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Remarks on state sovereignty in light of the *Lotus* case

International law is based on the sovereignty of states. This sovereignty forms the regulatory principle of that law. In spite of the regular attacks against it by some supporters of the doctrine over recent years, sovereignty still constitutes the basis of law. International law originates from states and ends with states. This is not affected by the fact that it is addressed to individuals, and that individuals have specific, robust rights within states, the best example of which are human rights.

The traditional positivist theory of international law based on sovereignty is expressed in the judgment adopted by the Permanent Court of International Justice (PCIJ) in the *Lotus* case.[172] The facts of the case were as follows: On 2 August 1926, a French steamer bearing the above-mentioned name collided with a Turkish vessel, *Boz Kourt*, on the high seas. As a result, the Turkish vessel was torn in two and sank, resulting in the death of eight Turkish nationals. After the Lotus arrived at harbour in Istanbul, the Turkish authorities started an investigation against Hassan Bey, captain of Boz-Kourt, and Lieutenant Demons, First Officer of the French vessel. On 15 September, the Turkish court sentenced Demons to 80 days in prison and a fine of 22,000 pounds. Demons had filed a complaint earlier, objecting against the jurisdiction of the Turkish courts, but the complaint was rejected. As regards their own jurisdiction, the Turkish courts invoked Article 6 of the Penal Code, which stipulates that the Turkish courts have competence in cases of this type.

France reacted to the proceedings of the Turkish courts, arguing, that due to diplomatic immunities, Turkey had no jurisdiction to condemn Demons, since the collision had occurred on the high seas. Consequently, the case of the Lotus crew could only be judged by the court of the ship's flag state.

The Turkish Government proposed to submit the case to the Permanent Court of International Justice. As a result, on 12 November 1926, France and Turkey signed a special agreement (*compromis*) under which they requested that the Court examine whether Turkey had violated Article 15 of the treaty on residence, business and jurisdiction concluded on 24 July 1923 (Peace

172 *"Lotus"*, Judgment of 7 September 1927, PCIJ Publ., Series A, No. 10.

Treaty of Lausanne) when they started criminal proceedings against Lieutenant Demons.

In its judgment of 7 August 1927, the Court of The Hague established that Turkey had not acted contrary to international law. For this reason they did not examine the French claim for a monetary compensation to Lieutenant Demons. The vote of the judges was split, six to six, so the presiding judge – a post occupied by Max Huber at the time – had to make the casting vote. It should be noted that Judge J. B. Moore concurred with the judgment in all its material points. The only issue on which he disagreed was that the criminal proceedings were based on Article 6 of the Turkish Penal Code.

The Court examined as a prominent issue the sovereign rights of a state, which they examined on a jurisdictional basis. France claimed that in order for the Turkish courts to be able to exercise jurisdiction over Lieutenant Demons, they would have to rely on a norm or principle existing under international law. The French were of the opinion that the dispute should have been settled under international law, which *prima facie* limits the exercise of a state's criminal jurisdiction when acting outside of its territory. French delegate Jules Basdevant stated in the international court proceedings that:

> *a state may rely on sovereignty within the boundaries of its own internal jurisdiction, but must justify any extension of its jurisdiction by a legal ground recognised under international law; that is, the state has to rely on the standards of international law.*[173]

Turkey claimed exactly the opposite. It took the view that Turkey had a right to exercise its jurisdiction insofar as this did not come into conflict with international law. Turkish Minister of Justice Mahmout Essat Bey stressed that:

> the basic principle in this case is that each sovereign state is entitled to establish its own rights, organise its courts and determine their competences. No restriction to this crucial attribute of sovereignty can be presumed, anyone who claims such a restriction must prove it. Such a restriction can only derive from a clear and precise provision of a general and specific treaty, or from the transformation of certain norms of national law into properly and voluntarily accepted general custom (*consacré*). If there is any doubt as to the existence of a treaty or na-

173 PCIJ Publ., Series C, No. 13-II, s. 150-151.

tional customary law, the principle of liberty should take precedence: *in dubio pro libertate*.[174]

The PCIJ supported the second position. According to the Court, international law regulates the relationships between independent states. So the rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed (known as the *Lotus principle* or the *Lotus doctrine*).[175]

Some supporters of the doctrine contested the PCIJ's position from the outset.[176] To this day, the *Lotus* judgment has been linked with positivism,

174 PCIJ Publ., Series C, No. 13-II, s. 134-135. [highlighted by the author].

175 "*Lotus*", judgment of 7 September 1927, PCIJ Publ., Series A, No. 10, s. 18.

176 Among others. J. L. Brierly, *The Basis of Obligation in International Law*, [w:] J. L. Brierly, *The Basis of Obligations in International Law and Other Papers*, red. H. Lauterpacht, C. H. Waldock, Oxford 1958, s. 11-12; J. H. H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, ZaöRV, Bd. 64 (2004), s. 547, 556. See also: M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, Cambridge 2005, s. 309-312; J. L. Brierly, *The 'Lotus' Case*, [w:] J. L. Brierly, *The Basis of Obligation in International Law and Other Papers*, red. H. Lauterpacht, C. H. Waldock, Oxford 1958, pp. 142-144; I. Brownlie, *The Principles of Public International Law*, Oxford 2008, 20, pp. 239-240; L. Cavaré, *L'arrêt du 'Lotus' et le positivisme juridique*, Travaux Juridiques et Economiques de l'Université de Rennes 1930, t. 10, pp. 144-148; A. Steiner, *Fundamental Conceptions of International Law in the Jurisprudence of the Permanent Court of International Justice*, AJIL 1936, t. 30, pp. 414-416; H. Lauterpacht, *The Function of Law in the International Community*, Oxford 1933, p. 51-84; H. Lauterpacht, *The Functions of Law in the International Community*, Oxford 1933, pp. 51-96. H. Lauterpacht went even further, accusing the *Lotus* doctrine "of being obsolete and contrary to the very terms of Article 38 of the Statute." H. Lauterpacht, *The Development of International Law by the International Court*, London 1958, p. 360. It seems that the International Law Commission was of a similar opinion when it discussed the laws regulating jurisdiction in the case of a collision of ships on the high seas (YILC 1956, t. II, p. 281): „[t]his judgement, which was carried by the President's casting vote after an equal vote of six to six, was very strongly criticized and caused serious disquiet in international maritime circles. A diplomatic conference held at Brussels in 1952 disagreed with the conclusions of the judgement. The Commission concurred with the decisions of the conference, which were embodied in the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in matters of Collisions and Other Incidents of Navigation … [10 May 1952] it did so with the object of protecting ships and their crews from the risk of penal proceedings before foreign courts in the event of collision on the high seas, since such proceedings may constitute an intolerable interference with international navigation."

while statements in support of the PCIJ's judgment have been attacked on the grounds that they fail to properly interpret the essence of international law. J. L. Brierly described the above-cited part of the judgment as a highly controversial metaphysical proposition of the extreme positivist school that the law emanates from the free will of sovereign independent States, and from this premise that restrictions on the independence of States cannot be presumed.[177] Furthermore, C. de Visscher complained that the *Lotus* judgment showed the most unpleasant consequences of positivist doctrines in international law, and he reproached the Court for accepting an interpretation which resulted in static law which was only slightly progressive, and which did not support the development of international law.[178]

Whether the PCIJ's judgment represents an extremely positivistic perception of law depends on what is meant by "extreme" and how we construe the position of the Court. In the 19th century, the *Selbstverpflichtung* theory was popular, which was firmly opposed by H. Triepel[179]. It stated that the binding force of international law depends on the will of a state, and that international law norms are only valid insofar as they reflect this will.[180] H. Triepel was right in stating that the acceptance of a theory of this kind would result in the unilateral enactment of a law outside the state (*äusseres Staatsrecht*).[181]

Such an extreme interpretation of international law would actually lead to the denial of the existence of this law, and give rise to positions expressed

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177 J. L. Brierly, *The* "Lotus" *Case*, Law Quarterly Review, 1928, t. 44, p. 155. See also: Declaration of Judge Simma, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Request for Advisory Opinion)*, ICJ Reports 2010, paras. 8-9.

178 C. de Visscher, *Justice et médiation internationales*, Revue de droit international et de législation comparée 1928, t. 9, pp. 77-78.

179 H. Triepel, *Völkerrecht und Landesrecht*, Leipzig 1899, pp. 78-79 and 268. He supported the concept of common will underlying international law, a will which is generated by the cooperation between states.

180 O. Spiermann, *International legal argument in the Permanent Court of International Justice. The Rise of the International Judiciary*, Cambridge 2005, pp. 39-40. He refers to the following works: Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts*, Dorpat 1877, pp. 19-37 and G. Jellinka, *Die rechtliche Natur der Staatenverträge: Ein Beitrag zur juristischen Construction des Völkerrechts*, Vienna 1880, pp. 5-45. See: R. Harrison, *Hobbes, Locke and Confusion's Masterpiece*, Cambridge 2003, p. 96; M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960*; pp. 198-206; M. Koskenniemi, *From Apology to Utopia*, pp. 125-130; R. Kwiecień, *Teoria i filozofia prawa międzynarodowego. Wybrane problemy*, Warszawa 2011, pp. 111-115.

181 H. Triepel, op. cit., p. 79.

by the deniers of international law, such as T. Hobbes,[182] J. Austin[183] or G. Jellinek[184]. However, this was not declared by the Court in any manner. Due to criticism, the Court has never reiterated this position, and some of its statements since then could even be understood as mitigating the position taken in the *Lotus* case.[185] In spite of that, general opinion is that this position has been confirmed by some decisions of the Permanent Court of International Justice and the International Court of Justice. [186] For instance, in the *Military and Paramilitary Activities in and against Nicaragua* case, the International Court of Justice took the position that international law did not contain any rights other than those accepted by the state concerned by way of an international treaty or otherwise, based on which the level of disarmament of a sovereign state could be limited. This principle applies to all states, without exception.[187] The latest expression of this is found in the Advisory Opinion on *Kosovo* of the International Court of Justice which is hard to accept as a proper argument for the theory of agreement among states, due to its controversial nature.[188]

182 T. Hobbes, *LEVIATHAN, or the matter, forme and power of a commonwealth ecclesiasticall and civil.*, translated by: C. Znamierowski, Chapter 17 Zob. M. Koskenniemi, op. cit., pp. 79-83.

183 J. Austin, *Province of Jurisprudence Determined*, London 1954, *throughout*, in particular pp. 1-12 and 122-129. See: M. Koskenniemi, op. cit., p. 125-126

184 It is worth noting that G. Jellinek assumed that any will can only restrict the state if it complies with the natural objectives of a state (*Staatszwecke*), that is why it cannot make arbitrary decisions (*Willkür*) or change its will. The voluntary obligations of a state are binding, regardless of its will, which follows from social living conditions between states (*Natur der Lebensverhältnisse*) and constitutes an objective restriction on the will of a state.

185 For instance: *Territorial Jurisdiction of the International Commission of the River Oder*, judgment of 10 September 1929, Series A, No. 23, p. 26, where the Court dismissed the Polish argument for a narrow interpretation of the rules of the Convention, which referred to the freedom of states, and that if there is any doubt as to the interpretation of the text of the Convention, no restriction should be presumed.

186 *Factory at Chorzów (Merits)*, Judgment of 13 September 1928, Series A, No. 17, p. 28; *Fisheries (United Kingdom v. Norway)*, Judgment of 18 December 1951, I.C.J. Reports 1951, pp. 124 and 143; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, paras. 21, 22, 52.

187 Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion), Advisory Opinion of 22 July 2010, I.C.J. Reports 2010, especially para. 56. See: R. Kwiecień, *Glosa do opinii doradczej Międzynarodowego Trybunału Sprawiedliwości z 22.7.2010 r. w sprawie zgodności z prawem międzynarodowym jednostronnej deklaracji niepodległości Kosowa*, Kwartalnik Prawa Publicznego, 2010, No. 3, pp. 211-221.

188 Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion), Advisory Opinion of 22 July 2010, I.C.J. Reports 2010, especially para. 56. See: R. Kwiecień, *Glosa do opinii doradczej Międzynarodo-*

However, it is worth mentioning here that the International Court of Justice has not been consistent in its judgments, and from time to time, it refers to factors that are not generally accepted as sources of international law.[189]

Despite strong criticism, the *Lotus* doctrine has been maintained in international law, and is constantly provoking dissenting opinions. The dispute over the positivist concept expressed by the Permanent Court of International Justice was revived by the Advisory Opinion made in the *Legality of the Threat or Use of Nuclear Weapons* case, and, to a lesser extent, by the *Arrest Warrant of 11 April 2000*[190][191].

In the framework of these cases, the objective concept of international law has been presented. A substantial part of the opinions essentially stresses the communitarian origin of the international community and international law. Judge M. Shahabuddeen attempted to mitigate the Lotus formula to some extent and free it from its positivistic elements by pointing out that the state does not have absolute sovereignty which would authorise it to commit any acts, however heinous, if there were no appropriate prohibition in international law.[192] In his opinion, the existence of several sovereign states at the same time results in a restriction to state sovereignty in the case of procedures where the existence of other sovereignties is excluded. These restrictions mark

wego Trybunału Sprawiedliwości z 22.7.2010 r. w sprawie zgodności z prawem międzynarodowym jednostronnej deklaracji niepodległości Kosowa, Kwartalnik Prawa Publicznego, 2010, No. 3, pp. 211-221.

189 For instance: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 23, where the IC established that the crime of genocide is "a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law…", and: "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." In another case: *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment of 12 October 1984, I.C.J. Reports 1984, para. 111, The IC recognised that customary law comprises two types of norms (the first is independent of the existence of *opinio juris*), since custom: "comprises a limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice…"

190 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996.

191 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002.

192 Dissenting Opinion of Judge Shahabuddeen, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 393

the objective structural framework within which sovereignty can exit, which framework is suggested by the PCIJ itself, when it refers to "co-existing independent communities".

In a rather critical attitude towards the Lotus formula, ICJ Chairman M. Bedjaoui claims that the opinion of the PCIJ was in line with international law at the beginning of the 19th century and expressed the *spirit of the times* and the spirit of an international society which as yet had few institutions and was governed by an international law of strict coexistence, itself a reflection of the vigour of the principle of State sovereignty. He is of the opinion that the decidedly positivist and voluntarist concept of international law has been replaced by an objective concept of international law, which is better reflected in collective legal conscience *(conscience juridique collective)* and responds to the social needs *(nécessités sociales)* of certain states organised as societies. A. Cançado Trindade takes a position in support of the objective concept of international law, but fully opposes the positivistic concept, stating that international law is an expression of universal legal conscience and human conscience. In this way, he attempts to put humankind at the centre of this law and refer to human rights.

In 2002, three judges of the ICJ joined in the criticism of the PCIJ's positivistic stance and the communitarian idea of international law, claiming that the statement made in the *Lotus* case was the *high-water mark of laissez-faire* in international relations and emblematic of a period of time which has been broken by other tendencies in a significant way. [193] In the context of universal jurisdiction, they further stated that the *Lotus* case expresses the horizontal system of international law, while the signing of a number of multilateral treaties containing provisions on the jurisdiction of a state expresses the determination of societies that certain types of crimes must be condemned.

Accordingly, when states investigate and punish these crimes, they are acting as agents of the international community, and the *authority* granted to them for this purpose is indicative of the vertical nature of law, as opposed to the PCIJ's horizontal interpretation of international law. It follows from this that any dispute on the legitimacy of international law is only possible within the framework of an international community having the right purposes, which purposes are later realised by the states based on the authority granted to them by the community. In this approach, the dispute over the binding

193 Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, para. 51.

force of international law should be decided based on the will of the international community rather than on that of individual states.

As stated earlier, the theory of agreement has frequently received harsh criticism by some supporters of the doctrine. But even the fiercest opponents stress the consensual nature of international law. As L. Henkin puts it:

States make law by consent, by agreement. Inter-State law is made, or recognized, or accepted, by the "will" of States. Nothing becomes law for the international system from any other source.[194]

As mentioned before, the ICJ's judgment continues to receive harsh criticism of some supporters of the doctrine up to this day.[195] In light of the criticism, they sometimes propose amendments which make approval of the state's legitimacy contingent upon the state's compliance with certain norms. In this respect, human rights and democracy are mentioned the most frequently.[196] Apart from these arguments, other more serious accusations are also being voiced. Among others, they claim that the nature of international law has changed, and as opposed to the representation of the interests of individual states, the representation of common interests (i.e. the interests of the

194 L. Henkin, *International Law: Politics, Values and Functions: General Course on International Law*, RCADI 1989 IV, t. 216, p. 46.

195 Judge Simma, among others, criticises the ICJ for having accepted an extremely consensualist concept of international law, which is based on the *Lotus* doctrine. According to the Judge: "[t]he underlying rationale of the Court's approach reflects an old, tired view of international law, which takes the adage, famously expressed in the "*Lotus*" Judgment, according to which restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order … by upholding the *Lotus* principle, the Court fails to seize a chance to move beyond this anachronistic, extremely consensualist vision of international law. The Court could have considered the scope of the question from an approach which does not, in a formalistic fashion, equate the absence of a prohibition with the existence of a permissive rule; it could also have considered the possibility that international law can be neutral or deliberately silent on the international lawfulness of certain acts." Declaration of Judge Simma, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, paras. 8-9.

196 A. Buchanan, *The Legitimacy of International Law*, [w:] *The Philosophy of International Law*, red. S. Besson, J. Tasioulas, Oxford 2010, s. 79; A. Buchanan, R. O. Keohane, *The Legitimacy of Global Governance Institutions*, [w:] *Legitimacy In International Law*, red. R. Wolfrum, V. Rőben, Berlin – Heidelberg – New York 2008, s. 25 i n.; F. R. Tesón, *International Obligation and the Theory of Hypothetical Consent*, Yale Journal of International Law 1990, t. 15, pp. 106-107.

international community) has come to the foreground. J. H. H. Weiler states that the establishment of quasi-legislative and quasi-judicial organs calls into question the theory of an agreement among states on legitimacy.[197]

According to the cited author, the realisation of common interests by means of international law reduces the justification of international law through a consensus of states to mere fiction. R. Wolfrum adopts a similar tone, stating that the legitimacy of international law relying on the will of states is insufficient in today's world.[198] He is of the view that in certain fields of international law, powers have been transposed to the international level. This "internalisation", along with the reinforcement of the roles of entities (organs, expert groups established by the treaties, criminal liability, appearance before international courts and investment courts), and the increasing role of litigation all demonstrate the expression of trends which call into question whether international law is still based on the consensual nature of international obligations.

The internationalisation of the regulation of international relations (e.g. WTO) exhausts and dilutes the traditional legitimacy formula. Accordingly, a less problematic basis for legitimacy needs to be found. R. Wolfrum also complains that the democratic factor is disappearing, which is connected to the elevation of powers to the international level – which he terms as "deparlamentarisation" and as an enhanced role of executive organs in international relations. This remark is all the more valid when international organisations extend their functions via creative interpretation, and assume competences which states have not consciously and specifically intended to grant them. This means that, even though he did not say so explicitly, this German author posits that democracy is a value that lends legitimacy to international law. Indeed, he shares the opinions mentioned above which reflect the same idea. This seems to be the dominant view in the legal literature today, which can also be construed as the "democratisation" of international law.

Despite the above-listed opinions of stronger or milder criticism, to this day, the *Lotus* doctrine has demonstrated the nature and basis of international law to the fullest extent as regards state sovereignty. The differences between the positions taken by lawyers are clearly determined by each author's view on the philosophy of law. The *Lotus* doctrine is primarily supported by ad-

197 J. H. H. Weiler, op. cit., s. 556 i n.

198 R. Wolfrum, *Legitimacy of International Law from a Legal Perspective: Some Introductory Remarks*, [w:] *Legitimacy in International Law*, red. R. Wolfrum, V. Rőben, Berlin – Heidelberg – New York 2008, pp. 19-20.

vocates of legal positivism, while its opponents are proponents of doctrines other than positivism (including natural law theory). As explained before, in a part of its judgments, the International Court of Justice is still adopting a similar standpoint.