
General legal characteristics of States

A view from the past of the Permanent Court of International Justice

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Contributors to this book share the privilege of having been supervised by Professor Crawford in an atmosphere combining theoretical curiosity and vast practical experience that is unique to James: a truly open system. These were supervisions at their most effective, open-minded and thought-provoking; they were also supervisions by a master not to be imitated by his students, as this chapter will confirm. With James Crawford in the Whewell chair, international law at Cambridge acknowledged a close relationship between law and history long before it became flavour of the month. This chapter will take the general characteristics of States listed in *The Creation of States in International Law* and discuss these, albeit not quite in the Crawfordian style, with a view to the past of the Permanent Court of International Justice.

The Permanent Court stands as a monument to the possible impact to be exercised on and from the bench of the World Court by eminent scholars. In their generation, Max Huber and Dionisio Anzilotti were second to none. The Permanent Court was the first significant court of justice at the international level. Obscure cases decided by the Permanent Court are household names, familiar to present generations of international lawyers, because they were, by chance, the first place for authoritative expression of various principles of general international law. Such statements of principle have found wide use far beyond their original context. Many are also to the point today. As Crawford has noted, '[o]ur system is one which international lawyers of four generations ago would have had no particular difficulty in recognizing or working with, once they had got over its bulk'.¹ To the question 'what are the constitutional underpinnings

¹ James Crawford, *International Law as an Open System* (London: Cameron May, 2002), 17.

of the processes that are producing such developments as these?', Crawford's answer has been: 'the same old concepts of consent, treaty-making and state authority'. To the question 'what are the legal techniques at play in determining the results of these processes?', he has answered: '[t]he same old techniques.'²

General legal characteristics of States

In *The Creation of States in International Law*, Crawford lists five general legal characteristics of States, including the following:

- (1) In principle, States have plenary competence to perform acts, make treaties and so on in the international sphere: this is one meaning of the term 'sovereign' as applied to States.
- (2) In principle, States are exclusively competent with respect to their internal affairs, a principle reflected by Article 2(7) of the United Nations Charter. This does not of course mean that international law imposes no constraints: it does mean that their jurisdiction over internal matters is *prima facie* both plenary and not subject to the control of other States.
- ...
- (4) In international law States are regarded as 'equal', a principle recognized by the Charter (Article 2(1)). This is in part a restatement of the foregoing principles, but it has other corollaries. It is a formal, not a moral principle. It does not mean, for example, that all States are entitled to an equal vote in international organizations: States may consent to unequal voting rights by becoming members of organizations with weighted voting. . . . Still less does it mean that they are entitled to equal voice or influence. But it does mean that at a basic level, States have equal status and standing. . . .³

Essentially, these three general characteristics of States combine three notions that are fundamental to international law and international lawyers.

First, sovereignty: States have 'plenary competence', both 'in the international sphere' (1) and 'with respect to their internal affairs' (2).

² *Ibid.*, 37.

³ James Crawford, *The Creation of States in International Law*, 2nd edn (Oxford University Press, 2006), 40–1.

Secondly, independence: States are 'prima facie . . . not subject to the control of other States', in international matters (4) as well as in 'internal matters' (2).

Thirdly, international/national divide: sometimes States act 'in the international sphere' (1 and 4), sometimes in 'their internal affairs' (2).

It takes a plurality of States, and the acknowledgement thereof, to move from sovereignty to independence and the international/national divide. This move cannot be explained or questioned within international law. It is axiomatic to international law. International lawyers have an understanding of what constitutes 'the international sphere' before they become, or see themselves as, international lawyers. This minimum of internationalism is beyond sovereign will. Sovereignty is competence while independence is restriction upon competence, something to be accepted in order to secure the sovereignty of other states through international law.

Yet another general legal characteristic of States, as formulated by Crawford, is the following:

- (3) In principle States are not subject to compulsory international process, jurisdiction, or settlement without their consent, given either generally or in the specific case.⁴

Independence translates into a variety of principles, which are substantive in kind, the necessary minimum of international law and, in terms of scope, an international sphere, as distinct from internal affairs. The substantive principles into which independence translates have been categorised by tradition as customary international law, sometimes supplemented by general principles of civilised nations. Some have tried to introduce avant-gardist terms such as 'international law of co-existence'. Crawford prefers the more appropriate term 'general international law'.

It is a choice to include the absence of compulsory jurisdiction in general international law as a general, and legal, characteristic of States. It means that jurisdiction takes consent and treaty form. It is an aspect of substantive international law. Instead of this negative aspect of general international law, one could just as well refer to some of the positive aspects as general legal characteristics of States, such as the principle of peaceful settlement of disputes.

The last general legal characteristic of States listed by Crawford is the following:

⁴ *Ibid.*, 41.

- (5) Derogations from these principles will not be presumed: in case of doubt an international court or tribunal will tend to decide in favour of the freedom of action of States, whether with respect to external or internal affairs, or as not having consented to a specific exercise of international jurisdiction, or to a particular derogation from equality. This presumption – rebuttable in any case – has declined in importance, but it is still invoked from time to time and is still part of the hidden grammar of international legal language. It will be referred to as the Lotus presumption – its classic formulation being the judgment of the Permanent Court in *The Lotus*.⁵

This last general characteristic of States is accompanied by a footnote occupying almost a full page, and it is controversial, not least from the point of view of the Permanent Court.

Independence and the Permanent Court

The flow of grand statements from the Permanent Court that are still quoted today are almost exclusively the fruits of the work of the Permanent Court in its first composition in the 1920s. This period saw a tendency to employ the most general principles in deciding the most specific issues, and an interest in ‘developing’ international law.

The first thing to note about this period is that the focus of the Permanent Court was on independence, as distinct from sovereignty, as illustrated by the following cases.

In the *Eastern Carelia* Opinion, independence was characterised as ‘a fundamental principle of international law [*la base même du droit international*]’. The Permanent Court added: ‘It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.’⁶

Just before the *Eastern Carelia* Opinion, in the *Nationality Decrees* Opinion, the Permanent Court took independence (in the form of a principle of non-intervention) as a blueprint when interpreting Article 15(8) of the Covenant of the League of Nations. According to Article 15(8), the Council of the League of Nations should make no recommendations in

⁵ *Ibid.*, 41–2.

⁶ *Status of Eastern Carelia (USSR v. Finland)*, Advisory Opinion, 23 July 1923, PCIJ Series B, No. 5 (1923), 27.

matters 'within the domestic jurisdiction'. In the view of the Permanent Court, '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'.⁷ 'Without this reservation', the Permanent Court explained, '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'. However, a caveat was entered. According to the same paragraph of the *motifs*, '[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations'.⁸ Article 15(8) 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'. In short, independence was not synonymous with sovereignty nor a principle of *in dubio pro libertate*, a presumption against international law.

In *The Lotus* then, the Permanent Court was again dealing with independence, as distinct from sovereignty:

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 [*la co-existence de ces communautés indépendantes*] or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.⁹

The last sentence, '[r]estrictions upon the independence of States cannot therefore be presumed', has been taken by many academics to imply that the Permanent Court saw no need for international law, that each State was sovereign and self-contained, and that it supported a presumption against international law.

In the *Nuclear Weapons Opinion*, the International Court of Justice for the first and only time confronted that particular sentence, just in

⁷ *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, Advisory Opinion, 7 February 1923, PCIJ Series B, No. 4 (1923), 25.

⁸ *Ibid.*, 24.

⁹ *SS Lotus (France v. Turkey)*, Judgment, 7 September 1927, PCIJ Series A, No. 10 (1927), 18.

order to side-step it. According to the International Court, none of the States appearing before the Court had disputed that 'their independence to act was indeed restricted by the principles and rules of international law'.¹⁰ Therefore, the International Court assumed that the Permanent Court had been using the word 'independence' as synonymous with 'sovereignty', while the approach of the Permanent Court was, in fact, the exact opposite. In 1931, Max Huber had made it known that the majority opinion in *The Lotus* 'a été quelquefois mal interprété par les critiques du dit arrêt'.¹¹ Åke Hammarskjöld, the ingenious Registrar of the Permanent Court, was equally critical of the readers, writing under pseudonym.¹²

What the Permanent Court dealt with in that critical passage of the judgment in *The Lotus* was the making of international law outside general international law, namely treaty law. Clearly the Permanent Court assumed that only states can make international law and, because 'independent', no State could lay down international law with binding effect on another State: 'The rules of law binding upon States therefore emanate from their own free will.' This was the only way to make international law. At least, '[r]estrictions upon the independence of States cannot therefore be presumed'. Accordingly, this statement referred back to the *Eastern Carelia* Opinion, according to which 'the principle of independence of States' is 'a fundamental principle of international law'.

Sovereignty and the Permanent Court

It was in decisions other than *The Lotus* that the Permanent Court explored notions of sovereignty, not always entirely successfully, beginning with *The Wimbledon*. Pleadings on the part of the German government were taken to imply that the matter concerned 'a personal and imprescriptible right, which forms an essential part of her sovereignty and which she neither could nor intended to renounce by anticipation'. The Permanent Court responded eagerly:

¹⁰ *Legality of the Threat of Using Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996), 226, para. 21.

¹¹ Max Weber, 'Observations de M. Huber', *Annuaire de l'institut de droit international*, 36-I (1931), 79.

¹² Michel de la Grotte, 'Les Affaires traitées par la Cour Permanente de Justice Internationale pendant la période 1926–1928', *Revue de droit international et de législation comparée*, 10 (1929), 387.

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.¹³

The Permanent Court agreed to proceed on the basis of sovereignty, upon which, it said, ‘an obligation of this kind places a restriction’. But, invoking the international/national divide, the counter-argument simply transferred sovereignty from the national to the international sphere: ‘the right of entering into international engagements is an attribute of State sovereignty’. This playing with words has amused scholars ever since, and it has attracted much less criticism than *The Lotus*, albeit it would have been much more straightforward had the Permanent Court simply stated that treaty obligations are binding as a matter of international law.

In *The Wimbledon*, as in a number of other decisions, the Permanent Court alluded to a principle of restrictive interpretation. According to the majority:

the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation. But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.¹⁴

In the context of the motifs, this was an empty gesture, as the Permanent Court had already held that the text of the treaty provision in question was ‘clear’. Yet it was again a less than ideal way in which to overcome sovereignty. As Crawford has noted:

These days that concession would not be made: the language of treaties is not subject to any particular presumption but will be read so as to give effect to the object and purpose of the treaty in its context.¹⁵

¹³ *SS Wimbledon (United Kingdom v. Germany)*, Judgment, 17 August 1923, PCIJ Series A, No. 1 (1923), 25.

¹⁴ *Ibid.*, 24–5.

¹⁵ James Crawford, ‘Sovereignty as a Legal Value’ in James Crawford and Martti Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), 117, para. 123.

The international/national divide and the Permanent Court

The international/national divide played into decisions of the Permanent Court other than *The Wimbledon* in various ways, but none is more thought-provoking than the treatment given to non-State actors. The *Jurisdiction of Courts of Danzig* Opinion went down in history. The Polish government contended that an international agreement (between two states or State-like entities) could not create rights and obligations for individuals. The Permanent Court's response was memorable, at least to a degree:

It may be readily admitted that, according to a well established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts.¹⁶

According to Dionisio Anzilotti, the Permanent Court's opinion:

ne dit pas qu'un traité, comme tel, peut créer des droits et des obligations pour des individus, sans besoin que les règles y afférentes soient incorporées dans le droit interne: il dit seulement que l'intention des Parties contractantes peut être celle d'adopter des règles déterminées créant des droits et des obligations pour des individus et susceptibles d'être appliquées par les tribunaux nationaux.¹⁷

That being said, Anzilotti pointed to an argument that had been put at the end of the *motifs*:

Poland would contend that the Danzig Courts could not apply the provisions of the *Beamtenabkommen* because they were not duly inserted in the Polish national law, the Court would have to observe that, at any rate, Poland could not avail herself of an objection which, according to the construction placed upon the *Beamtenabkommen* by the Court, would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international engagement.¹⁸

¹⁶ *Jurisdiction of Courts of Danzig*, Advisory Opinion, 3 March 1928, PCIJ Series B, No. 15 (1928), 17–18.

¹⁷ Dionisio Anzilotti, *Cours de droit international* (1929), 407–8. [Translation: 'The Court's opinion does not say that a treaty can, in itself, create rights and obligations for individuals, obviating the need to incorporate the rules pertaining to it into internal law: it only says that the contracting parties might resolve to adopt specific rules which create rights and obligations for individual and can be applied by national tribunals.']

¹⁸ *Jurisdiction of Courts of Danzig*, 26–7.

Here then, the Permanent Court found comfort in treaty obligations simply being binding as a matter of international law, rather than sovereignty.

Many years later, in the judgment from 2001 in the *LaGrand* case, the International Court confirmed rather unobtrusively that a treaty may create individual rights.¹⁹ International law is no longer a law of exclusion. Nevertheless, relatively few international lawyers have been willing unhesitatingly to characterise individuals as international legal subjects or persons.

In *The Creation of States in International Law*, having emphasised the position of individuals as holders of international rights and obligations, Crawford adds: 'But it remains true that these forums are created and ultimately controlled by States or by intergovernmental organizations, and it is these entities that remain the gatekeepers and legislators of the international system.'²⁰ In a footnote, Crawford states explicitly that individuals are not 'in any meaningful sense "international legal persons"', the reason being that '[a]s holders of rights and even obligations they do not cease to be subject to the State of their nationality, residence or incorporation, as the case may be'.²¹ This may be mainly a question of terminology, as suggested by Crawford's characterisation of international law as an open system. In his words, '[i]t may be that the system is so open in this respect that the former threshold concept [of legal personality] has ceased to have much significance'.²²

¹⁹ *LaGrand case (Germany v. United States of America)*, Judgment, 27 June 2001, ICJ Reports (2001), 466, para. 77.

²⁰ Crawford, *The Creation of States in International Law*, 29. ²¹ *Ibid.*, 30, note 132.

²² Crawford, *International Law as an Open System*, 21.