

**THE LOTUS CASE IN CONTEXT –
SOVEREIGNTY, WESTPHALIA, VATTEL, POSITIVISM**

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INTRODUCTION

In examining jurisdiction in international law from a historical perspective, most people – be they in academia, government or elsewhere – would agree that the concept, even in modern terms, need to be considered in light of the judgment of the Permanent Court of International Justice (hereinafter ‘PCIJ’) in the 1927 case of *S.S. Lotus*¹ (hereinafter the “*Lotus case*”), between France and Turkey. For better or worse, it has been considered “a turning point in jurisdictional jurisprudence”;² the decision ‘is still one of the most often cited international law cases’³ (in both legal practice and doctrine). Accordingly, in spite of the major changes that occurred in the law of state jurisdiction, during the last ninety or so years, a critical assessment of this paradigmatic judgment that set the tone, so to speak, to everything else that followed, is absolutely indispensable.

To begin with something uncontroversial, although jurisdiction is said to have a multiple of meanings depending on the context, in international law the term is generally deemed to describe the ability (as well as the limits thereof) for a state or other regulatory authority to exert legal power – in making, enforcing and adjudicating normativity – over

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¹ *S.S. Lotus (France v. Turkey)*, PCIJ Series A, No. 10.

² Danielle Ireland-Piper, ‘Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine’ (2013) 9 *Utrecht Law Review* 68, at 69.

³ Armin von Bogdandy and Markus Rau, ‘The Lotus’, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, 2nd ed. (Oxford: Oxford University Press, 2013), para. 15.

persons, things and places.⁴ Note right away, and also because it will be highly relevant later, that this definition highlights the different dimensions of the concept, that is to say, prescriptive (or normative), enforcement (or investigating) and adjudicative jurisdiction,⁵ depending on whether the power concerns, within the organising structure of a state, the legislature (Parliament), the executive (Government) or the judiciary (Courts);⁶ it is worth mentioning, for completeness sake, functional jurisdiction, essentially in the field of the law of the sea.⁷ This classification, with possible overlaps of course, is also uncontested;⁸ other chapters of this Handbook will have dwelled upon them in further details, no doubt.

We are told, again and again, that the concept of jurisdiction is intrinsically linked with sovereignty; it was referred to as ‘an aspect of sovereignty’,⁹ as ‘a manifestation of State sovereignty’.¹⁰ Arbitrator Max Huber in the 1928 case of *Island of Palmas*,¹¹ wrote this: ‘Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any

⁴ See Bruno Simma and Andreas Müller, ‘Exercise and Limits of Jurisdiction’, in James Crawford and Martti Koskeniemi (eds.), *Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), 134; and Vaughan Lowe and Christopher Staker, ‘Jurisdiction’, in Malcolm Evans (ed.), *International Law*, 3rd ed. (Oxford: Oxford University Press, 2010), 313.

⁵ See Michael Akehurst, ‘Jurisdiction in International Law’ (1972-1973) 46 *British Y.B. Int’l L.* 145.

⁶ Some publicists limit the types of jurisdiction to two categories, prescriptive and enforcement, the latter including adjudicative; for example, Gideon Boas, *Public International Law – Contemporary Principles and Perspectives* (Cheltenham: Edward Elgar, 2012), at 246.

⁷ See Cedric Ryngaert, ‘The Concept of Jurisdiction in International Law’, in Alexander Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham: Edward Elgar, 2015), 50, at 59.

⁸ See Frederick A. Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964-I) 111 *Hague Recueil* 1.

⁹ James Crawford, *Brownlie’s Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press 2012), at 456.

¹⁰ Derek W. Bowett, ‘Jurisdiction: Changing Patterns of Authority Over Activities and Resources’ (1983) 53 *British Y.B. Int’l L.* 1, at 1.

¹¹ *Island of Palmas case (Netherlands, USA)*, (1928) 2 R.I.A.A. 829, at 838. See also John G. Ruggie, ‘Territoriality and Beyond: Problematizing Modernity in International Relations’ (1993) 47 *Int’l Org.* 139, at 151.

other State, the function of a State'. A few years after the *Lotus case*, in 1933, the case of *Eastern Greenland*¹² saw the PCIJ explicate the connection between jurisdiction and sovereignty: 'Legislation [prescriptive jurisdiction] is one of the most obvious forms of the exercise of sovereign power'.¹³

Similarly, Frederick Mann writes: 'International jurisdiction is an aspect of an ingredient or a consequence of sovereignty [...] jurisdiction involves both the right to exercise it within the limits of the State's sovereignty and the duty to recognize the same right of other States'.¹⁴ As a consequence of the different ramifications of sovereignty – independence, equality of states, non-interference¹⁵ – in regard to state jurisdiction, it is noteworthy that this notion actually acts not only as the main justification for, but also as a restraining device to exercising legal competence.

Having set out these groundwork elements, essential to any discussion about state jurisdiction, it is now possible to sketch out the contours of the present chapter, within the part of the book focusing on the historical perspective. Before examining the *Lotus case*, it is necessary to go way back before the judgment, with a brief excursion in the 17th and 18th century, examining the Peace of Westphalia and the doctrinal work of Emer de Vattel; the objective is to allow for a discussion of sovereignty (and thus jurisdiction) truly in context, both historically and theoretically. Then the 1927 PCIJ judgment will be revisited in detail, with a view to bringing out the core lessons flowing from this case, all the while being aware of the prevalent epistemology of international law at the time. The conclusion will come back to the heritage of the *Lotus case*, with regard to the rules on state jurisdiction, as well as for international law in general.

¹² *Legal Status of Eastern Greenland (Denmark v. Norway)*, (1933), PCIJ Reports, Series A/B, No. 53.

¹³ *Ibid.*, at 48.

¹⁴ Frederick A. Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' (1984) 186 *Hague Recueil* 9, at 20.

¹⁵ See Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), at 645.

I. STATE SOVEREIGNTY IN CONTEXT: WESTPHALIA AND VATTEL

It is sometimes said that territoriality as the foundational basis of international jurisdiction is historically contingent.¹⁶ Thus it is worth giving a good look at what is considered the most important historical event in international relations and international law¹⁷ (though this understanding is, of course, Eurocentric¹⁸), which resonates particularly loudly in the law of jurisdiction, namely the Peace of Westphalia.¹⁹ Although some have been critical of the social construction around the treaties that ended the Thirty Years War in 1648,²⁰ it is deemed ‘the most important, and in its results the most enduring, public act of modern history, for from it dates the present political system of Europe as a group of independent sovereign states’.²¹ Indeed, Westphalia has been ‘considered, rightfully so, as the starting point of the historical development of the present international law’.²² Specifically, regarding issues of state competence,

¹⁶ Cedric Ryngaert, ‘The Concept of Jurisdiction in International Law’, in Alexander Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham: Edward Elgar, 2015), 50, at 51.

¹⁷ See Leo Gross, ‘The Peace of Westphalia, 1648-1948’ (1948) 42 *American J. Int’l L.* 20.

¹⁸ See, generally, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

¹⁹ See, generally, Stéphane Beaulac, *The Power of Language in the Making of International Law – The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden: Martinus Nijhoff, 2004).

²⁰ See David Kennedy, ‘Primitive Legal Scholarship’ (1986) 27 *Harvard Int’l L.J.* 1, at 1: ‘International legal scholars have made much of 1648’ [footnotes omitted]. See also Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999); Andreas Osiander, ‘Sovereignty, International Relations, and the Westphalian Myth’ (2001) 55 *Int’l Org.* 251; and Benno Teschke, *The Myth of 1648 — Class, Geopolitics, and the Making of Modern International Relations* (London and New York: Verso, 2003).

²¹ David J. Hill, *A History of Diplomacy in the International Development of Europe*, vol. 2, *The Establishment of Territorial Sovereignty* (New York: Longmans, Green, 1906), at 599.

²² Dionisio Anzilotti, *Cours de droit international*, vol. 1, Introduction - Théories générales (Paris: Sirey, 1929), at 5; translation of: ‘considérés avec raison comme le point de départ du développement historique du droit international actuel’. See also, to the same effect, Robert Redslob, *Histoire des grands principes du droit des gens — Depuis l’antiquité jusqu’à la veille de la grande guerre* (Paris: Rousseau, 1923), at 213.

‘Westphalian sovereignty thus creates a system in which legal jurisdiction is congruent with sovereign territorial borders’.²³ It is, of course, a mere epistemology to understanding the problematics of state jurisdiction, but one which became an orthodoxy in Europe and, by means of the colonies,²⁴ in most of the world since the 17th century and lingering on to this day.²⁵

Westphalia has since been considered, ‘a new diplomatic arrangement – an order created by states, for states – and replaced most of the legal vestiges of hierarchy, at the pinnacle of which were the Pope and the Holy Roman Emperor’.²⁶ Before the turn of the 17th century and the break of the Thirty Years War in 1618, the feudal type of governance in Europe ‘involved the decentralisation and personalization of political power by lords, creating the “parcellized sovereignty” of the medieval “state”’.²⁷ The exercise of ‘public’ power was conceived not mainly in terms of geographical location but rather in relation with origin, nationality and religion:²⁸ ‘people were subject to the laws of the community or tribe to which they belonged, rather than those of the territory on which they resided at a given moment’.²⁹ Unlike the contemporary understanding of territory and the authority

²³ Kal Raustiala, ‘The Geography of Justice’ (2005) 73 *Fordham L. Rev.* 2501, at 2509. See also Miles Kahler and Barbara F. Walter (eds.), *Territoriality and Conflict in an Era of Globalization* (Cambridge: Cambridge University Press, 2006).

²⁴ See Joan Fitzpatrick, ‘Sovereignty, Territoriality, and the Rule of Law’ (2002) 25 *Hastings Int’l and Comp. L. Rev.* 303, at 309.

²⁵ See, for instance, Henry Wheaton, *History of the Law of Nations in Europe and America — From the Earliest Times to the Treaty of Washington, 1842* (New York: Gould, Banks, 1845), at 69; and Théodore Ruysen, *Les sources doctrinales de l’internationalisme*, vol. 1, Des origines à la Paix de Westphalie (Paris: Presses universitaires de France, 1954), at 487 ff. See also, generally, Wilhelm Grewe, *The Epochs of International Law* (Berlin and New York: Gruyter, 2000).

²⁶ Kalevi J. Holsti, *Peace and War – Armed Conflicts and International Order, 1648 - 1989* (Cambridge: Cambridge University Press, 1991), at 25 [footnotes omitted].

²⁷ Benno Teschke, ‘The Origins and Evolution of the European States-System’, in William Brown, Simon Bromley and Suma Athreye (eds.), *Ordering the International: History, Change and Transformation* (London: Pluto Press, 2004), 21, at 51.

²⁸ Shalom Kassan, ‘Extraterritorial Jurisdiction in the Ancient World’ (1935) 29 *American J. Int’l L.* 237, at 237-238.

²⁹ Cedric Ryngaert, ‘The Concept of Jurisdiction in International Law’, in Alexander Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham: Edward Elgar, 2015), 50, at 52.

exercised over it, in pre-Westphalia times, several legitimate claims by different polities over a piece of land could exist at the same time: ‘territoriality was vertically mediated and horizontally perforated by the various layers of sub-infeudation’.³⁰

From a reality where public authorities were both overlapping and shifting over geographical spaces, the end of the medieval era with the Peace of Westphalia in 1648 signalled paradigm shift, no less.³¹ ‘By the end of the Thirty Years’ War, sovereignty as supreme power over a certain territory was a political fact, signifying the victory of the territorial princes over the universal authority of emperor and pope, on the one hand, and over the particularistic aspirations of the feudal barons, on the other’.³² The associations between sovereignty and territory, as well as between sovereignty and territoriality, were not only natural, they have been ontologically necessary.³³ Thus, in international law, it is said that, ‘the connection between jurisdiction and sovereignty is, up to a point, obvious, inevitable and almost platitudinous, for to the extent of its sovereignty a State necessarily has jurisdiction’.³⁴

The idea of state sovereignty over their territories, which Westphalia made into the concept of territorial sovereignty, has been at the core of territoriality as the main – if not the sole, clearly the primary – basis for jurisdiction.³⁵ ‘The political change from the medieval to the modern world involved the construction of the delimited territorial state

³⁰ Benno Teschke, ‘The Metamorphoses of European Territoriality: A Historical Reconstruction’, in Michael Burgess and Hans Vollaard (eds.), *State Territoriality and European Integration* (London: Routledge, 2006), 37, at 44.

³¹ See Stéphane Beaulac, ‘The Westphalian Model in Defining International Law: Challenging the Myth’ (2004) 8 *Australian J. Legal History* 181.

³² Hans J. Morgenthau, ‘The Problem of Sovereignty Reconsidered’ (1948) 58 *Columbia L. Rev.* 341, at 341.

³³ See Christopher K. Ansell, ‘Restructuring Authority and Territoriality’, in Christopher K. Ansell and Giuseppe Di Palma (eds.), *Restructuring Territoriality – Europe and the United States Compared* (Cambridge: Cambridge University Press, 2004), 3, at 6.

³⁴ Frederick A. Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964-I) 111 *Hague Recueil* 1, at 20.

³⁵ See Hannah L. Buxbaum, ‘Territory, Territoriality, and the Resolution of Jurisdiction Conflict’ (2009) 57 *American J. Comp. L.* 631, at 632, who put it in terms of a triangular relationship between sovereignty, territory and jurisdiction.

which exclusive authority over its domain'.³⁶ In short, since 1648, sovereignty has been the only game in town³⁷ and, as a derivative, territorial sovereignty has become the most useful metaphor for apprehending issues of state jurisdiction.³⁸

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To inject some theoretical perspective, along with the present historical account, the notion of sovereignty was articulated in contemporary terms, as well as externalised onto the international sphere, with two major doctrinal works, in the century before and the century after the Peace of Westphalia in 1648. Indeed, the conception of sovereignty, even in modern terms,³⁹ has a clear genealogical lineage with both Jean Bodin's *Les six Livres de la Republique*,⁴⁰ published in 1576, and Emer de Vattel's *Le Droit des Gens*,⁴¹ published in 1758. They correspond to the dual manifestations,⁴² the twin dimensions of this structural ideal, namely, internal sovereignty *as per* domestic constitutional law and

³⁶ Mark W. Zacher, 'The Territorial Integrity Norm: International Boundaries and the Use of Force' (2001) 55 *Int'l Org.* 215, at 216.

³⁷ See Stephen D. Krasner, 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law' (2004) 25 *Michigan J. Int'l L.* 1075, at 1077.

³⁸ See Harold G. Maier, 'Jurisdictional Rules in Customary International Law', in Karl M. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice* (London, The Hague, Boston: Kluwer Law International, 1996), 64, at 65.

³⁹ See Wayne Hudson, 'Fables of Sovereignty', in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds.), *Re-envisioning Sovereignty – The End of Westphalia* (Aldershot and Burlington: Ashgate Publishing, 2008), 19.

⁴⁰ Jean Bodin, *Les six Livres de la Republique* (Paris: Jacques du Puys, 1583), first published in 1576; the translation by Richard Knolles, Jean Bodin, *The Six Bookes of a Commonweale* (London: Impensis G. Bishop, 1606). See also Stéphane Beaulac, 'The Social Power of Bodin's "Sovereignty" and International Law' (2003) 4 *Melbourne J. Int'l L.* 1

⁴¹ Emer de Vattel, *Le Droit des Gens; ou Principes de la loi naturelle appliqués à la conduite and aux affaires des Nations and des Souverains*, 2 vols. (London: n.b., 1758); the translation by Joseph Chitty, *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns* (Philadelphia: Johnson Law Booksellers, 1863). See also Stéphane Beaulac, 'Emer de Vattel and the Externalization of Sovereignty' (2003) *J. History Int'l L.* 237.

⁴² See Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *European J. Int'l L.* 513, at 515-518.

external sovereignty *as per* public international law.⁴³ This internal-external dichotomy has been clear for centuries: ‘sovereignty of the State may be looked at from without and from within: from without, as the independence of a particular State in relation to other [and] from within, as the legislative power of the body politic’.⁴⁴

Bodin’s idea of absolute authority exclusively in the hands of the sovereign ruler, exercised within a territory and over a population, was not only accurate for the needs of the time,⁴⁵ but it also proved most lasting in governance history.⁴⁶ It also led other legal scholars, in France, to develop early versions of territorial jurisdiction, at the turn of the 17th century.⁴⁷ As for Vattel, he endeavoured to revisit and adjust (internal) sovereignty with a view to externalising the notion and, in effect, articulate a scheme for the political and legal organisation of the international society.⁴⁸ Among the main points of external sovereignty is the substitution of *civitas Christiana* – Christendom under the Holy Roman Emperor and the Pope – by territorial states, which enjoy independence in their relations among themselves, including the principles of equality and of non-intervention (non-interference).⁴⁹ Vattel put it thus: ‘whatever privileges any one of them derives from

⁴³ See Neil Walker, ‘Late Sovereignty in the European Union’, in N. Walker (ed.), *Sovereignty in Transition* (London: Hart Publishing, 2003), 3.

⁴⁴ Johann Bluntschli, *The Theory of the State*, 2nd ed. (Oxford: Clarendon Press, 1892), at 501. See also Thomas J. Lawrence, *The Principles of International Law* (London: Macmillan, 1895), at 56-57; Paul Fauchille, *Traité de droit international public*, vol. 1 (Paris: Rousseau, 1922), at 224; and Armelle Treppoz, ‘Les sujets du droit international public dans la jurisprudence du Conseil constitutionnel’ [2000] *Droit Public* 1629, at 1644.

⁴⁵ See James L. Brierly, ‘Règles générales du droit de la paix’ (1936) 58 *Hague Recueil* 1, at 24.

⁴⁶ See Stéphane Beaulac, ‘Le pouvoir sémiologique du mot “souveraineté” dans l’œuvre de Bodin’ (2003) 16 *Int’l J. Semiotics L.* 45.

⁴⁷ See, for instance, Pierre Ayrault, *L’Ordre, formalité et instruction judiciaire, dont les anciens Grecs et Romains ont usé es accusations publiques* (Paris: Michel Sonnius, 1588).

⁴⁸ See, generally, Emmanuelle Jouannet, *Emer de Vattel et l’émergence doctrinale du droit international classique* (Paris: Éditions Pedone, 1998).

⁴⁹ See Thomas A. Walker, *A History of the Law of Nations*, vol. 1, From the Earliest Times to the Peace of Westphalia, 1648 (Cambridge: Cambridge University Press, 1899), at 87.

freedom and sovereignty, the others equally derive the same from the same source'.⁵⁰ He further wrote: 'It is an evident consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that no state has the smallest right to interfere in the government of another'.⁵¹

Most crucially, Vattel's external sovereignty is the cornerstone of his edification of international law, what he referred to as '*droit des gens*' ('law of nations'). External sovereignty, understood as international independence, not only entails that states are not submitted by any political authority (e.g. Holy Roman Empire, other states), it also means that states are not submitted to any legal authority, they are not *ipso facto* constrained by rules of international law.⁵² For Vattel, 'independence is necessary to each State, in order to enable her properly to discharge the duties she owes to herself and to her citizens, and to govern herself in the manner best suited to her circumstances'.⁵³ As a result, external sovereignty requires that states – which are independent and enjoy equality – voluntarily accept international normativity, be it conventional, customary or else.⁵⁴ Consequently, it has been clear since Vattel's work in the 18th century that international law, including the law of jurisdiction, rests on the notion of (external) sovereignty and that the theory of sources in that legal system is grounded in the positivistic idea of voluntary acceptance of normativity⁵⁵ ('*la thèse volontariste*'⁵⁶).

⁵⁰ Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns*, Chitty's translation (Philadelphia: Johnson Law Booksellers, 1863), at 149.

⁵¹ *Ibid.*, at 154.

⁵² See Martti Koskenniemi, *From Apology to Utopia – The Structure of International Legal Argument* (Helsinki: Lakimiesliiton Kustannus, 1989), at 94.

⁵³ Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns*, Chitty's translation (Philadelphia: Johnson Law Booksellers, 1863), at xiv.

⁵⁴ See Horatia Muir Watt, 'Droit naturel et souveraineté de l'Etat dans la doctrine de Vattel' (1987) 32 *Archives philo. droit* 71, at 77.

⁵⁵ See, generally, Stéphane Beaulac, *Précis de droit international public – théorie, sources, interlégalité, sujets*, 2nd ed., (Montreal: LexisNexis Canada, 2015).

⁵⁶ See Patrick Daillier, Mathias Forteau and Alain Pellet, *Nguyen Quoc Dinh – Droit international Public*, 8th ed. (Paris: LGDJ, 2009), at 111.

This last feature on the nature of international law, closing the chapter section on the historical and theoretical context of state jurisdiction – focusing on Westphalia and Vattel – is an appropriate bridge to move to the *Lotus case*. Indeed, the underlying theme of the case analysis will be legal positivism.

II. THE LOTUS CASE REVISITED: POSITIVISM AND PROHIBITIVE RULES ON JURISDICTION

The dominant epistemology behind international law is a form of positivistic legal theory, which methodology borrows from legal positivist scholars like Jeremy Bentham⁵⁷ and John Austin.⁵⁸ Building on Vattel's doctrine, positivism became the prevalent theory in international law in the late 19th century and early 20th century, counting on the major contributions by German writers such as Georg Jellinek⁵⁹ and Heinrich Triepel,⁶⁰ as well as Italian publicists such as Dionisio Anzilotti⁶¹ and Arrigo Cavaglieri.⁶² But since this chapter is not about international legal theory, positivism will not be examined in detail.⁶³ Suffice it to highlight what is relevant for the law of jurisdiction and, more specifically, for the proper – non-anachronistic – discussion of the *Lotus case* that follows.

⁵⁷ His main work: Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (London: Pickering, 1823).

⁵⁸ His main work: John Austin, *The Province of Jurisprudence Determined; and The Uses of the Study of Jurisprudence* (London: John Murray, 1832).

⁵⁹ His main work: Georg Jellinek, *Die rechtliche Natur der Staatenverträge – Ein Beitrag zur juristischen Construction des Völkerrechts* (Vienna: Alfred Hölder, 1880).

⁶⁰ His main work: Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: Hirschfeld, 1899).

⁶¹ His main work: Dionisio Anzilotti, *Corso di diritto internazionale*, 2 vol. (Padua: Cedam, 1928).

⁶² His main work: Arrigo Cavaglieri, *Lezioni di diritto internazionale* (Naples: Rondinella, 1934). See also Arrigo Cavaglieri, 'La conception positive de la société internationale' (1911) 18 *R.G.D.I.P.* 259.

⁶³ For more detail, see Mónica García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2013); and Awalou Ouedraogo, 'Le positivisme en droit international: fondement épistémologique d'un paradigme mécaniciste' (2010) 40 *Revue générale de droit* 505.

Just like legal positivism in domestic law holds that the law is set by men for men, international positivism proposes that international law set by states for states.⁶⁴ Viewed in this way, of course, international normativity is concerned with regulating the relations and affairs between states, in fact the whole legal construction is set out for states, which are the primary (formerly the sole) subjects of the system.⁶⁵ As Lassa Oppenheim wrote in early 20th century: ‘The Law of Nations is a law for the intercourse of States with one another’; further, ‘[a]s, however, there cannot be a sovereign authority above the several sovereign States, the Law of Nations is a law between, not above, the several States’.⁶⁶ In the international positivist understanding, states enjoy unrestricted authority and freedom on the international plane, which flows from their statehood status and as an ontological consequence of (external) sovereignty. ‘Consequently, positivism emphasises individual state will as the sole source of legal principles of their authority’.⁶⁷ Even today, as Alain Pellet put it, ‘where there is State will, there is international law: no will, no law’.⁶⁸

At the time the *Lotus case* was decided: ‘Practically all the text-writers define[d] international law in such a way as to express the idea that it is an evolving body of rules and principles, prescribing the rights and duties of states, based on agreement or consent’.⁶⁹ As the basis of international normativity is the will of sovereign states, the sources of law must point to facts, empirically provable, constituting actual acceptance by

⁶⁴ See Stephen Hall, ‘The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism’ (2001) *European J. Int’l L.* 269, at 279.

⁶⁵ See Janne Nijman, *The Concept of International Legal Personality – An Inquiry into the History and Theory of International Law* (The Hague: TMC Asser Press, 2004).

⁶⁶ Lassa Oppenheim, *International Law – A Treatise*, vol. 1, Peace (London: Longmans, Green, 1905), at 4 [italics in original].

⁶⁷ Alex Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 *British Y.B. Int’l L.* 187, at 192.

⁶⁸ Alain Pellet, ‘The normative Dilemma: Will and Consent in International Law-Making’ (1988-89) 12 *Australian Y.B. Int’l L.* 22, at 22. See also Bruno Simma and Andras L. Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in International Conflicts: A Positivist View’ (1999) 93 *American J. Int’l L.* 302, at 304.

⁶⁹ George W. Berge, ‘The Case of the SS Lotus’ (1928) 26 *Michigan L. Rev.* 362, at 376-377 [footnotes omitted].

them of the legal rules. ‘Of such facts there are only two’,⁷⁰ explained Lassa Oppenheim. Hence the sources of international law are twofold: ‘(1) *express* consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) *tacit* consent, which is given through States having adopted the custom of submitting to certain rules of international conduct’.⁷¹ As we know, in 1920, Article 38 of the *Statute of the Permanent Court of International Justice* – reiterated in Article 38(1) of the *Statute of the International Court of Justice*, in 1945 – added other elements to the (non-exhaustive) list, though customs and treaties have remained the core formal sources, firmly grounded in positivism and the voluntarist theory of international law.

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The *Lotus case* was brought before the PCIJ, *as per a compromis* agreed upon by France and Turkey, the main issue being whether the latter violated international law in exercising criminal jurisdiction against a French national. The domestic court proceedings at issue related to a collision on the high seas (Aegean, near Mitylene) between a French steamer, the S.S. Lotus, and a Turkish collier ship, the Boz-Kourt, which was split in two and sank, killing eight crew members. After assisting and taking the survivors on board, the S.S. Lotus continued on its journey to Constantinople (Istanbul), her next port of call, where the commanding officers of both vessels were interrogated by Turkish authorities and, ultimately, placed under arrest and charged for involuntary manslaughter, pursuant to Article 6 of the Turkish Penal Code.⁷² They were found guilty and, despite objections that Turkey had no criminal jurisdiction,⁷³ French Lieutenant Demons was sentenced to imprisonment and to pay a fine.⁷⁴

⁷⁰ Lassa Oppenheim, *International Law – A Treatise*, vol. 1, Peace (London: Longmans, Green, 1905), at 21.

⁷¹ *Ibid.*, at 22 [italics in original].

⁷² See *Lotus case*, at 14.

⁷³ See William E. Beckett, ‘Criminal Jurisdiction over Foreigners: The Franconia and the Lotus’ (1927) 8 *British Y.B. Int’l L.* 108.

⁷⁴ See Robert Ruzé, ‘L’affaire du Lotus’ (1928) 55 *Revue de droit international et de législation comparée* 124.

Before, during and after the court proceedings,⁷⁵ the French government protested vehemently and made forceful diplomatic representations,⁷⁶ requesting their national be transferred from Turkey's to France's judicial system. While the domestic judgment was under appeal, the two governments struck a special agreement to submit the international affair to the PCIJ: to decide whether, in exercising judicial competence over Lieutenant Demons, Turkey 'acted in conflict with the principles of international law' (in French, '*agi en contradiction des principes du droit international*'). In the end, the international adjudication was split 6-6, the casting vote of the president being decisive,⁷⁷ holding that Turkey had jurisdiction over the French national in the present circumstances and that, as a consequence, there was no violation of international law. An author noted that it was, certainly, 'the first decision of the Court on what may be said to be a question of general international law',⁷⁸ specifically regarding state jurisdiction.

Leaving aside issues of treaty interpretation – *Convention of Lausanne* (1924), at article 15: 'principles of international law' – and of preparatory work, the PCIJ focused on a question of principle, going at the heart of public international law. It was clearly set out by the respective party positions: while France argued that state competence had to be permitted by a rule of international law, Turkey's pretention was to the effect that it could exercise its jurisdiction unless there was a prohibition on the international plane. In short, is international normativity permissive or prohibitive: 'This way of stating the question', wrote the Court, is 'dictated by the very nature and existing conditions of international law'.⁷⁹ Then, the famous dictum reads:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in

⁷⁵ See Jan H.W. Verzijl, 'L'affaire du "Lotus" devant la Cour permanente de justice internationale' (1928) 55 *Revue de droit international et de législation comparée* 1.

⁷⁶ See John Fischer Williams, 'L'affaire du "Lotus"' (1928) 35 *Revue générale de droit international public* 361, at 362.

⁷⁷ This is a feature of the judgment that some have highlighted, undermining its authority: see James L. Brierly, 'The "Lotus" Case' (1928) 44 *L.Q. Rev.* 154, at 155.

⁷⁸ Alexander P. Fachiri, 'The Case of the *Lotus*' (1928) 9 *British Y.B. Int'l L.* 131, at 131.

⁷⁹ *Lotus case*, at 18.

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.⁸⁰

In the case at hand, the majority of the PCIJ was of the view that there was no prohibitive rule preventing Turkey from exercising jurisdiction for a collision on the high seas.

Going back to the judicial teachings on the law of jurisdiction and, generally, on the status of international law, the above statement is said to be qualified, indeed nuanced by what follows immediately after. In the next paragraph, the majority of the PCIJ wrote:

Now the first and foremost restriction imposed by international law upon a state is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.⁸¹

Accordingly, the initial statement that international normativity, in effect, acts to impose restrictions to what states can do, including in regard to their jurisdiction, and that such limitations cannot be presumed given their sovereignty, may be less far reaching than it seems at first blush. Here, in fact, there would be an inherent restriction to the exercise of jurisdiction, namely territoriality.⁸² To put it simply, the exercise of jurisdiction by one state cannot infringe upon the territorial sovereignty of another state; this is, indeed, a sort of overarching prohibitive rule in international law, regarding state jurisdiction.

⁸⁰ *Ibid.* [emphasis added].

⁸¹ *Ibid.*, at 18-19 [emphasis added].

⁸² See An Hertongen, 'Letting *Lotus* Bloom' (2015) 26 *European J. Int'l L.* 901, at 907.

There is a third (somewhat long) excerpt from the PCIJ majority judgment worth reproducing in full. To appreciate it, though, one must recall the distinction – seen in the introduction – between prescriptive, enforcement and adjudicative jurisdiction (although an anachronism, admittedly). The passage reads thus:

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. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.⁸³

Is this an exception to the exception (to the restriction), bringing us back to the original idea of unlimited jurisdiction, as justified by state sovereignty? Or is it a qualification of the general prohibitive rule, circumventing the scope of application of territoriality only to enforcement jurisdiction, all in the spirit of territorial sovereignty?

The latter understanding, as many contemporary publicists highlight,⁸⁴ seems to be well founded. The answer comes from the key phrase in the second excerpt, which I underlined, namely that a state cannot ‘exercise its power’ extraterritorially, which must be limited to enforcement jurisdiction. State power cannot be used to enforce legal rules

⁸³ *Lotus case*, at 19 [emphasis added].

⁸⁴ See, for instance, Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (Oxford: Oxford University Press, 2015), at 31.

outside its territory; the coercive force of a state – the police or the military – cannot be exercised on the territory of another state. As Cedric Ryngaert put it, ‘the contrary would mean shattering the sacrosanct principle of sovereign equality of nations’. Accordingly, the general ban in international law, alluded to by the PCIJ in the second excerpt, is on extraterritorial enforcement jurisdiction, not extraterritorial prescriptive jurisdiction or extraterritorial adjudicative jurisdiction. As far as prescriptive jurisdiction is concerned, so long as no enforcement is involved, sovereign states may have legislation that reaches outside its territory. *As per* the fundamental idea of sovereignty (‘independence’), as well as positivism and the voluntarily thesis (‘own free will’), underscored in the first excerpt, international law leaves ‘a large measure of discretion’ for prescriptive jurisdiction (only constrained by certain ‘prohibitive rules’), as the PCIJ suggested in the third excerpt.

With regard to the actual dispute in the *Lotus case*, a wide prescriptive jurisdiction meant that Turkish criminal law could apply extraterritorially. Indeed, the majority held that ‘the territoriality of criminal law [...] is not an absolute principle of international law and by no means coincides with territorial sovereignty’.⁸⁵ More importantly, given that “what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies”,⁸⁶ it meant that Lieutenant Demons’ crime was actually linked to the territory of Turkey, pursuant to the doctrine of effects⁸⁷. ‘If’, as it was put, ‘a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned’.⁸⁸ Referring to both prescriptive and adjudicative jurisdiction, the majority concluded that, ‘there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting,

⁸⁵ *Lotus case*, at 20.

⁸⁶ *Ibid.*, at 25.

⁸⁷ See Cedric Ryngaert, ‘Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law’ (2009) 9 *Int’l Crim. L. Rev.* 187. See also Michael Akehurst, ‘Jurisdiction in International Law’ (1972-73) 46 *British Y.B. Int’l L.* 145, at 152-153.

⁸⁸ *Lotus case*, at 25.

accordingly, the delinquent'.⁸⁹ Thus the majority answered the question on the basis of objective territorial jurisdiction,⁹⁰ tossing aside the passive personality principle.⁹¹

In the end, instead of exclusive competence as argued by France, jurisdiction was held to be concurrent between the two states involved. Since the question at issue is not whether states need a permissive rule to exercise prescriptive or adjudicative jurisdiction and because there is no prohibitive rule in international law in that regard,⁹² Turkey could exercise its legal competence, on the basis of territoriality, over the French national in the circumstances of the present case, just like France could have done, too. More broadly in terms of state interests, the majority opined that concurrent jurisdiction was warranted because, 'neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States'.⁹³ As a consequence: 'It is natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole'.⁹⁴

* * *

There were six judges dissenting in the *Lotus case* split judgment, decided by the casting vote of President Huber. The most significant is Judge Loder's dissenting opinion because, in a way, it summed up in a catchy phrase what the majority actually did in the case. Considering Turkey's argument, which indeed was endorsed by the majority of the Court, he wrote that, 'the contention [is] that under international law everything which is not prohibited is permitted. In other words, [...] under international law, every door is

⁸⁹ *Ibid.*

⁹⁰ Generally, on objective territoriality and subjective territoriality, see Robert J. Currie, *International and Transnational Criminal Law* (Toronto: Irwin Law, 2010), at 62-64.

⁹¹ *Lotus case*, at 22-23.

⁹² *Ibid.*, at 30.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, at 30-31.

open unless it is closed by treaty or by established custom'.⁹⁵ Generally on the nature of international law, in agreement with the majority it seems, Judge Loder characterized it in positivistic terms: 'This law is for the most part unwritten and lacks sanctions; it rests on a general consensus of opinion; on the acceptance by civilized States, members of the great community, of nations'.⁹⁶ Such normativity, he further wrote, is made 'of rules, customs and existing conditions which they [States] are bound to respect in their mutual relations, although neither committed to writing nor confirmed by conventions'.⁹⁷

Dissenting Judge Weiss understood the approach favoured by the PCIJ majority in the following way: '[Turkey] can do as she thinks fit as regards persons or things unless a specific provision in a treaty or an established custom in international law prevents her from so doing'.⁹⁸ Alluding to the voluntarist theory of international law and referring, by name, to the notion of sovereignty, he pointed out that: 'This power is thus in its essence unlimited'.⁹⁹ As for dissenting Judge Nyholm, he was highly critical of the majority's opinion as well, suggesting that it showed, 'a confusion of ideas'.¹⁰⁰ He noted that: 'If this reasoning be followed out, a principle of public international law is set up that where there is no special rule, absolute freedoms must exist'.¹⁰¹ For Judge Nyholm, the present situation is one where, on the facts of the case, there is no specific rule of international law; however, this is different from that suggesting that, as a general position, international normativity acts by means of prohibitive rules.¹⁰² Accordingly, it is fair to say that the dissenting judges, 'interpreted the dictum that became the *Lotus* principle as applicable beyond the facts of the case – an attempt by the Court to articulate a general

⁹⁵ *Ibid.*, at 34 (Judge Loder's dissent).

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, at 42 (Judge Weiss' dissent).

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, at 60 (Judge Nyholm's dissent).

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, at 60-61.

principle of international law that governs a situation where no applicable law constraining state behavior can be discerned'.¹⁰³

* * *

Already in the immediate aftermath of the *Lotus case*, the raw positivistic feature of the PCIJ majority's dictum was highlighted by international publicists. John Fischer Williams thought that 'the statement was an extreme form of positivism' ('l'énoncé de la doctrine positiviste extrême'¹⁰⁴). In an article actually entitled, 'L'arrêt du "Lotus" et le positivisme juridique',¹⁰⁵ in 1930, the author analysed the judgment and cited classic German and Italian theorists of legal positivism in international law, mentioned above, like Henrich Triepel, Arrigo Cavaglieri and Dionisio Anzilotti; interestingly, as he noted, the latter was one of the judges of the PCIJ majority in the *Lotus case*. Referring to the famous dictum, the French author suggested that sovereignty was the keystone, or the cornerstone, of the positivist theory of international law ('la clef de voûte de la théorie positiviste. [Elle est] grosse de conséquences pour la conception du droit et de la Société internationale'¹⁰⁶). Borrowing from the terminology of the majority in the *Lotus case*, in line with international positivism, whereby sovereignty means the independence, states

¹⁰³ Hugh Handeyside, 'The *Lotus* Principle of ICJ Jurisprudence: Was the Ship Ever Afloat?' (2007) 29 *Michigan J. Int'l L.* 71, at 76. See also Robert Ruzé, 'L'affaire du Lotus' (1928) 55 *Revue de droit international et de législation comparée* 124, at 149-150: '[L]a Cour [a] posé et résolu le problème sur le terrain très général de la souveraineté territoriale des États. Ce faisant, il semble qu'elle ait déplacé la question, qu'elle l'ait enlevée à son cadre véritable, dans lequel seul elle était capable de recevoir une solution satisfaisante'.

¹⁰⁴ John Fischer Williams, 'L'affaire du "Lotus"' (1928) 35 *Revue générale de droit international public* 361, at 366. See also Jan H.W. Verzijl, 'L'affaire du "Lotus" devant la Cour permanente de justice internationale' (1928) 55 *Revue de droit international et de législation comparée* 1, at 16.

¹⁰⁵ Louis Cavaré, 'L'arrêt du "Lotus" et le positivisme juridique' (1930) 10 *Travaux juridiques et économiques de l'Université de Rennes* 144; in English, 'the keystone of the positivist theory. [It is] of huge consequences for our conception of international society' [my translation].

¹⁰⁶ *Ibid.*, at 172.

are said to be free to create normativity at their will, to decide to submit themselves or choose not to be bound by legal rules.¹⁰⁷

Publicists, then and now, are unequivocal: ‘*Lotus* has long been considered the touchstone of international legal positivism’;¹⁰⁸ Louis Henkin considered the PCIJ case as ‘one of the landmarks of the twentieth-century jurisprudence’.¹⁰⁹ But having said that, it is also true that, ‘international lawyers have had a love-hate relationship with the *Lotus* principle’.¹¹⁰ Far from being a novel criticism,¹¹¹ the *Lotus case* positivist and voluntarist take on international law has long been seen by some as retrograde,¹¹² by others grossly overrated;¹¹³ the proposition is said to be outdated and surely irreconcilable with late 20th and early 21st century dominant understanding of international law.¹¹⁴

CONCLUSION: IMPACT OF THE LOTUS CASE

Beside and beyond these grandiose and harsh doctrinal critics of the *Lotus case*, what is the real legacy of this major decision of the World Court? In the conclusion, it is

¹⁰⁷ *Ibid.*: ‘La règle essentielle dans cette Société est l’indépendance de l’État, libre de créer à sa guise le droit, de se lier comme il le veut ou de ne pas se lier par des règles juridiques’.

¹⁰⁸ Hugh Handeyside, ‘The *Lotus* Principle of ICJ Jurisprudence: Was the Ship Ever Afloat?’ (2007) 29 *Michigan J. Int’l L.* 71, at 71.

¹⁰⁹ Louis Henkin, ‘International Law: Politics, Values and Functions’ (1989-IV) 216 *Hague Recueil* 9, at 278.

¹¹⁰ An Hertongen, ‘Letting *Lotus* Bloom’ (2015) 26 *European J. Int’l L.* 901, at 902.

¹¹¹ See H. Arthur Steiner, ‘Fundamental Conceptions of International Law in the Jurisprudence of the Permanent Court of International Justice’ (1936) 30 *American J. Int’l L.* 414, at 416.

¹¹² See Frederick A. Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964-I) 111 *Hague Recueil* 1, at 35.

¹¹³ See Rosalyn Higgins, *Problems and Process – International Law and How We Use It* (Oxford: Oxford University Press, 1994), at 77.

¹¹⁴ See Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice – The Rise of international Judiciary* (Cambridge: Cambridge University Press, 2004), at 249. See also Ole Spiermann, ‘*Lotus* and the Double Structure of International Legal Argument’, in Laurence Boisson de Chazournes and Philippe Sand (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999), 131.

worth coming back to the impact of the PCIJ's majority opinion on the law of jurisdiction, especially on the jurisprudence of the International Court of Justice (hereinafter 'ICJ'). Of course, technically, there is no *stare decisis* in international law – as per Article 59 of the *Statute of the International Court of Justice* – precedents being a subsidiary source of international normativity;¹¹⁵ they may nevertheless be highly valuable in understanding the law, here on state jurisdiction.

Strictly speaking, ICJ references to the *Lotus case* in judgments on the merits are very few indeed; three instances: the *North Sea Continental Shelf cases*,¹¹⁶ the *Nicaragua case*,¹¹⁷ the *Nuclear Weapons Opinion*.¹¹⁸ In the first two cases, recourse to the 1927 PCIJ case were on secondary points (proof of customary law; *jura novit curia* rule); only the latter ICJ case refers to the *Lotus* principle on sovereignty (and jurisdiction) and how it relates to the nature of international normativity. Indeed, the *Nuclear Weapons Opinion* saw the ICJ refer to the *Lotus* dictum thus: “restrictions upon the independence of States cannot ... be presumed” and that international law leaves to States “a wide measure of discretion which is only limited in certain cases by prohibitive rules”.¹¹⁹ The Court acknowledged also that the *Lotus* principle was argued along with a similar point made in the *Nicaragua case*.¹²⁰ In the end, the majority in the *Nuclear Weapons opinion* was

¹¹⁵ See, generally, Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge University Press, 1996). See also Yonotan Oupu and Erik Voeten, ‘Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights’ (2011) 42 *British J. Pol. Sc.* 413.

¹¹⁶ *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, Judgment, [1969] I.C.J. Reports 3, at 44.

¹¹⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, [1986] I.C.J. Reports 14, at 24 [hereinafter ‘*Nicaragua case*’].

¹¹⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Reports 226, at 238-239 [hereinafter ‘*Nuclear Weapons opinion*’].

¹¹⁹ *Ibid.*, at 238; citing the *Lotus case*, at 18 and 19.

¹²⁰ *Ibid.*, at 238-239; citing the *Nicaragua case*, at 135: ‘in international law there are no rules, other than such rules as may be accepted by State concerned, by treaty or otherwise, whereby the level of armaments of a sovereignty State can be limited’. On the issue of jurisdiction, the ICJ had written earlier in the judgment, *ibid.*, at 131: ‘A State’s domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law’.

based on, ‘the basic premises of the *Lotus* principle – that is, it queried whether international law contained a specific prohibition on the threat or use of nuclear weapons’.¹²¹

President Bedjaoui made a declaration in the *Nuclear Weapons opinion*, placing the *Lotus case* in its ‘particular context, both judicial and temporal’.¹²² ‘No doubt, this decision expressed *the spirit of the times*’, he wrote, ‘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’.¹²³ He referred to the ‘resolutely positivist, voluntarist approach of international law’, at the PCIJ in 1927, which ‘has been replaced by an objective conception of international law’.¹²⁴ Dissenting Judge Weeramantry, in the *Nuclear Weapons opinion*, wrote that an interpretation of the *Lotus case*, ‘to the effect that a State could do whatever is pleased so long as it had not bound itself to the contrary’, indeed, ‘would cast a baneful spell on the progressive development of international law’.¹²⁵ Those additional statements by ICJ judges show how the sovereignist/positivist/voluntarist approach to international law in general and, insofar as issues of state jurisdiction as well, remains highly contested.

More interesting, perhaps, than the *verbatim* citation of the *Lotus case*, by name, is the fundamental idea that it represents, based on the sacrosanct notion of sovereignty, and what it means for territorial competence, as well as territoriality at large as the basis for state jurisdiction. In 1949, for instance, in the *Corfu Channel case*,¹²⁶ the aura of the *Lotus case* dictum, is found in this statement by the ICJ: ‘Between independent States, respect for territorial sovereignty is an essential foundation of international relations’.¹²⁷

¹²¹ Hugh Handeyside, ‘The *Lotus* Principle of ICJ Jurisprudence: Was the Ship Ever Afloat?’ (2007) 29 *Michigan J. Int’l L.* 71, at 87.

¹²² *Nuclear Weapons opinion*, at 270 (President Bedjaoui’s declaration).

¹²³ *Ibid.* [emphasis in original].

¹²⁴ *Ibid.*, at 270-271.

¹²⁵ *Ibid.*, at 495 (Judge Weeramantry’s dissent).

¹²⁶ *Corfu Channel (United Kingdom v. Albania)*, Merits, I.C.J. Reports 4.

¹²⁷ *Ibid.*, at 35.

More broadly for the normative system, the *Lotus* principle stands for the proposition that everything that is not prohibited by international law is, in fact, permitted for sovereignty states. Similar to what it did in the *Nuclear Weapons opinion* – looking for a prohibition, imposed by international law, when assessing the legality of the threat or use of nuclear weapons – the ICJ followed the *Lotus* principle in the *Kosovo opinion*.¹²⁸ The question at issue, as interpreted by the Court,¹²⁹ was narrowed down and, in the end, was addressed using a logic emphasising on international law as a system permitting everything that is not prohibited.

Contrasting the situation at hand with the *Quebec Secession case*¹³⁰ – decided by the Supreme Court of Canada, in 1998 – the ICJ in that case deemed that the actual issue was not about whether Kosovo had a right, under international law, to effect secession by means of a unilateral declaration of independence. Rather, the question submitted by ‘the General Assembly has asked whether the declaration of independence was “in accordance with” international law’.¹³¹ Similar to what the PCIJ majority dictum held, the ICJ in the *Kosovo opinion* reiterated the positivist and voluntarist view of international normativity, acting to limit sovereignty, by prohibiting what can be done on the international plane. It held, unequivocally: ‘The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence’.¹³²

This approach was criticised by Judge Simma, who made a declaration in the *Kosovo opinion*, because the majority’s reasoning, ‘leaping as it does straight from the lack of a prohibition to permissibility, is a straightforward application of the so-called *Lotus* principle’.¹³³ Putting the issue in both historical and theoretical context – as this

¹²⁸ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] I.C.J. Reports 403 [hereinafter ‘*Kosovo opinion*’].

¹²⁹ See Frédéric Bérard and Stéphane Beaulac, *The Law of Independence – Quebec, Montenegro, Kosovo, Scotland, Catalonia* (Toronto: LexisNexis Canada, 2017), at 97.

¹³⁰ *Reference re Secession of Quebec*, [1998] 2 Supreme Court Report 217.

¹³¹ *Kosovo opinion*, at 425.

¹³² *Ibid.* [emphasis added].

¹³³ *Ibid.*, at 480 (Judge Simma’s declaration).

chapter attempts to do – he wrote: ‘By reverting to it [the *Lotus* principle], the Court answers the question in a manner redolent of nineteenth-century positivism, with its excessively deferential approach to State consent’.¹³⁴ Drawing from the way the *Lotus case* has been condemned by many over the years, Judge Simma summed up the whole problem thus: ‘Under this approach, everything which is not expressly prohibited carries with it the same colour of legality’.¹³⁵

Closing this survey of ICJ jurisprudence, the most recent opportunity to speak on the *Lotus case* was the *Arrest Warrant case*,¹³⁶ though only in particular opinions, not in the main judgment. For instance, in a joint Separate Opinion, judges Higgins, Kooijmans and Buergenthal expressed the view that the *Lotus case*, ‘represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies’.¹³⁷ Dissenting Judge van den Wyngaert, for her part, also opined in critical terms: ‘It has often been argued, not without reason, that the “*Lotus*” test is too liberal and that, given the growing complexity of contemporary international intercourse, a more restrictive approach should be adopted today’.¹³⁸

* * *

So this is the current situation, with the heritage left by the *Lotus case*, at least in ICJ’s jurisprudence. Wrapping it up and putting it directly in terms of state jurisdiction,¹³⁹ one cannot but appreciate how these issues, as well as the law governing them, continues to be intellectually apprehended and legally addressed, it seems, using the (still) dominant epistemology of legal positivism. At the heart of this understanding of the legal world, no

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, [2002] I.C.J. Reports 3.

¹³⁷ *Ibid.*, at 78 (judges Higgins, Kooijmans and Buergenthal’s joint separate opinion).

¹³⁸ *Ibid.*, at 169 (Judge van den Wyngaert’s dissent).

¹³⁹ See, generally, Steve Coughlan, Robert J. Currie, Hugh M. Kindred and Teresa Scassa, *Law Beyond Borders – Extraterritorial Jurisdiction in an Age of Globalization* (Toronto: Irwin Law, 2014), 4.

doubt, continue to be the *idée-force* of sovereignty, as well as the Westphalian paradigm of international relations, in turn articulated in terms of the Vattelian legal structure and the voluntarist thesis of international normativity.

It was true in 1927, at the time of the PCIJ's judgment.¹⁴⁰ Today, it appears that this analytical framework is alive and strong, for some, but also the lingering conception of international law to be ridden of, for others. Specifically for issues of state jurisdiction, the *Lotus case* was deemed the counter-intuitive approach – emphasising the sovereignty of states and requiring prohibitive rules to constraint its – very early on indeed. One will recall how, in 1935 already, the Harvard Research on International Law had suggested, in a *Draft Convention on Jurisdiction with Respect to Crime*,¹⁴¹ a more restrictive approach which, generally, required permissive rules for sovereign states to exercise competence, be it prescriptive, enforcement or adjudicative. This dichotomy – prohibitive rules *versus* permissive rules – remains at the centre of the problematics of state jurisdiction, almost a century later.¹⁴² As they say in Saint-Louis-du-Ha!-Ha! (Quebec): '*Plus ça change, plus c'est pareil*'.

¹⁴⁰ See Louis Cavaré, 'L'arrêt du "Lotus" et le positivisme juridique' (1930) 10 *Travaux juridiques et économiques de l'Université de Rennes* 144, at 183.

¹⁴¹ Harvard Research on International Law, 'Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 *American J. Int'l L.* 439.

¹⁴² In a recent book (2015), an author started his core chapter on jurisdiction thus: 'Under public international law, two approaches [prohibitive rules or permissive rules] could logically be taken to the question of jurisdiction [...] It is unclear which doctrine has the upper hand'. See Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (Oxford: Oxford University Press, 2015), at 29.