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## The Evaluation of Principles involved in the 'Lotus Case'

Alvin K Anil, Archita Baiju Panicker, Gitanjali Sadan Pillai, Adnan Hameed K P<sup>1</sup>

### ABSTRACT

*State sovereignty is naturally constrained in a growing interdependent world to defend the freedom of other states. On the other hand, understanding the exact limits on states is a different and considerably more challenging task. The concept laid down in the case of France v Turkey (also known as the Lotus Case) enumerates the prerogative to act unless restricted by international law as the standard solution. However, the idea has come under fire due to its inconsistency with the needs of the new age of international relations and resulted in setting aside the Lotus judgement of the "Permanent Court of International Justice". This paper analyses the Lotus case decision, although it is argued that the concept is a misreading of the majority view and fails to provide the necessary conditions for interstate coexistence and collaboration, the majority's twin aims of international law. This paper then considers the concept of "co-existence" in modern international law and the notion of "locality" as an additional factor when solving conflicting jurisdictional claims.*

### I. INTRODUCTION

When a disagreement emerges among residents or institutions of a state, it is resolved by following the laws of that State. For example, suppose inhabitants of 'State A' breach a contract. In that case, the dispute will be decided by the court of State A according to the law provisions of that State, or if the judges of 'State A' are permitted, they may use their discretionary powers to resolve the problem. However, a problem arises when one party is a foreigner. Then there is the matter of whether a country's court has the power to prosecute a foreigner even if he has been charged with causing damage to a local entity or violating a legislative provision. The sources of international law, which include treaties, customary international law, case decisions, and publications by highly trained writers, provide a solution to this question. The

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<sup>1</sup> All the authors are the student at Symbiosis Law School, Hyderabad.

"*France v Turkey*"<sup>1</sup> case, often known as the "*Lotus case*", was one of the most hotly discussed court decisions in this regard.

The "*Permanent Court of International Justice's (PCIJ)*" decision in the "*Lotus case*" has received more attention than any previous judgement by the court, and its significance as a source of core concepts in numerous fields of international law has lasted.<sup>2</sup> The Lotus principle bestowed by the PCIJ's declaration is that "*restrictions on the independence of States cannot be presumed*"—which is frequently used as a broad starting point for Public International Law Study.

Over the years, as the world moved on with major changes to the concept of the jurisdiction of the state, a critical analysis of this landmark judgement that paved the way for modern international law has been conducted numerous times. The concept of Jurisdiction is a multi-dimensional concept whose meanings change upon the varying context they are put into within the framework of international law, common meaning talks about the capacity of a state to peruse its power in enforcing and prosecuting people, things and places within their domain.<sup>3</sup>This definition, to an extent, highlights various dimensions of the concept.

The Lotus case is one of the earliest international cases which stands as the foundation of international law. It is essential to thoroughly understand the case and its interpretation, which this paper helped navigate. Therefore, it aided the research in a remarkable manner.

This study is limited to the analytical aspect of the "Lotus case". Additionally, the researchers would be only addressing the issues that the researchers derived from the case analysis.

## II. THE LOTUS DECISION: FACTS AND JUDGEMENT

On August 2<sup>nd</sup> 1926, an accident happened between the French steamship "S.S. Lotus" and Turkish steamship named "S.S. Kourt". The incident occurred just before midnight in the high seas, the Turkish steamship "S.S. Boz Kourt" was cut into two and sank, killing eight Turkish nationals on board.

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<sup>1</sup> France v Turkey, 1927 P.C.I.J (ser. A) No. 10.

<sup>2</sup> Ole Spiermann, *International Legal Argument In The Permanent Court Of International Justice: The Rise Of The International Judiciary* 247 (2005).

<sup>3</sup> Bruno Simma And Andreas Muller, "Excercise And Limits Of Jurisdiction", 134, 3<sup>rd</sup> Edn (Oxford University Press, 2010), 313.

The Lotus ship then continued its course to Constantinople, the capital of Turkey with 10 people who were saved, among which was the captain of Turkish steamship, Hassan Bey. The ship arrived at Constantinople on 3rd August. Shortly afterwards, an officer of the Lotus ship M. Demons was arrested by Turkish authorities without notice. A fine of 22 pounds and 80 days of imprisonment was ordered against Mr. M. Demons on 15th of September. More severe penalty was given to Mr. Hassan Bey. Due to an appeal filed by a prosecutor at the Turkish court the execution of the sentence was suspended. But the criminal proceedings against Mr. Demons were not affected. He was imprisoned for 39 days according to France, this led to diplomatic tensions between the French and Turkish governments.

Later, the governments agreed to move the case to the Permanent Court of International Justice.

**The main questions placed before the court were<sup>4</sup>**

- Has there been a violation on the principles of international law by Turkey, with inappropriate use of Jurisdiction and if there has been a violation then by which principles?
- What compensation would be granted to Mr. Demons if Turkey is found to have violated these principles?

Turkey argued in court to give judgement in favor of the Turkish court. They also argued that since the offence was committed on S.S. Boz- Kourt which was flying the Turkish flag, Turkey had jurisdiction.

Turkey argued that Turkey is not liable to pay any reparation to the French government, as Article 15 of the “Convention of Lausanne” gives Turkey jurisdiction when such jurisdiction does not conflict with international law.

The French argued that as a practice of international law of civilized nations, a “state is not entitled to extend criminal jurisdiction of its courts to include a crime or offence committed by a foreigner abroad solely in consequence of the fact that one of its nationals has been a victim of the crime of offence”. The French also argued that acts done on the high seas which bring criminal proceedings are subject to the courts of the nationality of the ship or the courts of the

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<sup>4</sup> Publications of The Permanent Court of International Justice: The Case of The S.S. Louis (September 7<sup>th</sup> 1927), [http://www.icj-cij.org/pcij/serie\\_A/A\\_10/30\\_Lotus\\_Arret.pdf](http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf).

country whose flag the ship flies, and the victim's nationality cannot override this rule. They also pointed out that since the ships are of different nationalities, jurisdiction cannot be transferred between them due to the absence of any international agreements or laws. Turkey should be able to point out any international laws or conventions that allow them jurisdiction to prove their point.

At the end of the case, the court ruled in favour of Turkey and pointed out that "There is no rule of international law that points, criminal proceedings occurring from collisions at sea are exclusively within the jurisdiction of the state on whose flag the vessel is flown." Due to these facts, the court found that there is concurrent jurisdiction over the whole incident.

The court, in its ruling, associated the Turkish vessel with Turkish territory as a ship on the high seas is assimilated into the territory of the flag state. Since the effects of the collision were produced on the Turkish vessel, which is considered Turkish territory, the Turkish criminal law cannot be challenged even though foreigners committed the offences.

The court, in its judgement, also ruled that it can be demonstrably concluded that *opinio juris* is reflected in the omissions of the state as well as the acts they choose to pass (Nicaragua Case) when those omissions have been motivated by a belief that the State in the issue is compelled by law to refrain from acting in a particular manner, same principles must be followed if an offence committed in the high seas has consequences for a ship flying a different flag or in foreign territory and there is no rule of international law that prevents the State whose ship the offence has consequences for from considering the offence to have been committed to.

The Lotus case provided a crucial ruling on the development of customary international law.

With respect to the principle stated above the court ruled that there has not been any violation of international principles or laws by Turkey in instituting criminal proceedings against M. Demons, due to this fact the court rejected the question of compensation payable to Mr. Demons.

As a result, the case developed the Lotus principle. The principle has two dimensions and puts forward two very important principles with regard to international law. By the first principle no country has the right to exercise its powers outside its jurisdiction without an international agreement or enacted laws which gives the country the right to do so at the same time the principle also pointed out that every country has the right to use its powers within its territories,

within its own authority even in the absence of international laws that gives the state absolute powers to do so.

Up until the Geneva high seas convention, the Lotus principle was applied to high seas accidents.

The Geneva High Seas Convention, which specifically addressed jurisdiction over vessel collisions that occur in the high seas, later in 1958 saw the signing of an article.<sup>5</sup>In article 11 of the Geneva High Seas convention, all the powers for criminal and disciplinary proceedings, as well as powers for detention and arrest on the crew members as well as the ship, were given to the authorities of the flag state. In the Lotus case, the French presented precisely this argument to the Permanent Court of International Justice.

The Permanent Court of International Justice would have made a different ruling if this convention took place before the Lotus collision and Turkey would not be having authority to file charges against Mr Demons. The Geneva High Seas Convention's eleventh article is to blame for this. The Permanent Court of International Justice could have issued a ruling requiring Turkey to compensate Mr. Demons in this case.

### III. ANALYSIS OF THE LOTUS PRINCIPLE

The foundation for one of the most essential principles in the Jurisprudence of Public International Law was laid in the famous Lotus Case<sup>6</sup> of 1927. The case led to the creation of various provisions and principles with regard to collision, local claim, territorial and concurrent jurisdiction etc.

The first principle in the case is that a State has the power to exercise its jurisdiction outside its area or limits only when a customary law or international treaty permits the state to do so. The Court emphasized that without any permissive rule, a State does not have the authority to exercise any form of its power in the territory of another State. The Court further stated, "*In this sense, jurisdiction is certainly territorial; a State cannot exercise it outside its territory except by a permissive rule derived from international custom or a convention.*" Concerning this principle, the case further suggested that in situations where the crime took place outside a state's territory. However, a constitutive element of it took place in that State, the State would

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<sup>5</sup> Convention Of the High Seas art. 11, Apr. 29 1958, U.N.T.S. 450.

<sup>6</sup> *supra* note 1.

still have territorial jurisdiction over the matter. This concept is presently termed as subjective territorial jurisdiction. It is necessary to prove that the actual crime and its element are entirely inseparable from establishing subjective territorial jurisdiction.<sup>7</sup> In short, the crime would not have happened in the absence of the constituent element.

The second principle put forward by the Lotus Case is that even in the absence of a specific rule of international law, a State has the power to exercise its jurisdiction within its territory in any matter. Here, the States are granted a broad measure of discretion which only specific prohibitive rules of international law can limit. The Court held that: *“It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”*

A ship on the high seas is incorporated into the flag State's territory, according to the Court. To the exclusion of other States, this specific state has the authority to exercise jurisdiction over the ship similarly to its land. In the present scenario, the Court concluded that the ship damaged should be associated with Turkish territory. The Court determined that the offence had its own impacts on the said Turkish ship and, as a result, at a location that is melded to Turkish territory, it cannot be disputed when Turkish criminal law is applied, even when foreigners commit crimes there. Turkey was found to have jurisdiction over this case by the Court. When the effect of an offence that took place on the high seas is produced on a ship carrying a different flag, the principles need to be applied considering that two different State territories were concerned.<sup>8</sup> It can be concluded that the State to which the specific belongs has the authority to regard that the offence was committed in its territory and may prosecute the delinquent accordingly as there is a provision under international law that prohibits the same in this situation.

This finding of the Court was based on the “sovereign will of States”. International law primarily governs the relations between independent States. Various conventions and usages

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<sup>7</sup> Dakshinie Ruwanthika Gunaratne, *Lotus Case (Summary)*, Jul. 27 2012, <https://ruwanthikagunaratne.wordpress.com/2012/07/27/Lotus-case-summary/>.<sup>8</sup>  
*Id*

are formed to articulate various legal principles, achieve common goals and keep a check on the relations between coexisting autonomous communities. All such conventions state that the law that intends to bind and connect the States originates from the States' sovereignty or free will.<sup>9</sup> Due to this reason, it is not possible to impose restrictions on the independence of states in this regard. Another aspect of the judgement attracted criticism and led to debates. It was contended by some that the Court was giving too much importance to sovereignty and the consent of states. This group was against the strong positivist view portrayed by the Court's decision. The decision in the case gave rise to huge discussion and difference of opinion between two groups, which supported positivism and normativity respectively. It can be considered that there was an effort being made to fill the gap in law with regard to this matter. However, since early times this decision of the Court can only be considered as inapposite and inaccurate at the lines of the international law principles.

The Lotus case established a major principle in the development of customary international law. France claimed that criminal courts rarely hear jurisdictional matters with regard to collision cases because states usually only prosecute before the flag state. The Court disagreed and held that, "*this would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.*" In short, when the viewpoint supports certain State omissions that the State should not act in a certain way as per law, it is represented as *opinio juris* just the way it is in State acts.<sup>10</sup>

The Lotus Case opened a new dimension to international with provisions regarding territorial issues and high seas collisions. Even though the crime was committed outside the territory of both parties, the Court found that Turkey had the right to bring a claim against Lotus as the Turkish vessel was damaged by Lotus. It was decided at the time that the decision of this case would apply in all instances involving or linked to it. Since then, Lotus's case has been used in criminal and civil proceedings. It was critical to determine what region or state would be occupied. Following the Lotus case, the jurisdiction over collision was pointed out under Article 11 of the Geneva High Seas Convention in 1958. Had there been such a conference before the Lotus Case, the decision of the PCIJ would have been entirely different. As a result

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<sup>9</sup> Hugh Handeyside, *The Lotus Principle in ICJ Jurisprudence: Was the Ship ever Afloat*, 29 MICH. J. INT'L L. 71 (2007).

<sup>10</sup> An Hertogen, *Letting Lotus Bloom*, 26 EUR J INT'L. 901(2015).

of Article 11 paragraph 1, Turkey would be unable to initiate criminal proceedings against L.t Demons.

As pointed out by various scholars and judges, the Lotus principle is an application of extensive laissez-faire in matters regarding international state relations. It portrays an era which has been overlooked later in the future. Looking into the principle deeply suggests that various interpretive notions could be axiomatic and clear-cut rules. Even though the principle is considered a landmark judgement in the history of international law, it received very little support in the future jurisprudence of the ICJ. The aftermath and future decisions of the Court have been discussed in the next part of the paper and show that the principle was not upheld many times. The unreceptive attitude of the Courts towards the principle is a significant hint that they are skeptic about invoking or applying the principle due to the opinions it poses.

#### IV. AFTERMATH OF THE CASE

The Lotus Case has a significant place in international law and is considered the foundation of public international law. The judgement in the case has caused a stir as it discussed several principles and case laws. For this reason, the case paved the way for numerous discussions and deliberations. Such heated debates continue even today, more than one century later. The bench has upheld the test of objective territoriality. The United States widely uses this principle to govern foreign unions, i.e., when American citizens are affected by such unions.<sup>11</sup> After this case, the flag rule was solidified into the High-seas Convention of 1958 under Article 11.<sup>12</sup> This is an indication that the decisions taken in the case has been overturned. The solidified law is a general practice and establishes jurisdiction in high sea related matters. This was reassured in Article 97 of the “UN Convention on the Law of the Sea (UNCLOS) 1982”<sup>13</sup>. According to the above-mentioned article, when there is any incident with respect to collision or navigation on the high seas and involves a person having a penal/disciplinary responsibility for the service of the ship, jurisdiction for penal/disciplinary proceeds lies with either the flag state or nation the individual belongs to.<sup>14</sup> When it comes to disciplinary issues, the state issuing the master’s certificate or the licence will only be competent, after due legal process, to withdraw such certificates and licenses even if the individual is not originally from that state.<sup>15</sup> Also, the authorities of the flag states can only order the arrest or detention of the ship, and this includes for investigation purposes as well.<sup>16</sup>

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<sup>11</sup> *supra* note 10.

<sup>12</sup> *supra* note 5.

<sup>13</sup> *supra* note 6.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

On this note, it is considered important to learn about the impacts and interpretations of the Lotus case since 1927. For better understanding, the interpretations and deliberations will be discussed in chronological order.

After the International Court of Justice (ICJ) replaced the Permanent Court of International Justice (PCIJ), the resentment towards the Lotus case was evidently strong based on the International Court of Justice's initial position with the judgement.<sup>17</sup> For instance, in the *UN Reparations*<sup>18</sup> case, the Lotus principle stating that the powers/duties in the treaty must be explicitly expressed and not inferred was challenged. The court was of the opinion that the organization can infer their powers and duties if it is necessary to facilitate the performance of their duties. Hence, the Court did not refer to the Lotus Principle, reflecting the value given to the laid down principles. Taking another example, the *Asylum*<sup>19</sup> Case, the ICJ confronted the lacuna in the law formulated in the Lotus case and stated that it was "countervailing" the logic of other principles, specifically territory sovereignty. The court rejected the contention made by Colombia by referring to the notions put forth in the Lotus case.

However, during the 1960s to 1980s period, it can be observed that the ICJ was in a dilemma about whether to remain in doubt with the principles in the Lotus case or support the positivist approach taken by the PCIJ. In the cases of "*Eth. v. S. Afr.*" and "*Liber. v. S. Afr.*"<sup>20</sup>, the court repositioned itself to take a positivist approach by leaning slightly towards the approach taken in the Lotus case. This did not mean that the court was renouncing its ability to believe in laws other than the formulated strict law. In the case of "*United Kingdom v. Iceland*"<sup>21</sup>, the court refrained from embracing a positivist approach and did not respond well to the logic of the Lotus case principles.

It is clear by now that the ICJ does not draw most of its judgments using the Lotus case, even when relevancy indicates doing so. On the contrary to this, there are rare instances where the court supports the principles of the case—to be precise, three times. Out of the three times, only the 1996 case involving the "Legality of the Threat or Use of Nuclear Weapons"<sup>22</sup> directly referred to the principles of the case.

In short, the ICJ interpreted and questioned many areas of the Lotus Case, some of which are as follows:

- The positivism approach taken by the PCIJ while adjudging the case
- The Lacuna, which existed due to the non-existence of any law at that time for the essential matters of the case
- Whether the gaps and grey areas get filled after the decision in the case

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<sup>17</sup> *supra* note 10.

<sup>18</sup> UN Reparations, 1949 I.C.J. at 182.

<sup>19</sup> Colombia v Peru, 1950 I.C.J. 266.

<sup>20</sup> South West Africa, *Eth. v. S. Afr.*, *Liber. v. S. Afr.*, 1966 I.C.J. 6.

<sup>21</sup> United Kingdom v. Iceland, 1974 I.C.J. 3.

<sup>22</sup> Nuclear Weapons, 1996 I.C.J. at 238-39.

With the development of international law, the interpretation of the case changed. The *Arrest Warrant case (2002)*<sup>23</sup> gave rise to a different and new interpretation. The principles of the case were heavily criticized based on their applicability in criminal matters between two states. At the same time, the jurists were concerned with the principle that if there is no law or act prohibiting a particular act, it does mean there is permission to do it. The PCIJ's narrow approach resulted in a problematic understanding of international law. This principle was one of the most debated aspects of the judgement due to the positivist and narrow approach. Some of the jurists and analysts stated that it placed much emphasis on the consent and sovereignty of states. As the case received much criticism from different perspectives, it was subsequently amended over the years. However, in the *2010 case In the "Kosovo Advisory Opinion"*<sup>24</sup> case, the court referred to the Lotus case to decide and establish if the unilateral declaration of Kosovo is on par with the existing international law.

The Lotus case undoubtedly had its share of ups and downs. From the referred cases above, the courts have interpreted the cases differently and decided whether to refer to the principles or not. Evidently, it is almost impossible to have a concrete precedent, and it will be subject to essential amendments. The case at hand is a 1926 case, almost a century ago. Therefore, the changes to the initial judgments were inevitable. Amending the precedents based on applicability is an effective measure, as this will maintain the relevancy of the laws and precedents as times and circumstances around us change.

## V. CONCLUSION

One of the fundamental problems of Public International Law is the relationship between states. If the parties to the issue agree to resolve the disagreement in this manner, International Law intervenes whenever there is a clash or collision of interests between two or more States. The Lotus case taught us three concepts that have helped international law modify the international judicial system's structure. However, we must remember that no case ruling is ever final. The Lotus case's numerous consequences in many other situations are controversial. For example, in the Kosovo issue, the Lotus principles have been interpreted as a statement against unilateral declarations of independence. However, it appears to be an attack on the right of nations worldwide to exercise their right to self-determination. As a result, it is time for the International Court of Justice justices to reconstruct a better solution than the one recommended in the Lotus case, paving the path for a more peaceful world.

The ICJ usually does not squarely address the principle laid down in the Lotus case. Legal practitioners and scholars who appear before the ICJ consider the principle as a Keystone of

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<sup>23</sup> Democratic Republic of the Congo v Belgium, (2002) ICJ 1.

<sup>24</sup> Kosovo Advisory Opinion, ICGJ 423 (ICJ 2010).

the International Legal Sphere, but it can be seen that the Principle's Status and Popularity as a milestone in international law may have run out of its cause and emptied its substance over time rendering it banality without any acceptance in the field. While going through the recent involvement of the Lotus Principle in the *Nuclear Weapons Case*,<sup>25</sup> We can see that the ICJ will be wary of invoking the Lotus principles in the future.

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<sup>25</sup> I.C.J. Reports 1996, p. 226.