The Permanent Court of International Justice and the International Rights of Groups and Individuals
Bröllmann, C.M.

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND THE INTERNATIONAL RIGHTS OF GROUPS AND INDIVIDUALS

Catherine Bröllmann
The Permanent Court of International Justice and the International Rights of Groups and Individuals

Catherine Bröllmann

Cite as: ACIL Research Paper No 2012-12, finalized 25 September 2012, available on SSRN

The Permanent Court of International Justice and International Rights of Individuals and Groups

Catherine Bröllmann

I. Introduction

The Permanent Court of International Justice (Permanent Court or PCIJ) was established in a period in which the position of the State as the 'natural' form of political organization had come under pressure, among others in academic-legal circles. It was also the period in which international-legal concern for groups within the State became institutionalized, notably through the efforts of the League of Nations. And while the League brought institutional and procedural novelties, the Permanent Court contributed on significant points to the development of international law regarding non-State groups and – to a lesser degree – individuals.

Whether in that period international ‘rights’ or only ‘benefits’ were at issue, is a matter of debate, but the Permanent Court’s contribution to the legal emancipation of groups and individuals in international law is undisputed. This chapter aims to trace the contours of that contribution by addressing the international-legal context of the time (II.) and some hallmark decisions of the Permanent Court in which it considered the international-legal position of groups (III.) and individuals (IV.).

II. The PCIJ and the Interbellum

* Associate Professor of International Law at the University of Amsterdam, Research Fellow at the Amsterdam Centre for International Law.
2 The question as to whether minorities enjoyed rights was linked to the question as to whether minorities were ‘subjects’ rather than ‘objects’ of international law. As to the interbellum, the debate on the minorities’ status was (and is) undecided; see eg B Vukas, "States, peoples and minorities as subjects of international law." RdC 1991, Dordrecht, Martinus Nijhoff Publishers, 231, at 499-501; Mandelstam, cit n. (infra), 475-477 and 511; Ermacora, 310 and 346 cit n. (infra); a broadly shared view was that minorities enjoyed some sort of ‘protected status’ but no ‘legal personality’; cf I Brownlie, Principles of Public International Law (7th ed), Oxford, OUP, 2008, at 60; AK Meijknecht, Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law, Antwerpen, Intersentia, 2001. For a cautious assessment regarding the recognition of individual rights see K Parlett, The Individual in the International Legal System (Cambridge CUP 2011) 65 et seq
While being a Court for States in the State-oriented international system of the time, the Permanent Court did get to address issues of non-State entities. The context of the interwar period was specific, marked by the postwar arrangements and re-drawing of maps in Europe. The Peace treaties, which sanctioned for example the independence of Poland and the territorial gains of Greece (see below III(1)), involved the creation of national States and the moving of boundaries, and had groups caught between newly drawn international borders.

The idea of nationality which had been on the rise following the birth of nation-States like Germany and Italy, had also taken on legal relevance. The protective clauses in treaties which in previous times had concerned the protection of religious minorities, now looked to national minorities. The ‘national minorities’ at issue were a direct result of the granting of self-determination to some peoples, which left sections of nations whose majority formed a State of their own, as a part of the population in another State in which the majority was of a different ethnic or linguistic structure to the minority.

So, these were specifically minority groups linked to the majority population in another State. Also because of this link, rising nationalism had the paradoxical effect of reinforcing both the State and the identity of minorities. The political concern of the time was focused notably on the protection of minority groups with an independent ‘kin-state’, not on groups which may have constituted a minority without a link to a majority population elsewhere, such as today for example the Inuit or the Kurds. These numerically inferior, distinct groups were perceived as a prominent factor in the post-Versailles political balance.

---

The primary focus on inter-State interests (rather than for instance ‘fundamental rights’) appears for example from the acclaimed treatment of international minority protection by Versailles participant Charles de Visscher in his lectures on “The Stabilization of Europe.”

While minorities figure prominently in the League system and the case law of the Court, such was not the case with ‘peoples’. The difference between these two legal categories (which in most concrete cases are occupied by the same physical persons) was relevant as it is today, as they were already then part of different discourses, with self-determination being specifically linked to ‘nations’ or ‘peoples’ and not to ‘minorities’.

Alongside the rise of the nationality principle and of nationalism, the principle of self-determination had played an important role in the political negotiations and ultimately the architecture of the post-War world. US President Wilson, after having introduced the principle of ‘self-determination’ in his Fourteen Points Speech, but “without the knowledge that nationalities existed,” reportedly had suffered “anxieties” over the powerful dynamic he had unleashed, in which many groups claimed independence. ‘Self-determination’ has been said to have two manifestations - the classical or ‘statist’ one, which tends to legitimize existing States, and the revolutionary or ‘anti-statist' one, which poses a challenge to the existing State-structures by concentrating on ‘peoplehood' or "authentic communal feeling ... among the relevant group." Once political solutions had been negotiated and effectuated, the statist version of ‘self-determination’ definitively prevailed and the principle did not enter the reasonings of the Permanent Court. Minorities were – as is the case today – as a legal category by definition part of a State and in a legal sense emphatically not associated with the right to self-determination.

8 Ch De Visscher, The Stabilization of Europe (Univ of Chicago Press, Chicago 1924), with I. “the problem of Nationalities” and II. “protection of Minorities” (3-50).
10 M Koskenniemi, ‘National Self-Determination Today: Problems of Legal Theory and Practice’ (1994) 43 ICLQ 241, 246. Nathaniel Berman (n 7) points to a similar conceptual duality which permeated the inter-war debate on the meaning and definition of ‘minority’ and ‘community’.
Part of the post-War legal scholarship challenged the State as the ‘natural’ entity in international law. Following the discredit brought by the Great War a number of international lawyers expressed hope and optimism about a ‘new international law,’ which would have an eye for the individual as the building block of international law. Scholars such as Brierly and Kelsen proposed a challenge to the State-centered international law of the nineteenth century using the individual as the vehicle.\textsuperscript{11} Even though not consistently – when Feinberg in 1937 discusses the concept of equality as developed by the PCIJ (see below), for a frame of reference he mentions only the Déclaration des Droits de l’Homme et du Citoyen as found in “democratic states”\textsuperscript{12} - the individual thus was present in the international law discourse of the interwar period. This said, no international framework or a ‘system’ for human rights was in place, nor a comprehensive discourse (proceeding from the individual as a logical point of departure for legal arrangements), as there would be in the United Nations era later on.

Meanwhile, the fact that minority protection was internationalized first of all in the cause of international peace and security made the context of the protection of groups different from that of today. Accordingly, while from the perspective of present day international law and human rights law it makes sense to take the legal position of individuals and groups together, at the time of the Permanent Court such conceptual unity may have been less self-evident. Otherwise, it is likely that for many international lawyers of the interbellum rights of the individual would be derived from rights of the group, rather than the other way around as it is most often construed today.\textsuperscript{13}

III. The PCIJ and the Protection of Minorities

1) The Minorities Protection System


\textsuperscript{12} N Feinberg, \textit{La Juridiction et la Jurisprudence de la Cour Permanente de Justice Internationale en Matière de Mandats et de Minorités}, (1937 I) 59 Recueil des Cours 587, 653.

The ‘minorities protection system’ in the framework of the League of Nations\textsuperscript{14} was made up of commitments comprised in special “minorities treaties” (as with Poland, the Serb-Croat-Slovene State, Czechoslovakia, Romania and Greece, between 1919 and 1920),\textsuperscript{15} in special chapters in peace treaties (as with Austria, Bulgaria, Hungary and Turkey, between 1919 and 1923);\textsuperscript{16} in special provisions in the framework of other agreements (such as the - most elaborate - minority protection regime provided for in the Treaty between Germany and Poland on Upper Silesia);\textsuperscript{17} and in unilateral declarations made to the Council of the League (as by Finland, Albania, Lithuania, Latvia and Estonia, between 1921 and 1923).\textsuperscript{18} In substance these were similar provisions, all modelled on the Polish minority treaty. Generally they provided for three categories of rights: rights accruing to all citizens of a State, such as equal legal protection and a right to nationality; rights accruing to all inhabitants of a State, such as full protection of life and liberty; and rights of a minority group in particular, such as freedom of religion and freedom of education.\textsuperscript{19}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{15} Treaty between the Principal Allied and Associated Powers and Poland (28 June 1919) 112 BSP 232 (“Polish Minority Treaty”or “Little Versailles”); Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State (10 September 1919) 112 BSP 514; Treaty between the Principal Allied and Associated Powers and Czecho-Slovakia (10 September 1919) 112 BSP 502; Treaty between the Principal Allied and Associated Powers and Roumania (9 December 1919) 5 LNTS 336; Treaty concerning Thrace, between the Principal Allied and Associated Powers and Greece (10 August 1920) 28 LNTS 225.
\item \textsuperscript{16} Treaty of Peace between the Allied and Associated Powers and Austria, Protocol, Declaration and special Declaration (10 September 1919, Part III, Chap V, 62 to 69) 112 BSP 317; Treaty of Peace between the Allied and Associated Powers and Bulgaria, and Protocol (27 November 1919, (Part III, Chap IV, 49 to 57) 112 BSP 781; Treaty of Peace between the Allied and Associated Powers and Hungary (4 June 1920, Part III, Chap VI, 54 to 60) 6 LNTS 187; Treaty of Peace with Turkey (24 July 1923, Part I, Chap III, 37 to 45) 28 LNTS 11.
\item \textsuperscript{17} Treaty between Germany and Poland on Upper Silesia (15 May 1922, part III), 9 LNTS 466.
\item \textsuperscript{18} See the list with primary source references in Ermacora (n 6) 249, 258-259; A Meijknecht, ‘Minority Protection System between World War I and World War II’ in R Wolfrum (ed) The Max Planck Encyclopedia of Public International Law (OUP 2008) online edition <www.mpepil.com>.
\item \textsuperscript{19} Cf Article 2 Polish Minorities Treaty: ‘Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion. All inhabitants of Poland shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals.’ An overview in N Lerner, ‘The Evolution of Minority Rights in International Law’ in CM Brölmann, R Lefeber and MYA Zieck (eds) Peoples and Minorities in International Law (Martinus Nijhoff, Dordrecht 1993) 77, 83-84; A Mandelstam, ‘La Protection des Minorités’ in (1923 I) Recueil des Cours 362, 411-446; Feinberg (n 12) 634; Ermacora (n 6) 259.
\end{itemize}
\end{footnotesize}
The protection of named national minorities then was buttressed by a ‘guarantee’ of the League of Nations, which had two components. It meant that the stipulations regarding minority protection could not be modified without approval (by majority) of the League Council. Secondly, it meant that the League had to ascertain that the provisions for the protection of minorities were always observed. This implied that the Council would have to take action in the event of any infraction, or danger of infraction, of any of the obligations with regard to the minorities in question.

Taken together these stipulations are said to have constituted the first international system for minority protection. Importantly, that system did not set out general international rules. The League Covenant in its final version did not contain provisions generally ensuring the minorities’ rights in all of the League’s member States. Draft versions with obligations to this effect for all League of Nations members had been proposed by US President Wilson, but in the end had been blocked by established States, generally for the reason that it ‘assail[ed] the holy principle of ‘full internal sovereignty’’. Also, attempts to impose minority protection provisions upon Germany, Belgium, Denmark, France or Italy in the Peace Treaties had been unsuccessful. The system thus embodied the maximum attainable solution of creating several individual regimes tailored to particular political situations and geographical areas. Minority protection would have been set as a condition for the recognition of independent Statehood (for example in case of Poland), for the recognition of territorial gains (for example in case of Greece) or for membership of the League (for example in case of the Baltic States).

Minority protection was therefore served by a non-general, non-reciprocal system imposed specifically on States of Central and Eastern Europe (with the

---

20 Article 12 (1) of the Minorities Treaty between the Principal Allied and Associated Powers (the British Empire, France, Italy, Japan and the United States) and Poland, signed at Versailles, (28 June 1919) 225 CTS 412 (hereinafter: the Polish Minorities Treaty): “the stipulations ... shall be placed under the guarantee of the League of Nations.” This provision was subsequently included in the treaties with Czechoslovakia, Yugoslavia, Romania, Greece, Austria, Bulgaria, and Hungary.

21 H Rosting, ‘Protection of Minorities by the League of Nations’, (1923) 17 AJIL 641-660; Meijknecht (n 18); cf Article 11 League Covenant.

22 See De Visscher (n 8), at 18-19PLS ADD PAGE REF

23 Representative of Great Britain; see Nijman (n 5) 5.5.3. See also C Fink, Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection, 1878–1938 (CUP, Cambridge 2004) 152–4; and Thornberry (n 7) 38–40.

24 Claude (n 6) 35-36. Cf also Fink (n 23).
seed of resentment sown). From a positive law perspective, the selective scope of the rules and obligations certainly limited their potential for having “a fundamentally norm-creating character.” It is one reason why ‘minority’ did not become a general legal category with given legal implications. The term ‘minority’ is found occasionally, as in the Polish Minority Treaty; but, for example, the Treaty of Versailles, in its provisions on the Czecho-Slovak and Polish State, referred to “inhabitants of that State who differ from the majority of the population in race, language, or religion”. If and when the term ‘minority’ was used, no legally relevant definition would be added.

2) The Role of the PCIJ

This was the context in which several questions were put before the Permanent Court regarding the rights of minorities and State obligations in their regard. The Permanent Court dealt with these questions both in judgments and in Advisory Opinions. Contentious procedures on minority issues at the time were less odd than they might seem today, because of the accepted role of kin-States. Advisory Opinions could be seen to serve, then as now, as a vehicle for obtaining a legal pronouncement on the rights of non-

---

25 See eg Fink (n 23).
26 To borrow from the Permanent Court’s successor; see North Sea Continental Shelf (Federal Republic of Germany v. Denmark and Federal Republic of Germany v. Netherlands), [1969] IC J Rep 3 [72]: “that the provision concerned should ... be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law”.
27 See eg Article 8 of the Treaty concerning the Recognition of the Independence of Poland and the Protection of Minorities 225 CTS 412
28 See Treaty of Peace at Versailles (28 June 1919) 225 CTS 188, Articles 86 and 93, respectively.
29 For this chapter the following cases are taken do be directly concerned with the rights of groups or individuals: Questions Relating to Settlers of German Origin in Poland (Advisory Opinion), [1923] PCIJ Ser B No 6; Question concerning the Acquisition of Polish Nationality (Advisory Opinion), [1923] PCIJ Ser B No 7; Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials Who Have Passed into the Polish Service, Against the Polish Railways Administration) (Advisory Opinion), [1928] PCIJ Ser B No 15; Rights of Minorities in Upper Silesia (Minority Schools) (Judgment), [1928] PCIJ Ser A No 15; Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration, Signed at Neully-Sur-Seine on November 27th, 1919 (Greco-Bulgarian Communities) (Advisory Opinion), [1930] PCIJ Ser B No 17; Access to German Minority Schools in Upper Silesia (Advisory Opinion), [1931] PCIJ Ser A/B No 40; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion), [1933] PCIJ Ser A/B No 44; Minority Schools in Albania (Advisory Opinion), [1935] PCIJ Ser A/B No 64.
State groups under international law, where they cannot assert these rights directly.

Although minority groups themselves had no *locus standi*, they did gain access to the mechanism via the petition system which the League developed early in the 1920s.\(^{31}\) The filing of a petition with the League via the Secretary-General could on certain conditions lead to a formal request with the League Council, which in turn could ask the Permanent Court for an Advisory Opinion as per Article 14 of the League Covenant. In practice this happened only in a very few cases.\(^{32}\) Ultimately the petition system proved too formal and burdensome, and fruitful negotiation and reconciliation would take place not on the basis of a formal petition but based on informal procedure or *procédure non-écrite*.\(^{33}\)

**3) Points of Law**

This said, the Permanent Court had occasion to pronounce itself on some fundamental points of law. Arguably this was due also to the particular context of the minorities protection system, as reaffirmed, for example, by the comment of a contemporary observer that the “…système des droits, accordés aux minorités par les traités, … en général, il est conforme aux exigences de l’heure actuelle. Il a seulement besoin d’être exposé avec plus de précision et de détail.”\(^{34}\) Precisely because the system was lacking ‘precision and detail’, the Court was faced with basic questions which it needed to address - without an existing body of case law or doctrine to rely on - before it could proceed to decide on the facts of a particular case.

The expression ‘minority’ came to be used – though not consistently - in legal doctrine notably with the creation of the minority protection system after the First World War,\(^{35}\) but without a generally agreed definition. From the in depth analysis of the interwar debate by Nathaniel Berman emerges a highly political picture, in which the search for a definition of ‘minority’ moved along

---

\(^{31}\) On the right to petition see eg J Robinson (ed), *Were the Minorities Treaties a Failure*? (Antin Press, New York 1943) 128.

\(^{32}\) Meijknecht (n 18) points out that between 1919 and 1939 “….only 16 petitions reached the agenda of the Council,” while in total 950 petitions were filed, of which 758 were declared admissible.

\(^{33}\) These expressions were used by the League Secretariat; see C Gütermann, *Das Minderheitenschutzverfahren des Völkerbundes* (Duncker & Humblot, Berlin 1979) 149 et seq.

\(^{34}\) Mandelstam (n 18) 511.

\(^{35}\) Ermacora (n 6) 287
the lines of the tension between the ‘statist’ versus ‘nationalist’ interpretation of international law. Berman argues convincingly how, since in the end the question was decided by who had the power to define ‘community’ and ‘minority’, this debate was ultimately about international authority. When it thus fell upon the Permanent Court to clarify the notion of ‘minority’ and the threshold for being (a member of) a minority for legal purposes, the impartial judicial authority (symbolically reinforced by the fact that the Court was not formally an organ of the League of Nations) was especially relevant.

In an early case the Court was called upon to interpret a provision on the acquisition of nationality, which the new Polish State wished to apply restrictively with a view to limiting acquisition of Polish nationality by the German minority. The Court in this occasion defined a minority as “inhabitants who differ from the population in race, language or religion”; it moreover adopted a famously ‘broad’ definition, contrary to Polish propositions: “that is to say ... inhabitants of this territory of non-Polish origin, whether they are Polish nationals or not.”

Further elements were added to the definition in the Greco-Bulgarian Communities case, when the Court was asked for an Opinion on the consequences of liquidation of property of Greco-Bulgarian ‘communities’, such as churches, convents, schools, and on the dissolution of these communities when members voluntarily emigrated. By the interpretation of the 1919 Convention Between Greece and Bulgaria Respecting Reciprocal Emigration the Court in fact paralleled to some extent ‘communities’ and ‘minorities.’ In a well-known passage the Court then gave an intricate definition:

By tradition ... the “community” is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their

---

36 Berman (n 7).
37 Cf H Lauterbach, The Development of International Law by the International Court (Stevens & Son, London 1958) 261.
38 Berman points out that “[t]he underlying political issue in the German Settlers and Polish Nationality cases was the same: to what extent would Poland have the right to take measures to reduce the size of its German minority?” (n 7) 1840 fn 201); see in general 1834-1842.
39 Acquisition of Polish Nationality (n 29) 14-15, emphasis added.
traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.\(^{40}\)

The definition in the *Greco-Bulgarian Communities* Opinion has several features which would prove foundational to the later doctrine regarding minority protection. First, it indicates that for a group to fall within the (legal) category of ‘minority’, recognition on the part of the minority State or ‘host state’ is not a constitutive element. This made the definition an essentially non-juridical exercise, which sometimes has been termed the ‘sociological approach’: \(^{41}\)”[t]he existence of communities is a question of fact; it is not a question of law.”\(^{42}\) This, incidentally, was a delicate matter in view of the selective scope of the minorities protection obligations. \(^{43}\) The factual approach also truly internationalized the position of minorities, as it followed that the existence of a minority would be given legal relevance independent from the consent of the individual States.

Furthermore, the definition of ‘minority’ proposed by the Court had both objective and subjective aspects. The objective and subjective ‘theory’ regarding the constitutive elements of a ‘minority’ had been the subject of intense debate in the 1920s. \(^{44}\) Already in the 1928 *Minority Schools* case the Court had pointed to both objective signs, such as language or history, and subjective aspects of a minority identity, stating that, "the German-Polish Convention . . . concerning Upper Silesia bestow[s] upon every national the right freely to declare according to his conscience and on his personal responsibility..." whether or not his child "...belonged to a racial, linguistic or religious minority."\(^{45}\)

\(^{40}\) *Greco-Bulgarian Communities* (n 29) at 21-22.

\(^{41}\) See the detailed analysis in Berman (n 7) 1855.

\(^{42}\) *Greco-Bulgarian Communities* (n 29) at 22.

\(^{43}\) Cf Mandelstam, in his brief *deuxieme partie* on 'La reconnaissance de fait des minorités' (n 19, at 407-409)

\(^{44}\) Cf eg Nijman (n 5); Jackson Preece (n 7) 17. From contemporary writings see eg Redslob who, according to the subjective position, considers a nation not to be a given, but based on will and choice: R Redslob, *Histoire des Grands Principes du Droit des Gens Depuis l'Antiquité Jusqu'a la Veille de la Grande Guerre* (Rousseau, Paris 1923) 31–32.

\(^{45}\) *Rights of Minorities in Upper Silesia (Minority Schools)* (n 29) 46; see also Berman (n 7). A few years later the Court confirmed this stance in *Access to German Minority Schools in Upper Silesia* (n 29) at 20 → PLS CLARIFY/DELETE FRAGMENT
The case law of the Permanent Court, as in the *Greco-Bulgarian Communities* case, seemed to point to a combination of subjective and objective factors. At the time this was cause for criticism, suggesting the Court eschewed taking sides in a longstanding debate. But precisely this combination would become a cornerstone of international law doctrine in regard of non-State groups later on. All contemporary definitions and criteria-of-belonging combine subjective and objective elements, and furthermore proceed from the ‘sociological’ approach which requires no ‘recognition’ of the minority. The subjective factor in group identification for the purpose of international law – ‘self-identification’ as it came to be named in the 1970s and 1980s - gained a firm place in the conceptualization of ‘minorities’, but also of ‘peoples’ and ‘indigenous peoples’ in the United Nations era.

The legal definition of ‘minority’ commonly (though still not unanimously) used today, which was proposed by Special Rapporteur Francesco Capotorti in the 1979 study for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, was directly based on the 1930 definition by the Permanent Court in the *Greco-Bulgarian Communities* case. It also includes non-dominance, another element which defines ‘minority’ in the sociological tradition.

In the context of minority protection the Permanent Court is perhaps best known for its development of the legal concept of ‘equality’. In an early case on the position of the German minority in Poland, the Court articulated the notion of equality both in law and in fact: “The fact that no racial discrimination appears in the text of the law ..., and that in a few instances the law applies to non-German Polish nationals ..., makes no substantial difference... There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law.”

---

46 Cf Feinberg (n 12) 641.
48 Ermacora (n 6) 287.
49 F Capotorti, ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities’ (United Nations, New York 1979) E/CN4/Sub2/384/Rev 1, at 96: ‘A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.’
50 Cf Lauterpacht (n 37).
51 *German Settlers in Poland* (n 29) 24.
Almost a decade later in relation to the treatment of a Polish minority, the Court specified the particular point of non-discrimination in law and in fact. In order to be effective the prohibition of discrimination should: “ensure the absence of discrimination in fact as well as in law. A measure which in terms is of general application, but in fact is directed against Polish nationals and other persons of Polish origin or speech, constitutes a violation of the prohibition.”

In the 1935 *Minority Schools in Albania* Opinion, following a decision of the Albanian government to close all private schools in Albania and a reaction by the Greek minority, the Court carried the concept of equality in law and in fact further by articulating the concept of positive discrimination. The passage merits quotation in full:

> The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs. In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.
>
> The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.
>
> The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.

---

52 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory* (n 29) 28.

53 *Minority Schools in Albania* (n 29) 17.
As to "ensur[ing] suitable means" for the "minority elements", familiar objections were raised by dissenting judges: "This provision ... is intended to render the equality effective and real. There is nothing, however, in the wording of the provision to show that this equality in law may be disregarded and replaced by a system of different treatments for the minority and the majority so as to establish an equilibrium between them." 54

Yet, equality in law and in fact as well as the concept of ‘positive discrimination’ have since remained central concepts in human rights protection. Thus, in a speech to the UN General Assembly Sixth Committee in 2002 then President of the International Court of Justice Guillaume brought to mind how the 1935 Opinion by the Permanent Court “pav[ed] the way for the famous “affirmative action”, so dear to American liberals in the 1970s." 55

In the series of reasonings which culminated in the Minority Schools in Albania Opinion the Court thus developed what has been called the “two pillar structure” for minority protection, consisting of non-discrimination and the right of minorities to preserve their separate identity. 56 Arguably the latter can be considered a ‘group right’ 57 (borne by the collective as such), although group identity may also be seen as giving rise to ‘collective rights’ (individual rights enjoyed as member of a collective). Most of the interbellum minority rights are and were considered collective (thus individual) rights. 58 Article 8 of the Polish Minority Treaty for example contains the individualized formula we also find in Article 27 of the International Covenant on Civil and Political Rights: “Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Polish nationals.” 59

---

54 Minority Schools in Albania, Dissenting Opinion by Sir Cecil Hurst, Count Rostworowski and M Negulesco (n 29) 24.
57 Ibid.
58 Cf Henrard (n 56); Mandelstam (n 18) 436-442
59 Polish Treaty (n 16); and cf Art 27 CCPR (99 UNTS 171): “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.
Only some provisions have an unmistakable “group dimension”, as is pointed out by Henrard; for instance the obligations towards the Jewish community as such set out in the Polish Minority Treaty.60 Mandelstam, writing in 1923, has a similarly restrictive view of group rights (he calls them ‘collective rights’ using the reverse terminology) and identifies only “the right to proportional representation and the right to (forms of) autonomy”.61

Two further features of the case law of the Permanent Court on minority rights must be mentioned. While these are not points of substantive law, but rather legal principles, they have set the tone for the protection of minority rights by the Court and have increased the impact of the Court’s reasoning.

First, the Permanent Court has systematically confirmed the international character of minority rights and, by logical implication, their unconditional prevalence over the internal law of States. The breakdown of the old order of empires has been said to give way to “a murky situation[,] marked by a tangle of national and state identities, ... that called for increased international authority”.62 Indeed the Polish minority treaty and other treaties underscored the international character of minority protection obligations by referring to the guarantee of the League: “the stipulations ... so far as they affect persons belonging to racial, linguistic or religious minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations.”63 Still, the internationalization of minority rights was a daring project which challenged the existing order. The Court, however, “in its determination to discourage evasion of international obligation”64 reaffirmed it in the early case on Acquisition of Polish Nationality.65 Once the Court decided on a – broad – definition of ‘minority’ (see above), the preliminary question of whether acquisition of nationality fell under the League guarantee stipulated in the Polish Minority Treaty, could be answered in the affirmative. The Court found that indeed international law determined who constitutes a minority in the sense of the Polish Minorities Treaty and the Versailles Peace Treaties, and not the Polish State, and said: “[t]hough, generally speaking, it is true that a sovereign State has the right to decide

---

60 Henrard (n 36).
61 Mandelstam (n 18) 436-442.
62 Berman (n 7) 1841, emphasis added.
63 Article 12(1) the Polish Minorities Treaty (n 20) emphasis added. This provision was included in the treaties with Czechoslovakia, Yugoslavia, Romania, Greece, Austria, Bulgaria, and Hungary.
64 Lauterpacht (n 37) 262
65 Acquisition of Polish Nationality (n 29) 13-17
what persons shall be regarded as its nationals, it is no less true that this principle is applicable only subject to the Treaty obligations referred to above.”

A second characteristic of the Court’s decisions is the conspicuous role of effet utile in the interpretation of provisions on minority protection. In practically every pertinent case the Court referred to the principle of effectiveness and used an accordingly ‘teleological approach’ for the interpretation of provisions – which at the time was far from habitual in treaty interpretation.66

Thus in the Aquisition of Polish Nationality case the Court based its broad definition of ‘minority’ (see above) on the principle of effectiveness, lest the Article 4 of the Polish Minority Treaty would be deprived of meaning.67 Also the aforementioned conceptualization of ‘equality in law and in fact’ in the German Settlers case and the Polish Nationals in Danzig case was inspired by the principle of effectiveness (“The prohibition against discrimination, in order to be effective…”).68

Another example is the general statement of the Court in the Greco-Bulgarian Communities case: “the aim and object of the Convention, its connection with the measures relating to minorities, the desire of the signatory Powers ... everything leads to the conclusion that the Convention regards the conception of a ‘community’ from the point of view of this exclusively minority character ...”69. When in the Minority Schools in Albania case the Court was called upon to interpret Albania’s 1921 Minority Declaration, it held that in view of its objective the Minority Declaration should be interpreted in the same way as a minority treaty. The Court then proceeded from the Treaties’ object and purpose (“the idea underlying...”) to reach the ‘two pillar’ interpretation of ‘equality’ (see the text and quotation above).70

By taking minority protection as the ultimate objective and guiding principle in its interpretive practice, the Court to some extent gave minority protection

---

66 See the concise treatment of this point in Lauterpacht (n 37) 257-262; also A Spiliopoulou Åkermark, Justifications of Minority Protection in International Law, (Martinus Nijhoff, Dordrecht 1997) 110.
67 Lauterpacht (n 37) 258.
68 Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory (n 29) at 28; cf Lauterpacht (n 37) 257.
69 The Greco-Bulgarian “Communities” (n 29) 21-22.
70 Minority Schools in Albania (n 29) 17.
provisions the standing of a regime of ‘law’, rather than a collection of ‘obligations’.

IV. The PCIJ and the Rights of Individuals

The interwar period developed a ‘system’ for the protection of minorities, but no legal framework for the protection of rights of the individual. It is thus unsurprising that individuals figure less prominently than minority groups in the case law of the Permanent Court.

This said, the position of the individual was famously at issue in one of the Advisory Opinions delivered by the Court in relation to the newly established Free City of Danzig, 71 one of the post-War “experiments in internationalisation”. 72 The case concerned the question whether Danzig railway employees could bring claims against the Polish Railway Association in Danzig Courts, based on the 1921 Beamtenabkommen between Poland and the Free City of Danzig; or in other words: whether the 1921 treaty was part of the legal relation between the Danzig railway employees who had become employees of the Polish Railway Association and Poland. An appeal by the Free City against the decision of the High Commissioner, who had answered this question in the negative, led to a request by the League Council for an Advisory Opinion with the Permanent Court. The 1928 Opinion on the Jurisdiction of the Courts of Danzig has entered literature as one of the first pronouncements on the individual as beneficiary of an international provision. 73 Meanwhile, scholarly debate on the precise meaning of the Opinion persists until today. 74 In the key passage of its 1928 Opinion the Court stated:

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

71 Feinberg (n 12).
72 Berman (n 7) 1874.
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. That there is such an intention in the present case can be established by reference to the terms of the Beamtenabkommen.\(^75\)

According to Lauterpacht it was “difficult to exaggerate the bearing” of the Opinion,\(^76\) which showed that “no considerations of theory can prevent the individual from becoming the subject of international rights if States so wish.”\(^77\) Lauterpacht’s views on the legal position of the individual are reflected in his choice to discuss the case under the rubric of ‘judicial legislation by reference to parallel developments in international law’ rather than that of ‘judicial legislation on account of absence of generally accepted law’.\(^78\)

According to Anzilotti, on the other hand, the Court had said nothing more than that contracting parties could have the intention to adopt rules which create rights and obligations for individuals;\(^79\) these could then be applied by domestic courts provided they had been incorporated into domestic law. The ‘dualist’ views of Anzilotti, who was at the time of this case serving as president of the PCIJ, have been well studied.\(^80\)

A recent textual and contextual analysis of the Danzig Opinion traces the ambiguities in its wording, and convincingly argues how the conclusion must be that the Court said there is a possibility for individuals to obtain rights directly from international law (in casu a treaty) without adoption of rules in domestic law.\(^81\)

Whichever reading one adopts, the Opinion undoubtedly broke new ground. The Court did perhaps not propose to accord international rights directly to

---

75 *Jurisdiction of the Courts of Danzig* (n 29) 17.
76 Lauterpacht (n 37) 175.
79 D Anzilotti, *Cours de droit international* (Librairie de Recueil Sirey, Paris 1929) 407
80 Gaja, EJIL, and Parlett (n 74). The different composition of the Court in different periods, and the possible effect on the decisions, is left out of account in the present chapter, but see the contributions by O Spiermann (4-5), and J d’Aspremont (6 ff) in the present volume
81 Parlett (n 74).
individuals, but it did forward the idea of the individual as a beneficiary of rights that originated in international law. It seems fair to say that the Danzig Opinion, in its ambiguity, challenged the doctrinal premise that individuals could not be ‘bearer’ of rights under international law, and, implicitly, also the separation between national and international law that was prevailing in doctrine at the time.82

It is worth noting that in the Court’s reasoning, the ‘human right’ or ‘fundamental right’ discourse was absent. Rather, it revolved around a neutral ‘individual right’ – comparable to the individual right derived (in that case directly) from article 36(1) of the 1961 Convention on Consular Relations by the ICJ in the 2001 LaGrand case.83 While in the latter case the international Court of Justice may have been “prudently avoiding a politicization of the dispute,”84 it is likely that in the 1928 Danzig case the Permanent Court used the discourse prevalent at the time – that of a stable division of power between States. Interestingly, in LaGrand the International Court of Justice did not refer to the Danzig case, or any other possible precedent regarding individual rights, but to the PCJ Opinion in the Acquisition of Polish Nationality case85 as an authority for ‘grammatical interpretation’.

V. The PCJ and Legacy

The context of the PCJ was quite different from that of its successor. The stated aim to prevent kin-States from intervening on behalf of their national minority in another State is evidence of the interest in inter-State stability underlying the minorites protection project. Furthermore, positive international law was much less diversified than it is today. Rules of minority protection were rather clear-cut; they had no generality of scope and were not embedded in a general human rights system or discourse. Today the generalization of human rights is an obvious influence on the legal position of minorities.86 That minority protection in the United Nations era has come to be addressed within the human rights framework with its particular

82 Parlett (n 74).
83 LaGrand Case (Germany v United States Of America) (Judgment – Merits) [2001] ICJ Rep 466 [77].
85 Acquisition of Polish Nationality (n 29) 20
procedural remedies, and that ‘kin-states’ no longer have an accepted role to play in minority protection, are two possible reasons why questions concerning minorities have not come before the ICJ. Only in the 2011 Georgia v Russian Federation case – not adjudicated for lack of jurisdiction – did minority rights come up as part of the claim by Georgia that the Russian Federation, inter alia, had breached human rights including minority rights. In contrast, questions of ‘self-determination’ – which had been kept outside the sphere of the Permanent Court – have come before the International Court of Justice, for example in the cases concerning the Wall and Kosovo.

The minority protection system ended with the demise of the League, but the holdings of the Court have kept their relevance, as appears from references in decisions by the International Court of Justice and commentaries from scholars, such as Lauterpacht, who straddled the two eras. Specifically the issues addressed by the Court have proven relevant in human rights law until this day. This holds for the notion of formal and substantive ‘equality’, and for the element of self-identification in the identity of a minority, to name two examples. Bodies such as the UN Human Rights Committee have explicitly recognized the legacy of the Permanent Court, for instance on the ‘factual approach’ to the existence of minorities. In the procedural sphere, the petition system – in which the Court was indirectly involved as a petition could ultimately trigger a request for an Advisory Opinion – according to several commentators can be seen as a precursor of the various complaint mechanisms linked to human rights regimes in the United Nations era.

It is not certain whether the protection of rights of the individual was a stand-alone objective, for the League or for the Court. From the Jurisdiction of the Courts of Danzig case it appears the Court proceeded from a political perspective rather than from a premise of the individual’s fundamental

---


89 See General Comment No 23, dealing specifically with minority issues (6 Apr 1994, 50 UNGA, Hum Rts Comm, 1314th mtg, UN Doc CCPR/C/21/Rev1/Add5, 1994) reprinted in (1994) 15 Human Rights LJ 234; and cf Pejic (n 88) 671-672.

90 Vuciri Ramaga (n 86) 585 et seq.
dignity. In fact, the impact of the judgment was not immediate; for example the Jurisdiction of the Courts of Danzig Opinion was not mentioned in the 1930 edition of Oppenheim’s International Law. The decisions of the Court arguably have spurred on the visibility of individuals and groups in international law, identifying them as legally relevant categories. The PCIJ “laid the groundwork for international concern of individual rights.” However, this did not mean they were construed as Normadressat or ‘subjects’ of international law according to the then prevailing doctrine. The subject-object dichotomy remained in place when it came to minorities and individuals. This is perhaps the most fundamental difference with legal developments in the era of the International Court of Justice.

In the course of the 1920s, the optimism about the League’s system of minority protection turned to disenchantment. For the perceived failure of the League system several explanations have been proposed: that ‘the close link’ between the League and the Peace Treaties made the defeated countries—notably Germany— consider the League to be part of an ‘unjust’ post-war settlement; that the League and its Council suffered from general weakness due to the built-in inequality of States and the lack of full support of the Great Powers; that the protection system suffered from the reluctance of the League members to bring claims on behalf of minorities to the Council; the attitude of the new national States hosting minorities; the general political and economic context; and the fact that it was ‘the inevitable concomitant of the disintegration of the moral foundations of international order’. But commentators also mentioned the limited scope of the PCIJ’s jurisdiction (disputes arising out of the Minorities Treaties and Declarations only) and the absence of a right of minorities themselves to bring a claim directly before the PCIJ.

Be that as it may, when it comes to the development of international law regarding minorities and individuals, the role of the Permanent Court was

---

91 Parlett (n 2) 26: “the opinion did not have an immediately transformative effect on the position of the individual in the international legal system.”
93 Ibid.
94 See eg De Visscher (n 87) viii
95 On the right to petition see eg Robinson (n 31) v; as well as Claude (n 6) 31-50; Jackson Preece (n 7).
96 Cf Tams (n 14), at [4].
97 Claude (n 6) 50.
more important than that of the other law-making agents at the time. While the system was highly politicized, and "... the kin-states did not genuinely accept the internationalization of minority problems,"98 the Permanent Court had occasion to clarify and contribute to a new body of law, without much doctrine or precedent to rely on. The PCIJ itself accepted this role, ostensibly engaging in ‘judicial legislation’ and increasingly referring to precedents from its own case law.99 By virtue of its mission of applying general international law the Court could take a broader view than the League and the Council. For this reason the PCIJ contributed more to the development of international law regarding minorities and individuals than can be said for example of the League. This was also the view of Lauterpacht, who found that “when compared with the parallel – negative – developments in the political sphere” the “important and progressive contributions” of the Court appeared in their “true significance.”100

98 Ibid 45.
100 Lauterpacht (n 37) 262.