoke such rules', the dispute taking on 'an international character'.³⁶ It was because of this possibility of treaty-making that the scope of Article 15(8) was 'an essentially relative question' and depended 'upon the development of international relations'.³⁷ In other words, treaty obligations trumped the sweeping principle of non-intervention to the effect that the competence of the Council prevailed over ideas about a reserved domain.

³¹ See Huber's analysis in (1931) 36-I *Annuaire*, at 78 and also 79 and 82–86.

³² *Nationality Decrees in Tunis and Morocco*, PCIJ Series B No. 4 (1923) at 25.

³³ Huber, *Denkwürdigkeiten*, *supra* note 5, at 164–165 and 276.

³⁴ *Aaland Islands Case*, Official Journal 1920, Special Supplement No. 3 (1920) at 5.

³⁵ PCIJ Series B No. 4 (1923) at 24.

³⁶ *Ibid.*

³⁷ See Huber in (1931) 36-I *Annuaire* at 86 and 83.

Huber was clear that Article 15(8) ‘*a été inséré dans le Pacte pour des raisons politiques déterminées, et non pas pour des considérations tirées du système du Pacte ou du droit international en général*’; nevertheless, on Huber’s analysis preparatory work and intentions were overshadowed by ‘l’esprit’ of the Covenant.³⁸ In the Permanent Court’s Advisory Opinion, the definition of the Council’s powers in paragraph 1 was seen as ‘the fundamental principle’, while Article 15(8) was ‘an exception to the principles affirmed in the preceding paragraphs and does not therefore lend itself to an extensive interpretation’.³⁹ To the extent that ‘*l’idée de la communauté internationale*’ had found expression in the Covenant, the Permanent Court was willing to derogate from the drafting history of Article 15(8). Again, one may quote Huber:

*Jusqu’à la création de la S. D. N. et jusqu’au Pacte de Paris les Etats possédaient une compétence exclusive sur la manière dont ils voulaient liquider ou ne pas liquider leurs différends avec d’autres Etats. Cette compétence qui comprenait le droit à la guerre et partant à la négation des droits et même de l’existence d’autres Etats est une conception au fond incompatible avec celle de la communauté internationale et remontant à une période antérieure à celle-ci. Cette limitation de la compétence exclusive est l’événement le plus important dans l’évolution des compétences de l’Etat dans le domaine international.*⁴⁰

An open-ended ‘*Kodifikation der praktischen Politik*’,⁴¹ the Covenant had expanded the reach of international law. In this connection, it was of practical significance that, in the view of the Permanent Court, Article 15(8) was inapplicable where ‘the legal grounds (*titres*) relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council’.⁴² A higher threshold, for example, an ‘opinion upon the merits of the legal grounds (*titres*)’ would, the Permanent Court said, ‘hardly be in conformity with the system established by the Covenant for the pacific settlement of international disputes’. On behalf of the French Government, Professor Lapradelle had made such an exceedingly long speech on the merits of the dispute that it had become rather difficult to hold that the disputed

³⁸ See *ibid.*, at 83 and 81, respectively. Article 15(8) ‘was inserted into the Covenant for fixed political reasons, and not as a result of any considerations drawn from the Covenant system or from international law in general’.

³⁹ PCIJ Series B No. 4 (1923) at 24 and 25.

⁴⁰ (1931) 36-I *Annuaire* 86: ‘Until the creation of the League of Nations, and until the Pact of Paris, States possessed exclusive competence over the manner in which they wished to settle, or not to settle, their differences with other States. This competence, which included the right to wage war, and thus to negate the rights and even the existence of other States, is a concept that is fundamentally incompatible with that of an international community, and dates back to a period prior to the existence of such a community. This limitation of exclusive competence is the most important event in the evolution of State powers in the international domain.’

⁴¹ Cf. Huber, ‘Die konstruktiven Grundlagen’, *supra* note 7, at 2, 6 and 17–18 and also Huber, ‘Die Fortbildung des Völkerrechts auf dem Gebiete des Prozess- und Landkriegsrechts durch die II. internationale Friedenskonferenz im Haag 1907’, 2 *Jahrbuch des öffentlichen Rechts der Gegenwart* (1908) 470, at 477. See also Article 3, Paragraph 2, of the *Treaty of Lausanne (Frontier between Turkey and Iraq)*, *supra* note 26, at 26–28 and 31, which may be compared to *South-West Africa – Voting Procedure* [1955] ICJ Rep 67, at 75.

⁴² PCIJ Series B No. 4 (1923), at 26.

matters could be pronounced on without regard to various treaties.⁴³ As a result, Article 15(8) did not apply to the dispute in question.⁴⁴

The judges taking part in the majority had not agreed on the reasoning, and substantial parts of the draft prepared by Judge Huber in collaboration with Judge Anzilotti and Deputy-Judge Beichmann had been omitted.⁴⁵ In their final form, the *motifs* did not address the exact reason why a provisional conclusion as to the applicability of a treaty provision was seen as sufficient to exempt an issue from domestic jurisdiction. However, in 1924 Arbitrator Huber employed the same approach by analogy in a decision in the *British Claims in the Spanish Zone of Morocco* case,⁴⁶ and some years later he wrote about the drafting of the *Nationality Decrees* opinion:

Das Gutachten wurde von mir entworfen, und trotz starker – von mir, Anzilotti und Beichmann bedauerter – Streichungen ist es fast ganz das Produkt meiner Redaktion, auch in der endgültigen Fassung. Bei der Beratung zeigte es sich, wie wenig die Richter mit der inneren Struktur des Völkerbündnisses wirklich vertraut waren; daher ihr Bestreben, die Erwägungen, die für die Kenner des Paktes ausschlaggebend, ihnen aber fremd waren, auszuschalten. So konnten Anzilotti, Beichmann und ich nur durch Drohung mit einem Sondergutachten erzielen, daß die für uns wichtigsten Gedanken wenigstens in einer bis fast zur Unverständlichkeit komprimierten Form im Gutachten Platz fanden. Hammarskjöld hat nachher unsere Gedanken in einer Abhandlung in der 'Revue de Droit international de Vinewil' [sic.] klar dargelegt.⁴⁷

The article accredited to Åke Hammarskjöld, Registrar of the Permanent Court, was published under the pseudonym of 'Paul de Vineuil'. This commentator explicitly undertook to discern the rationale behind the loose test based on merely provisional conclusions, '*malgré le risque évident de mal interpréter les intentions de la Cour*'. In 'Paul de Vineuil's' view, there were two main reasons: firstly, if the Council were to apply a stricter test it would have to go more into the dispute, thereby making Article 15(8) '*une arme qui se retourne contre celui qui s'en sert*'; secondly, since Article 15(8) referred to what 'by international law' was solely a matter of domestic jurisdiction, a stricter test would have been a legal test approximating compulsory jurisdiction, which, according to this commentator, was why such a test would be contrary to 'the system

⁴³ See PCIJ Series C No. 2, at 155–191, which caused Sir Douglas Hogg's brilliant reply on behalf of the British Government: *ibid.*, at 200–203, 206–211 and 245. For an attempt to read the *Nationality Decrees* opinion in the light of the merits of the dispute, possibly assuming that the Permanent Court's interpretation was limited to a choice between the contentions brought forward by the parties, see Berman, 'The Nationality Decrees Case, or, Of Intimacy and Consent', 13 *Leiden J Int'l L* (2000) 265, at 290–295.

⁴⁴ PCIJ Series B No. 4 (1923) at 27–31.

⁴⁵ See Spiermann, *supra* note 2, at 158.

⁴⁶ See *Affaire des biens britanniques au Maroc espagnol*, 2 RIAA (1924) 615, at 634–639.

⁴⁷ Huber, *Denkwürdigkeiten*, *supra* note 5, at 276: 'The opinion was drafted by me and the final product was almost entirely due to my drafting, despite widespread deletions, which I, Anzilotti and Beichmann regretted. The deliberations demonstrated that the judges had only a limited understanding of the inner structure of the Covenant; hence their endeavour to eliminate the considerations which were decisive for the experts on the Covenant, but with which they were unfamiliar. Only by threatening to append a separate opinion did Anzilotti, Beichmann and I arrange for the thoughts that we regarded as being most important to be included, though in a form so compressed that it became almost unintelligible. Subsequently Hammarskjöld has explained our thoughts in an article by Vineuil in the *Revue de Droit international*.'

established by the Covenant for the pacific settlement of international disputes'.⁴⁸ It is remarkable that the Registrar made an attempt to add to the *motifs* a rationale that had been rejected, or at least suppressed, by members of the Permanent Court. Actually, Hammarskjöld's article had been sanctioned by President Loder in response to a blunt note in the *American Journal of International Law*, which had caused much ill-feeling on the bench. Referring to the lengthy arguments of the French Government, the author had written that 'the judges showed both their disapproval and their aptness for judicial functions by falling fast asleep'.⁴⁹ The author had also noted that the judges had 'little in common, except access to the same fund by way of compensation'.⁵⁰

The *Nationality Decrees* opinion leaves the impression that Judge Huber was perfectly able to accommodate the dynamics of international law (and international relations), while national sovereignty in the form of a reserved domain or the like was not destined for a leading role under an international lawyer's approach to international legal argument.

4 The Wimbledon

The first judgment of the Permanent Court was rendered in *The Wimbledon*, a politically sensitive case between the Principal Allied and Associated Powers and Germany and a rare instance of Judges Huber and Anzilotti not prevailing. German authorities had refused the S.S. Wimbledon, flying the British flag, access to the Kiel Canal on its way to Danzig for the reason that it carried weapons intended for a belligerent (Poland technically being in a state of war with Russia). The Principal Allied and Associated Powers relied on the Versailles Treaty, which had internationalized the Kiel Canal, while the German Government contended that it had to observe its duties as a neutral towards Russia under general international law. The Permanent Court gave judgment in favour of the Principal Allied and Associated Powers with Judges Anzilotti and Huber appending a dissenting opinion that, reportedly, reflected a secret protocol to the Versailles Treaty.⁵¹

According to this joint dissenting opinion, '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'.⁵² It was added that '[t]he right of a State [*la liberté d'un Etat*]

⁴⁸ See de Vineuil, 'Les leçons du quatrième avis consultatif de la Cour permanente de Justice internationale', 4 *Revue de Droit International et de Legislation Comparé* (1923) 291, at 299: 'despite the evident risk of misinterpreting the court's intentions': 'a weapon that turns itself against he who raised it'.

⁴⁹ Noble Gregory, 'An Important Decision by the Permanent Court of International Justice', 17 *AJIL* (1923) 298, at 306.

⁵⁰ In addition to the article by Hammarskjöld, Manley O. Hudson also complied with the request to provide a reply: see Hudson, 'The Second Year of the Permanent Court of International Justice', 18 *AJIL* (1924) 1, at 6 and 30, n. 114.

⁵¹ Huber, *Denkwürdigkeiten*, *supra* note 5, at 280; cf. *Case of the SS Wimbledon*, PCIJ Series A No. 1 (1923), at 40; and see de Vineuil, 'Les résultats de la troisième session de la Cour permanente de Justice internationale', 4 *Revue de Droit International et de Legislation Comparé* (1923) 573, at 580.

⁵² PCIJ Series A No. 1 (1923) at 36.

to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though these stipulations do not conflict with such an interpretation'.⁵³ In the overriding interest of peace, the text of a treaty was presumed to yield to the core principles of general international law that aimed at securing coexistence and make up, as it were, the subsistence level of states. Outside the context of the League of Nations, Judge Huber obviously gave more weight to the 'reality' of international relations under his sociological approach. *The Wimbledon* was very much a test for this approach and so, of course, Judge Huber was unhappy with the result reached by the majority. In his view, the judgment proved that . . .

*mehrere der Richter mit dem Völkerrecht gar nicht vertraut waren, und zwar nicht nur mit Einzelheiten; sondern Struktur und Wesen des Völkerrechts, seine tiefgreifenden Unterschiede gegenüber dem nationalen – bürgerlichen und öffentlichen – Recht kamen ihnen gar nicht genügend zum Bewußtsein. . . . Nur ein durch Unkenntnis des Völkerrechts erklärbarer juristischer Formalismus konnte der Mehrheit das Gefühl der Sicherheit bei ihrer am Buchstaben hängenden Vertragsinterpretation geben.*⁵⁴

It was said at the time that the comfortable majority had been motivated by 'certain pragmatic tests in the minds of the judges which were not brought out into the open'.⁵⁵ The *motifs* opened with the argument that the Versailles Treaty was 'categorical and give[s] rise to no doubt';⁵⁶ and they ended with general international law and a perhaps narrow view on neutrality in relation to 'an artificial waterway connecting two open seas . . . permanently dedicated to the use of the whole world'.⁵⁷ The majority also touched upon a principle of restrictive interpretation in the context of 'an important limitation of the exercise of . . . sovereign rights'; and it took issue with an argument to the effect that treaties in contravention with obligations as a neutral could not be entered unto:

The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.⁵⁸

⁵³ *Ibid.*, at 37.

⁵⁴ Huber, *Denkwürdigkeiten*, *supra* note 5, at 280: ' . . . several of the judges were not familiar with international law. This lack of familiarity concerned not only some details of international law but its nature and overall structure. The judges were not sufficiently mindful of its far-reaching differences from national law, both civil and public. . . . Due to their ignorance of international law the majority could feel confident about their treaty interpretation only by adopting a legal formalism, which was riveted to the letter of the law.'

⁵⁵ Hudson, *supra* note 50, at 13; see also E. Wolgast, *Der Wimbledonprozeß* (1926), at 159 and G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (1986), iv, at 213–214 and 241–242.

⁵⁶ PCIJ Series A No. 1 (1923), at 22.

⁵⁷ *Ibid.*, at 28.

⁵⁸ *Ibid.*, at 25.

The last sentence has impressed many lawyers, and it has been characterized as ‘the classical statement of a governing axiom’.⁵⁹ Upon reflection, however, it testifies to insecurity about the binding character of international law, just as the principle of restrictive interpretation – a sense of insecurity not shared by Judges Anzilotti and Huber. The majority let one conception of the state defeat another conception: the state as a national sovereign, self-sufficient and its own master, yielded to the state as an international sovereign-making international law. But, of course, the most straightforward argument would have been *pacta sunt servanda* and the conception of the state as an international law subject observing the obligations undertaken.

In the *Exchange of Populations* opinion, the Permanent Court came back to *The Wimbledon*. The Turkish Government contended that, in the treaty in question, the term ‘established’ had to be seen as a reference to Turkish law. In its opinion, in the drafting of which President Huber had exercised decisive influence, the Permanent Court responded in the following way:

The principal reason why the Turkish Delegation has maintained the theory of an implicit reference to local legislation appears to be that, in their opinion, a contrary solution would involve consequences affecting Turkey’s sovereign rights [*la souveraineté nationale*]. But, as the Court has already had occasion to point out in its judgment in the case of the *Wimbledon*, ‘the right of entering into international engagements is an attribute of State sovereignty’.⁶⁰

This was a virtual reconstruction of the pronouncement quoted. In *The Wimbledon*, the Permanent Court had substituted the conception of the state as an international sovereign for the conception of the state as a national sovereign, holding that all kinds of treaty obligations could be undertaken by a state. Nevertheless, the Permanent Court had made room for national sovereignty, being sympathetic to, at least verbally, restrictive interpretation of treaty rules. Now the *Exchange of Populations* opinion employed the same pronouncement as an argument against such a principle of restrictive interpretation. In their joint dissenting opinion in *The Wimbledon*, Judges Anzilotti and Huber had expressed serious doubts as to the conception of Germany as an international sovereign in respect of ‘*Das Diktat von Versailles*’.⁶¹ In contrast, as was underlined in the *Exchange of Populations* opinion, the scheme for exchange was (interpreted to be) ‘absolutely equal and reciprocal’.⁶² To put it differently, it was a conceivable outcome of two international sovereigns striking a bargain. ‘It is’, the Permanent Court held, ‘impossible to admit that a convention which creates obligations of this kind, construed according to its natural meaning, infringes the sovereign rights [*la souveraineté*] of the High Contracting Parties’.⁶³ So long as the conception of the state as an international sovereign had some reality (the treaty negotiations not

⁵⁹ [1980] II *Yearbook of the International Law Commission*, pt. 1, at 188.

⁶⁰ *Exchange of Greek and Turkish Populations*, PCIJ Series B No. 10 (1925) at 21.

⁶¹ PCIJ Series A No. 1 (1923) at 37; and see Huber in (1952) 44-I *Annuaire* at 201.

⁶² PCIJ Series B No. 10 (1925), at 20; see also *Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)*, *supra* note 26, at 29 and Huber, ‘Die konstruktiven Grundlagen’, *supra* note 7, at 10–12.

⁶³ *Ibid.*, at 21.

being completely at variance with notions of sovereign equality, or independence),⁶⁴ the *Exchange of Populations* opinion indicated that there was hardly any room in treaty interpretation for national sovereignty. Again, treaty obligations were seen through the prism of Huber's sociological approach and yet given full effect.

5 The Lotus

No decision of the Permanent Court has been closer associated with the name of Max Huber than *The Lotus*, which was decided by the casting vote of President Huber in accordance with Article 55 of the Statute. This association was a dubious honour since the judgment has regularly been criticized for being 'extremely' positivist. Unlike many of the other decisions of the Permanent Court, *The Lotus* almost exclusively dealt with general international law, as opposed to treaty interpretation. The *motifs* contained references to dualism and custom as a tacit treaty, which testified to the involvement of Judge Anzilotti in the drafting.⁶⁵ *The Lotus* attracted much analysis and made it less easy in international legal theory to neglect the Permanent Court. For the same reason, some of those openly disagreeing with the Permanent Court imported the notion of *obiter dictum*;⁶⁶ and in what has been referred to as 'a curious instance of opposition by the community of States against a pronouncement of the International Court',⁶⁷ treaties were subsequently adopted that changed the principle of concurrent jurisdiction laid down by the Permanent Court.⁶⁸

The facts of the case were simple. In 1926 a Turkish steamship suffered a collision on the high seas causing loss of life. The ship had collided with the S.S. *Lotus*, a mail steamer flying the French flag, which then sailed into a Turkish port to land the survivors and obtain repairs. Here the French officer on watch at the time of the collision was arrested and was subsequently prosecuted and sentenced before the Turkish courts. The French Government protested the action taken against the officer and as a result the French and Turkish Governments signed a Special Agreement submitting to the Permanent Court the question whether Turkey had acted in conflict with international law by exercising criminal jurisdiction.

⁶⁴ See expressly Judge Anzilotti's separate opinion in *Customs Regime between Germany and Austria (Protocol of March 19th, 1931)*, PCIJ Series A/B No. 41 (1931), at 66–67.

⁶⁵ *The Case of the SS Lotus*, PCIJ Series A No. 10 (1927), at 24 and 28 and see Spiermann, *supra* note 2, at 259.

⁶⁶ Fischer Williams, 'L'affaire du "Lotus"', 35 *Revue Générale de Droit International Public* (1928) 361, at 364–365, Beckett, 'Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de Justice internationale', 39 *Recueil des Cours* (1932) 135, at 144; and H. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), at 23–24 and 104.

⁶⁷ J.H.W. Verzijl, *International Law in Historical Perspective* (1971), iv, at 53.

⁶⁸ See Art. 1 of the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation from 1952 and also Art. 11 of the Geneva Convention on the High Seas and Art. 97 of the United Nations Convention on the Law of the Sea.

International legal argument provided two different angles from which to answer this question. On the one hand, it could be asked whether Turkey legislating over a French subject on French territory was an issue which lawyers recognized as being of significant interest not only to Turkey but also to France. An affirmative answer to this question and the case would fall within general international law (and there be met by the territorial principle, *prima facie* limiting the jurisdiction of a state to its territory). Six members of the Permanent Court took this view, while six other members, including President Huber, took the opposite view. However, even if Turkey, extending its criminal law to a French subject on French territory, was not ‘*une collision réelle*’,⁶⁹ Turkey could still have limited its *liberté* to legislate through treaty obligations voluntarily undertaken. This alternative angle was the underpinning theme of the *motifs*, including this oft-quoted paragraph:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.⁷⁰

Many have given to the last sentence the meaning of *in dubio pro libertate*.⁷¹ Such a presumption in favour of sovereignty, and against international law, had been argued by the Turkish Government;⁷² but it would have been a singularly astonishing proposition on the part of a newly established international court, which moreover had discarded principles of restrictive treaty interpretation and other arguments based on national sovereignty in favour of an international lawyers’ approach.⁷³ Huber’s *Die soziologischen Grundlagen des Völkerrechts*, which was republished in 1928, provides a different rationale. Discussing the distinction between customary law (*Völkerrecht*) and non-binding customs (*Völkersitte*), Huber joined customary law and general international law together and took the view that the essence of it was the territorial separation of states. Thus, as noted in *The Lotus*, ‘the first and foremost restriction imposed by international law upon a State is that . . . it may not exercise its power in any form in the territory of another State’.⁷⁴ Considering the possibility of other parts of general international

⁶⁹ See *infra* note 83.

⁷⁰ *The Case of the SS Lotus*, PCIJ Series A No. 10 (1927) at 18.

⁷¹ In the *Legality of the Threat or Use of Nuclear Weapons* opinion, the International Court of Justice refrained from expressing an opinion on the meaning and ‘the questions of burden of proof’ because the relevant states had either accepted or not disputed that ‘their independence [*liberté*] [*sic*] was indeed restricted by the principles and rules of international law’: see [1996] ICJ Rep 226, at para. 22. For references to individual opinions as well as doctrinal views see Spiermann, *supra* note 2, at 253, n. 218.

⁷² PCIJ Series C No. 13-II at 150–151.

⁷³ It may be noted that Huber for one was not dismissive of the prospect of a *non liquet*: see in particular his dissenting opinion in *Rights of Minorities in Upper Silesia (Minority Schools)*, Series A No. 15 (1928) at 54–55 and Huber, ‘Die konstruktiven Grundlagen’, *supra* note 7, at 14–16.

⁷⁴ PCIJ Series A No. 10 (1927) at 18; see also *Affaire des biens britanniques au Maroc espagnol*, 2 RIAA (1924) 615, at 642 and *Island of Palmas Case*, 2 RIAA (1928) 829, at 838.

law derogating from this principle, Huber wrote that '*es kann somit die Existenz solcher Normen nicht vermutet werden*'.⁷⁵ Indeed, Huber made it his general position that '*heir muß die Vermutung für die Nichtexistenz einer die Autonomie beschränkenden Norm durch partikuläre oder allenfalls kollektive Satzung widerlegt werden*'.⁷⁶ While general international law offered territorial sovereignty, other international law had the form of treaties where consent was required, but in respect of which no presumption was applied.⁷⁷

Clearly the Permanent Court assumed that only states could be international law-makers, or sovereigns, and because states were 'independent', no state could legislate with binding effect on another state. 'The rules of law binding upon States therefore emanate from their own free will'.⁷⁸ This was the only way to make international law. Or, at least, '[r]estrictions upon the independence of States cannot therefore be presumed'.⁷⁹ It could not be presumed, by the French Government, that a state, e.g., France, could legislate with binding effect on another state, e.g., Turkey; they were all sovereign. Accordingly, this statement pointed back to one of the other great statements on independence (as distinct from sovereignty), namely in the *Eastern Carelia* opinion, according to which 'the principle of independence of States' is 'a fundamental principle of international law [*la base même du droit international*]'.⁸⁰

In 1931, in observations submitted to the *Institut de Droit international*, Max Huber referred to the independence of states. He stated that '*le droit international commun est basé . . . sur les Etats comme unités territoriales indépendantes*'.⁸¹ In Huber's view, '*[d]ans ses propres frontières territoriales . . . [i]l n'y a que très peu de règles de droit commun applicables en l'espèce*'.⁸² He added the following remarks:

Je continue de penser que le principe proclamé par la Cour Permanente de Justice internationale dans l'affaire du 'Lotus' est exact; mais il a été quelquefois mal interprété par les critiques du dit arrêt. L'absence d'une règle qui départagerait les droits des Etats et la liberté qui en résulte pour chaque Etat de faire ce qui n'est pas défendu ne signifie pas un état d'anarchie où chacun aurait le droit de passer outre à la situation créée par un autre Etat. Là où les libertés font une collision réelle, le droit doit

⁷⁵ M. Huber, *Die Soziologischen Grundlagen des Völkerrechts* (1928), at 47. '... the existence of such norms can therefore not be presumed'.

⁷⁶ *Ibid.*, at 48: '... here must the presumption of the non-existence of a norm which restricts the autonomy be refuted by a particular or perhaps a general rule'.

⁷⁷ See for a similar proposition as regards state responsibility, Arbitrator Huber in *Affaire des biens britanniques au Maroc espagnol*, 2 RIAA (1924) 615, at 699.

⁷⁸ Series A No. 10 (1927) at 18.

⁷⁹ Anzilotti made the observation that the opening of *The Lotus* was in accordance with the principle that '*toute activité de l'Etat . . . est protégée par le droit international dans ce sens qu'il interdit aux autres Etats de limiter, sans un titre juridique particulier, le libre développement de ladite activité*': see D. Anzilotti, *Cours de droit international* (1929), at 58 compared with D. Anzilotti, *Corso di Diritto Internazionale* (4th edn, 1955), at 58.

⁸⁰ *Status of Eastern Carelia*, PCIJ Series B No. 5 (1923) at 27.

⁸¹ (1931) 36-1 *Annuaire*, at 78: 'Customary international law is based . . . on states as independent territorial units.'

⁸² *Ibid.*, at 79: 'Within its own territorial borders . . . there are only a very few rules of customary law currently applicable.'

*fournir la solution, car le droit international, comme tout droit, repose sur l'idée de la coexistence de volontés de la même valeur.*⁸³

In *The Lotus*, as in the *Eastern Carelia* opinion, the majority had relied on a residual principle of freedom without giving any support to a presumption. Reading that famous line, '[r]estrictions upon the independence of States cannot therefore be presumed', as a presumption against international law has no support in the judgment of the Permanent Court. Of course, establishing an international lawyer's approach to international legal argument in the context of an international court required that it be articulated by judges. But it also had to be appreciated by lawyers reading and commenting on the decisions. In 1927, the leading members of the Permanent Court were ahead of their contemporaries. The persistent tradition of criticizing *The Lotus* suggests that the international lawyer's approach underpinning the judgment has not always been that easily disseminated.

6 Epilogue

The 1920s saw the bench being moulded into one of international judges and it saw the crystallization of an international lawyer's approach to international legal argument, positioning the questions outside national law and answering then independently of particular national legal systems. The judgment of the Permanent Court delivered in 1927 in *The Lotus* was archetypal. There was a flow of grand statements in the 1920s that have occupied academics ever since and keep being referred to in decisions of its successor, the International Court of Justice, and other international courts and tribunals.⁸⁴ That source dried out, at least temporarily, following the second general election in 1930. It brought in a new, numerous breed who were neither former national judges, nor professors in international law, but former diplomats. They were led by Sir Cecil Hurst and Henri Fromageot, who had been each other's equivalents at the Foreign Office and the *Quai d'Orsay*; they were elected to the bench in the late 1920s. An early illustration of their combined impact was an Advisory Opinion delivered in 1930, according to which the Free City of Danzig could not become a member of the International Labour Organization. Six members of the bench, including Judges Fromageot and Hurst, supported the advice and produced some very short *motifs*, a substantial part of which constituted the reasons for giving a narrow interpretation to the

⁸³ *Ibid.*, and also at 84–85: 'I still think that the principle proclaimed by the Permanent Court of International Justice in the *Lotus* case is correct; but it has on occasion been misinterpreted by the critics of that judgment. The absence of a rule for deciding between the rights of States, and the resulting liberty for each State to do that which is not forbidden, does not give rise to a state of anarchy in which each has the right to disregard the situation of others. Where rights genuinely collide, the law must furnish a solution, because international law, as with all law, is based on the idea of coexistence between wills of equal value.' See similarly de la Grotte, 'Les affaires traitées par la Cour permanente de Justice internationale pendant la période 1926–1928', 10 *Revue de Droit International et de Législation Comparé* (1929) 387, at 387.

⁸⁴ See Hammarskjöld, 'The Permanent Court of International Justice and the Development of International Law', 14 *International Affairs* (1935) 797, at 799, Hudson, 'The Twentieth Year of the Permanent Court of International Justice', 36 *AJIL* (1942) 1, at 5 and M.O. Hudson, *The Permanent Court of International Justice, 1920–1942* (2nd edn, 1943), at 605–606.

⁸⁵ *Free City of Danzig and International Labour Organization*, PCIJ Series B No. 18 (1930) at 9–10 and 15.

request for an opinion.⁸⁵ Both President Anzilotti and Judge Huber appended dissenting opinions that were longer than the *motifs*. In particular, Judge Huber invoked the Permanent Court's 'traditional conception of advisory opinions' and remonstrated with the majority about not giving 'an answer of such usefulness as those concerned may well have expected'.⁸⁶

Having taken up the presidency of the International Committee of the Red Cross in 1928, Huber declined to stand for re-election in 1930. For his part, Anzilotti was re-elected only to find himself alone and isolated. Anzilotti had already written to Huber that . . .

*la Cour est composée d'hommes médiocres, qui toutefois font de leur mieux pour se comprendre et y arrivent presque toujours. Je ne vois pas d'hommes supérieurs, au sens véritable de mot, dans cette Cour; person ne, par exemple, qui puisse être, même de loin, comparé à vous ou à Beichmann. En revanche tout le monde prend part à la discussion et les résultats sont presque toujours le produit d'une convergence d'opinions originairement diverses ou opposées; ce qui n'arrivait pas souvent dans l'ancienne Cour. Le temps seul pourra nous dire jusqu'à quel point cette condition est préférable à l'oligarchie de la première Cour dans la dernière période de sa vie; plus encore, jusqu'à quel point la politique reste étrangère aux discussions.*⁸⁷

When back for the third phase of the *Free Zones* case in 1932, Huber wrote about his experiences to Moore:

I have now come back to the Court after an absence of one year and a half; that offers me an opportunity of seeing the Court with fresh eyes and with some detachment. But the impression is the same as I had during the last years of my term and I do not regret that I do no longer belong to the Court. The collaboration in a Court is satisfactory only when the large majority of the members have a large common ground of legal conceptions in international law and . . . the same sense and conception of judicial responsibility. I do not know what the new Court is, but I think, though it may be better than the old one, I should not find there the homogeneity and comprehension which seem to me indispensable for a really happy collaboration.⁸⁸

For its part, and as a testimony to his achievement, in its judgment in the *Eastern Greenland* case the Permanent Court made reference to Arbitrator Huber's award in the *Island of Palmas* case.⁸⁹ In the history of international adjudication, Max Huber was the right man, at the right time, in the right place. Through his involvement in the work of the Permanent Court, and as an arbitrator, he exercised influence that not even the most brilliant legal mind of any generation could expect. At the same time, he formulated and exemplified an international lawyer's approach that stands as a monument to international legal thinking when put into practice.

⁸⁶ *Ibid.*, at 29 and 36, respectively.

⁸⁷ See Spiermann, *supra* note 2, at 330–331 and, more subtly, PCIJ Series D No. 2, Add. 3 (1936), at 161, n. 1: 'The Court is composed of mediocre men, who nevertheless do their best to reach agreement and who almost always manage to do so. I see no superior men, in the true sense of the term, in this Court; no one who, for example, could be compared to you or to Beichmann, even from afar. On the other hand, everyone takes part in the discussions, and the results are almost always the product of a convergence of initially diverse or even opposed opinions; something that did not happen often in the old Court. Only time will tell the extent to which this situation is preferable to the oligarchy of the first Court in the second period of its existence; even more so, the extent to which politics will remain external to discussions.'

⁸⁸ *Ibid.*, at 292.

⁸⁹ *Legal Status of Eastern Greenland*, PCIJ Series A/B No. 53 (1933), at 45.