

# State Jurisdiction and the Permissiveness of International Law: Is the *Lotus* Still Blooming?

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## ABSTRACT

*The Lotus rule has traditionally stipulated that, in international law, any conduct not specifically prohibited is allowed. However, there now is considerable disagreement as to whether this principle is still valid. This article argues that one should distinguish between the Lotus principle's conceptual origins and its core content. It will be shown that, given the evolution of international law, the positivist assumptions on which Lotus was initially based are no longer tenable. On the other hand, the basic Lotus presumption, which requires state action to be deemed lawful unless it violates an international prohibition, is still viable and can be reconciled with the structure of modern international law. This 'enlightened reading of the Lotus rule' will subsequently serve as a lens for examining the international rules on state jurisdiction. The conclusion will be that this area of international law demonstrates that the presumption of lawfulness still applies, but that the sources from which relevant international prohibitions can be derived have diversified.*

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## INTRODUCTION

What is the function of law? Is it to establish and protect the freedom of its subjects? Or is the freedom of the legal subject instead assumed as a pre-existing value, and the role of the law is to *limit* this freedom where necessary? In domestic legal orders which recognise individual liberty, the answer is clear: Individuals are free to act as they wish, and this freedom is only limited in certain instances by legal rules. Accordingly, natural persons do not require permission from the state to act in a certain way—as long as there is no legal norm to the contrary, they are free to do what they please.<sup>1</sup>

In international law, there has traditionally been an analogous understanding, commonly referred to as the *Lotus* principle. Like individuals, states were presumed to have the freedom to act as they saw fit, with the function of international norms being to restrict this freedom in defined and limited circumstances.<sup>2</sup> Nowadays, however, there is surprisingly little agreement as to whether this rule still applies to contemporary international law. On the one hand, the continuing validity of the *Lotus* approach is portrayed as self-evident in taught courses which characterise it as the ‘ground rule’ of international law<sup>3</sup> and by commentators who readily cite and apply this presumption of state freedom.<sup>4</sup> At the other end of the spectrum, the *Lotus* model has been described as an anachronistic outlook on international law that should be<sup>5</sup>—or, alternatively,

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<sup>1</sup> Jan Klabbbers, *International Law* (3rd edn, Cambridge University Press 2021) 25.

<sup>2</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 255.

<sup>3</sup> John F Murphy and Jeffery Atik, ‘International Legal Education’ (2003) 37 *The International Lawyer*. 623, 626; Hugh Handeyside, ‘The Lotus Principle in ICJ Jurisprudence’ (2007) 29 *Melbourne Journal of International Law* 71, 72.

<sup>4</sup> Michael P Scharf, ‘Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States’ (2001) 35 *New England Law Review* 363, 366-368; Roger P Alford, ‘Reflections on US-Zeroing’ (2006) 45 *Columbia Journal of Transnational Law* 196, 203.

<sup>5</sup> Rosalyn Higgins, ‘International Trade Law and the Avoidance, Containment and Resolution of Disputes’ (1991) 230 *Recueil des Cours* 1, 114; van den Wyngaert, *Dissenting Opinion in Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, I.C.J. Reports 2002 (hereinafter *Arrest Warrant*), 137, para. 51.

already has been<sup>6</sup>—abandoned. This dissonance among scholars is remarkable given that the status of the *Lotus* principle is of fundamental importance for international adjudication: Whenever the legality of state conduct is at issue, the question poses itself whether the state concerned needs to justify its action by invoking a permissive rule of international law, or if the conduct is instead considered lawful unless it is shown to violate an applicable prohibition, as suggested by *Lotus*.

The present article will try to explain and resolve this scholarly ambiguity about the current standing of the *Lotus* rule in international law. In essence, it will be argued that a distinction needs to be drawn between the principle's *conceptual origins* and the presumption of lawfulness that forms the *core content* of this rule. While the positivist theoretical foundations of *Lotus* have indeed become outdated, the core presumptive logic it expresses is still valid and can be reconciled with the characteristics of modern international law.

In developing this line of argument, the initial articulation of the *Lotus* rule will first be placed in its intellectual context (I). Then, it will be argued that the structure of international law has changed since then, and that this has invalidated many of the original assumptions behind *Lotus* (II(A)). Subsequently, it will be shown that the quintessential *Lotus* presumption is nevertheless still reflected in the jurisprudence of the International Court of Justice ('ICJ') and that this presumption can be adapted to the structures of contemporary international law (II(B)). Following this, the international rules on the exercise of prescriptive state jurisdiction will serve as a test case for this modernised, 'enlightened' version of the *Lotus* principle (III). Finally, the essay will return to the introductory question and reflect on the conclusions from the discussions that emerged (IV).

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<sup>6</sup> Armin von Bogdandy and Markus Rau, 'The Lotus' Max Planck Encyclopedia of Public International Law, (Oxford University Press 2008) <[www.mpepil.com](http://www.mpepil.com)> accessed 7 November 2021, para. 18; Alvarez, Individual Opinion in *Fisberies Case (United Kingdom v Norway)*, Judgment, I.C.J. Reports 1951 (hereinafter *Fisberies Case*), 145, at 152.

## I. *LOTUS* IN CONTEXT: SOVEREIGNTY, POSITIVISM AND PERMISSIVENESS

The *Lotus* rule was named after the 1927 judgment by the Permanent Court of International Justice ('PCIJ'), in which it was first formulated.<sup>7</sup> The PCIJ faced the task of ruling on the legality of the exercise of criminal jurisdiction by Turkey over a collision that had occurred in the high seas between a Turkish and a French vessel (the *S.S. Lotus*). The Permanent Court found that there was no rule of international law which prohibited Turkey from trying and convicting the French captain responsible for the incident. From there, the majority concluded that this Turkish assertion of jurisdiction was lawful.<sup>8</sup> The underlying assumption which would subsequently rise to prominence as the *Lotus* principle was that states were free to engage in whichever conduct they wished, so long as there was no international legal norm precluding this conduct. In other words, the PCIJ subscribed to a permissive model of international law and assumed that any state action which is not prohibited is allowed. As the Court put it:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will [...] Restrictions upon the independence of States cannot therefore be presumed.<sup>9</sup>

In order to understand the status of the *Lotus* presumption of state freedom in today's international legal order, it is worth examining the intellectual-historical context that surrounded these statements.

By the end of the 19<sup>th</sup> century, natural law positions had lost most of their earlier influence on international legal thinking.<sup>10</sup> The Congress of Vienna had

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<sup>7</sup> *S.S. Lotus (France v Turkey)*, PCIJ Series A, No. 10, 4 (hereinafter *Lotus*).

<sup>8</sup> *ibid* 31.

<sup>9</sup> *ibid* 18.

<sup>10</sup> Richard Collins, 'Classical Legal Positivism in International Law Revisited' in Jean d'Aspremont and Jörg Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014) 32.; Hans-Ulrich Scupin, 'History of International Law, 1815 to World War I', Max Planck Encyclopedia of Public International Law, (Oxford University Press 2008) <www.mpepil.com> accessed 7 November 2021, para 82.



consolidated the central role and autonomous authority of states in international relations.<sup>11</sup> As a result, state sovereignty was increasingly considered a pre-legal fact, that is, an empirical reality which theories of international law had to account for.<sup>12</sup> In the eyes of English legal philosopher John Austin, this precluded the very existence of an international legal system properly so called:<sup>13</sup> for if states were sovereign, then by definition, there was no supreme authority above them which could regulate their behaviour—the notion of legal rules binding sovereign states was inherently contradictory.<sup>14</sup>

The response of Georg Jellinek and other German thinkers to this Austinian challenge lied in the concept of *Selbstverpflichtung*, or ‘autolimitation’: The binding character of international norms was considered to derive from states’ own free will.<sup>15</sup> This was seen as the only way to reconcile international law with the sovereign autonomy of states.<sup>16</sup> The ensuing understanding of international law as serving and stemming from the sovereign will of states became known as international legal positivism, and by the time the *Lotus* case was heard in the 1920s, it had become the dominant view among writers.<sup>17</sup>

On this basis, it is clear that once the axiom of state sovereignty being an aprioristic, extra-legal value is accepted, the permissive approach to international law expressed in the *Lotus* principle follows as a direct corollary. Sovereignty was understood to mean that only a state’s own consent can justify legal restrictions on its freedom. Consequently, where a state had *not* given its consent to be bound by any legal norms, the situation was, by default, governed by this state’s sovereignty and therefore by its freedom of action. And indeed, this positivist line

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<sup>11</sup>Scupin (n 10) para 5.

<sup>12</sup> cf Alex Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 *British Yearbook of International Law* 187, 191.

<sup>13</sup> Koskenniemi (n 2) 126.

<sup>14</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007) 44.

<sup>15</sup> Jochen von Bernstorff, ‘German Intellectual Historical Origins of International Legal Positivism’ in Jean d’Aspremont and Jörg Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014) 65.

<sup>16</sup> Koskenniemi (n 2) 127.

<sup>17</sup> Von Bernstorff (n 15) 63; Stéphane Beaulac, ‘The Lotus Case in Context’ in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press 2019) 48.

of thinking was what guided the PCIJ in its *Lotus* dictum.<sup>18</sup> As seen in the above-quoted passage, the Permanent Court grounded its deduction of the *Lotus* principle in the independence of states, which, in line with the positivist conception, was assumed to be a fact preceding international law.

Beyond this, the influence of international legal positivism on the *Lotus* judgment can also be demonstrated by considering the key figures involved in it. The decision was drafted by Italian lawyer Dionisio Anzilotti,<sup>19</sup> who is associated with precisely the late 19<sup>th</sup> and early 20<sup>th</sup> century positivist legal theory discussed above.<sup>20</sup> Meanwhile, it was Max Huber who, acting as the PCIJ's president, cast the tie-breaking vote.<sup>21</sup> Huber was equally known for his positivist perspectives on international law.<sup>22</sup> It is against this genealogical backdrop that Bruno Simma described the *Lotus* rule as 'redolent of nineteenth-century positivism'<sup>23</sup> and that ICJ President Mohammed Bedjaoui noted that the principle reflected the 'resolutely positivist, voluntarist approach of international law still current at the beginning of the [twentieth] century':<sup>24</sup> *Lotus* was an expression of the state-centric voluntarism which was prevalent at the time—that is, it was a product of the view that only the free will of states can create international law.

However, Simma has also criticised this classical *Lotus* approach as 'excessively deferential [...] to state consent'.<sup>25</sup> Along similar lines, ICJ Judges Higgins, Kooijmans and Buergerthal have asserted that the era of 'laissez-faire in international relations' epitomised in *Lotus* has been 'significantly overtaken by

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<sup>18</sup> Photini Pazartzis, 'Judicial Activism and Judicial Self-Restraint' in Christian J Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Martinus Nijhoff Publishers, 2013) 324; Robert Kolb, *Theory of International Law* (Hart Publishing, 2016) 217.

<sup>19</sup> James Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Brill Publishers, 2014) 65.

<sup>20</sup> Beaulac (n 17) 47.

<sup>21</sup> Klabbbers (n 1) 26.

<sup>22</sup> *ibid.*

<sup>23</sup> Declaration of Judge Simma, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, 408, para 8.

<sup>24</sup> Declaration of President Bedjaoui in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (hereinafter *Nuclear Weapons*), 268, at 270.

<sup>25</sup> Simma (n 23) para 8 (emphasis added).

other tendencies'.<sup>26</sup> The next section will examine what these tendencies are and whether they truly imply the obsolescence of the *Lotus* rule, or whether a purified, 'enlightened' version of the latter has survived these changes.

## II. *LOTUS* WITHIN THE CHANGING STRUCTURE OF INTERNATIONAL LAW

After the Second World War, the strictly positivist project of international law had, for many commentators, fallen from grace, and a re-emergence of non-positivist approaches was discernible.<sup>27</sup> This development was paralleled by substantial structural shifts in international law. Through these trends, the state-centred voluntarism which had underpinned the initial articulation of the *Lotus* presumption has come into question.<sup>28</sup>

### A. The outdated conceptual foundations of *Lotus*

The first premise of the PCIJ, which now seems scarcely tenable, is that international law was exclusively concerned with 'govern[ing] relations between independent States'.<sup>29</sup> Over the past few decades, the role played by non-state actors on the international plane has expanded considerably.<sup>30</sup> In international law, these developments have found expression, first, in the recognition of the legal personalities of international organisations.<sup>31</sup> In addition, individuals are now also recognised as bearing rights and duties under international law, namely through internationally enforceable human rights and in the field of international criminal law.<sup>32</sup> Recent doctrinal discussions have further explored the possible legal personalities of other non-state entities such as non-governmental

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<sup>26</sup> Joint Separate Opinion in *Arrest Warrant* (n 5), I.C.J. Reports 2002, 63, para 51.

<sup>27</sup> Malcom N Shaw, *International Law* (8th edn, Cambridge University Press 2018) 40.

<sup>28</sup> See in general Frauke Lachenmann, 'Legal Positivism', Max Planck Encyclopedia of Public International Law, (Oxford University Press 2008) <[www.mpepil.com](http://www.mpepil.com)> accessed 7 November 2021, paras 33-35.

<sup>29</sup> *Lotus* (n 7) 18.

<sup>30</sup> Von Bogdandy/Rau (n 6) para 17.

<sup>31</sup> Shaw (n 27) 205.

<sup>32</sup> Kate Parlett, *The Individual in the International Legal System* (Cambridge University Press 2011) 229 and 279.

organisations or multinational corporations.<sup>33</sup> Specifically, the mechanisms of international investment law precisely serve to protect the cross-border activities of private investors by granting them enforceable rights.<sup>34</sup> All of this shows how the class of international legal subjects is no longer confined to sovereign states, which challenges the state-centric model of international law underlying *Lotus*.

Correspondingly, the subject matter regulated by international law has equally multiplied and now goes beyond mere administration of the coexistence between states. In particular, the aforementioned domains of human rights and international criminal law, as well as the rules of international humanitarian law, are not primarily designed to balance the sovereign interests of states, but rather to protect individuals in vulnerable contexts.<sup>35</sup> International law has therefore moved to recognise not just the legal personalities, but also the autonomous interests of non-state actors such as individuals. This, in turn, marks a shift within the international legal order towards a more value-oriented approach: unlike what was declared in *Lotus*, international law's purpose today lies no longer just in regulating inter-state relations, but also includes the pursuit of higher humanitarian objectives.<sup>36</sup> In precisely this vein, the ICJ has remarked with respect to the 1948 Genocide Convention:

[I]ts object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes.<sup>37</sup>

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<sup>33</sup> Davor Muhvic, 'Legal Personality as a Theoretical Approach to Non-State Entities in International Law' (2017) 4(1) *Pecs Journal of International and European Law* 7.

<sup>34</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 44.

<sup>35</sup> Rosalyn Higgins, 'Conceptual Thinking about the Individual in International Law' (1978) 4 *British Journal of International Studies* 1, 5.

<sup>36</sup> cf Devika Hovell, 'The Authority of Universal Jurisdiction' (2018) 29 *European Journal of International Law* 427, 445, with further references.

<sup>37</sup> Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951, 15, at 23.

Third, and even more to the point, the insistence on the sovereign consent of states as the ultimate source of all international legal norms has also become difficult to uphold. Within the traditional sources of international law listed in Article 38 of the ICJ Statute, there has been a shift towards more ‘attenuated forms of consent’.<sup>38</sup> As such, while norms of customary international law are, in principle, established through widespread practice among states and corresponding *opinio juris*,<sup>39</sup> it is now accepted that this must not necessarily encompass the conduct of *all* states.<sup>40</sup> Hence, a single state alone has only limited control over the formation of new custom and may find itself bound by a customary norm which it has never consented to by displaying any type of acquiescing conduct.<sup>41</sup> Thus, in *North Sea Continental Shelf*, the ICJ subscribed to the view that a putative customary rule of equidistant maritime delimitation would be binding on Germany ‘automatically and independently of any specific assent, direct or indirect, given by [Germany]’.<sup>42</sup> It may well be that states can theoretically avoid such scenarios by persistently objecting to the legal rule in question.<sup>43</sup> Yet as a practical matter, this is often not a realistic option, as states will rarely have enough resources to detect and challenge emergent rules of international custom in time, especially given the multiplication of areas now regulated by international law.<sup>44</sup>

Meanwhile, under the head of general principles of law, legal obligations have been derived from highly abstract concepts such as equity,<sup>45</sup> creating doubts about whether states can be said to have previously consented to these more

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<sup>38</sup> Lachenmann (n 28) para 34.

<sup>39</sup> International Law Commission, Draft Conclusions on Identification of Customary International Law (2018), Conclusions 2 and 3.

<sup>40</sup> Alain Pellet and Daniel Müller, ‘Article 38’ in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 909.

<sup>41</sup> Michael Akehurst, ‘Custom as a Source of International Law’ (1977) 47 *British Yearbook of International Law* 1, 23.

<sup>42</sup> *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, 3, paras 37 and 63.

<sup>43</sup> *Fisheries Case* (n 6) 131.

<sup>44</sup> Alain Pellet, ‘The Normative Dilemma: Will and Consent in International Law-Making’ (1992) 12 *Australian Year Book of International Law* 22, 37.

<sup>45</sup> HC Gutteridge, ‘The Meaning and Scope of Article 38 (1)(c) of the Statute of the International Court of Justice’ (1952) 38 *Grotius Society* 125, 126.

specific obligations.<sup>46</sup> Accordingly, the recognition and contemporary application of general principles of international law under Article 38(1)(c) of the ICJ Statute further challenges the voluntarist understanding of international law-making. In fact, some, like ICJ Judge Tanaka, have gone so far as to contend that Article 38(1)(c) 'does not require the consent of States as a condition of the recognition of the general principles' at all and that this provision thus inherently 'extends the concept of the source of international law beyond the limit of legal positivism'.<sup>47</sup>

More importantly still, peremptory (or *jus cogens*) norms of international law are precisely defined as obligations from which no derogations are permitted, even where a given state has never individually consented to be bound by these rules.<sup>48</sup> For instance, the prohibition of torture is generally viewed as a peremptory norm from which no derogations are allowed.<sup>49</sup> Therefore, a state which practices torture would thereby violate international law even if it has not ratified the 1985 Convention against Torture, nor expressed any *opinio juris* which may have contributed to a customary prohibition of torturous practices. This state would not even have the possibility to opt out of this prohibition by signing a new bi or multilateral treaty specifically allowing it to torture again, as treaties which conflict with a *jus cogens* obligation are considered void.<sup>50</sup> Viewed in this light, the emergence of such peremptory norms of international law is probably the most noticeable refutation of the strictly voluntarist legal epistemology on which *Lotus* was based.

Another noteworthy phenomenon has been the adoption of legally binding decisions by international institutions. In a way, this development brings together the three aforementioned trends, viz. the emergence of non-state legal subjects, the expansion of international law's subject matters and the softening of the sovereign consent-requirement. The most prominent example concerns the

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<sup>46</sup> *ibid* 127.

<sup>47</sup> Dissenting opinion in South West Africa, Second Phase, Judgment, I.C.J. Reports 1966, 250, at 298.

<sup>48</sup> Markus Petsche, 'Jus Cogens as a Vision of the International Legal Order' (2010) 29 Penn State International Law Review 233, 266.

<sup>49</sup> Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment, I.C.J. Reports 2012, 422, para 99; Prosecutor v Furundžija, ICTY Trial Chamber Judgment, IT-95-17/1-T, para 155.

<sup>50</sup> Vienna Convention on the Law of Treaties, art 53.

United Nations ('UN') Security Council, which has the capacity to impose legally binding obligations on *all* member states, not just on those which are directly involved in its decision-making as permanent or non-permanent members.<sup>51</sup> As is well known, the Council has, since the 1990s, considerably broadened its practice by adopting resolutions which, rather than merely addressing questions relating to a particular conflict, created generalised obligations.<sup>52</sup> In this quasi-legislative manner, the Security Council has, for instance, regulated the domain of counter-terrorism<sup>53</sup> or set up entirely new judicial institutions in the field of international criminal law.<sup>54</sup> And even the decisions of other bodies which formally do not have binding legal effect—like those by the UN Human Rights Committee or the General Assembly—are nonetheless also widely held to shape the normative development of international law.<sup>55</sup> Along similar lines, judicial pronouncements of international courts and tribunals—which are recognised only as 'subsidiary means' of law ascertainment in theory<sup>56</sup>—have in practice attained near-precedential value in many areas of international law.<sup>57</sup>

From a voluntarist perspective, it may of course be argued that this power of courts and international organisations to create international law can be traced back to the will of states, as they give their abstract consent through, for example, their voluntary membership to the UN.<sup>58</sup> As a matter of formal legal hierarchy, this view is not wrong, as the doctrine of attributed powers does require the acts of international organisations to be rooted in those powers that were conferred

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<sup>51</sup> See Charter of the United Nations, art 25.

<sup>52</sup> Axel Marschik, 'The Security Council as World Legislator? Theory, Practice & Consequences of an Expanding World Power' Institute for International Law and Justice Working Paper 2005-18 3..

<sup>53</sup> UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

<sup>54</sup> UNSC Res 827 (25 May 1993) UN Doc S/RES/827 and UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

<sup>55</sup> Andrew Guzman, 'International Organizations and the Frankenstein Problem' (2013) 24(4) *European Journal of International Law* 999, 1017.

<sup>56</sup> Statute of the International Court of Justice, art 38(1)(d).

<sup>57</sup> Harlan Grant Cohen, 'Theorizing Precedent in International Law' in Andrea Bianchi and others (eds), *Interpretation in International Law* (Oxford University Press 2015) 269.

<sup>58</sup> cf Eric Suy, *Les actes juridiques unilatéraux en droit international public* (Librairie Générale De Droit Et De Jurisprudence, 1962) 30-32.

on them by states.<sup>59</sup> On the other hand, one can question whether this understanding adequately captures a reality in which decisions of international organisations regularly address contemporary phenomena and thus go beyond what was specifically envisioned by states in their original consent.<sup>60</sup> At any rate, the will of states plays only an indirect role in these instances where legal rules are developed by international organisations; and therefore, the increase in this type of decision-making constitutes a further challenge to the PCIJ's positivist-voluntarist understanding of international law.

Similar considerations apply in the context of international courts and tribunals. In principle, their jurisdiction is based on the consent of the parties to a case, meaning that the competence of adjudicative bodies to decide a dispute is contingent on all states parties involved granting them this competence.<sup>61</sup> However, in their judgments, courts and tribunals frequently clarify and develop the content of international legal norms in the abstract.<sup>62</sup> As mentioned, in practice, such statements are often treated as authoritative determinations of the law beyond the concrete dispute at hand, particularly in the case of the ICJ.<sup>63</sup> By specifying their obligations under international law, court decisions thus indirectly affect the legal position even of third states which have not consented to a court's jurisdiction in the underlying case. It is hard to see how such third states could be said to have voluntarily accepted these legal consequences. To this extent, the realities of international adjudication further undermine the strictly voluntarist reading of international law.

To illustrate these various structural shifts and their degrading effect on the role of states and their sovereign will in international law, a brief case study will

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<sup>59</sup> Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996, 66, para 25.

<sup>60</sup> Marschik (n 53) 23.

<sup>61</sup> Shabtai Rosenne, 'International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications' Max Planck Encyclopedia of Public International Law, (Oxford University Press 2008) <[www.mpepil.com](http://www.mpepil.com)> accessed 7 November 2021, para 3.

<sup>62</sup> Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 *Leiden Journal of International Law* 49, 55.

<sup>63</sup> cf Andrea Bianchi, 'The Game of Interpretation in International Law' in Andrea Bianchi and others (eds), *Interpretation in International Law* (Oxford University Press 2015) 41.



be examined. In 1993, the International Criminal Tribunal for the former Yugoslavia (ICTY) was established not by an inter-state treaty, but rather through a resolution by the UN Security Council.<sup>64</sup> The mandate of the ICTY was to try the perpetrators of war crimes committed in the context of the Balkan Wars. It was thus concerned with applying international law to the prosecution of individuals, rather than with regulating the relations between states as such. Then, in its very first decision, the Tribunal had to determine the rules of international humanitarian law applicable to internal armed conflicts. It declared that the same weapons which are prohibited in inter-state wars were also outlawed in internal conflicts.<sup>65</sup> Crucially, while the Tribunal's reasoning did include some references to relevant state practice, it based this finding primarily on 'elementary considerations of humanity and common sense' rather than on evidence of state consent.<sup>66</sup> In short, in this case, an international tribunal, created by an organ of an international organisation and tasked with prosecuting individuals, postulated the existence of legal obligations on the basis of what seemed more akin to natural law considerations than to positivist arguments of state will. This example demonstrates that international law can no longer be described as a mono-functional system designed to regulate the relations between states through norms emanating from their own will.

The overall picture of modern international law that emerges from these considerations is not so much one of sovereign states managing their coexistence through minimal legal rules, but rather of an *international community* which, through institutionalised structures of cooperation, works to achieve higher common aims.<sup>67</sup> Matters formerly considered part of the exclusive domestic competence of states are increasingly shaped by international law<sup>68</sup> and what is perhaps more

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<sup>64</sup> UNSC Res 827 (n 55).

<sup>65</sup> Prosecutor v Dusho Tadic aka "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, para 119.

<sup>66</sup> *ibid.*

<sup>67</sup> Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984, 299, para 111; Bruno Simma and Andreas Paulus, 'The "International Community": Facing the Challenges of Globalization' (1998) 9(2) European Journal of International Law 266, 276.

<sup>68</sup> Katja S Ziegler, 'Domaine Réservé' Max Planck Encyclopedia of Public International Law, (Oxford University Press 2008) <[www.mpepil.com](http://www.mpepil.com)> accessed 7 November 2021, paras 3-5.

important is that such international norms can no longer be reliably traced back to the will of the state concerned. The sovereignty of states, assumed by the PCIJ to be an absolute value preceding the law, has hence been relativised.

In light of this, commentators now increasingly adopt the view that the conceptual relationship between international law and the sovereignty of states should be reversed. In contradistinction to the PCIJ's statements in *Lotus*, they see the international legal order as the *source* of state sovereignty, rather than a mere limitation thereof. In this understanding, international law would not just impose limited restrictions on the pre-existing rights of states, but would rather provide the constitutive basis for state sovereignty to exist as a legal category in the first place.<sup>69</sup> As the contemporary edition of Oppenheim's textbook affirms:

[T]he rules of international law are the foundation upon which the rights of states rest, and no longer merely limitations upon states' rights [...] Although there are extensive areas in which international law accords to states a large degree of freedom of action [...] the freedom is derived from a legal right and not from an assertion of unlimited will.<sup>70</sup>

In a 2015 judgment, the UK Court of Appeal confirmed this to be the accurate understanding of the modern international legal system.<sup>71</sup> This reconceptualisation of international law as the foundation rather than a mere product of state sovereignty matters because it provides a theoretical explanation and justification for the existence of non-consensual norms of international law. As demonstrated, if states are imagined to enjoy absolute sovereignty—i.e., full independence and freedom of action<sup>72</sup>—then international law can only bind a state insofar as it has individually and voluntarily consented to such a norm. Any obligations not emanating from the state's own consent would violate its pre-legal

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<sup>69</sup> Mills (n 12) 193; Koskeniemi (n 2) 228 and 255 terms this the 'legal approach to sovereignty' as opposed to the PCIJ's 'pure fact approach'.

<sup>70</sup> Robert Jennings and Arthur Watts, *Oppenheim's International Law Volume 1: Peace* (9th edn, Oxford University Press 1992) 12.

<sup>71</sup> *Serdar Mohammed & Others v Secretary of State for Defence* [2015] EWCA (Civ) 843 [197].

<sup>72</sup> cf the definition of sovereignty provided by Max Huber in *Island of Palmas* (United States v The Netherlands), *Reports of International Arbitral Awards* Vol. II (1928), 829, at 838.

sovereignty. If, on the other hand, state sovereignty is conceptualised as being established through international law, then its content is naturally subject to the limitations provided by international legal norms. Consequently, where, for example, customary norms are deduced from the *collective* rather than the individual will of states, this can no longer be said to undermine the sovereign autonomy of those states that have not directly consented to these rules, as there simply is no such aprioristic, plenary state sovereignty. In this sense, the reconceptualisation in question lowers the threshold for establishing the existence of international norms, as the sovereign consent of a given state ceases to be an indispensable condition for holding this state to be bound by an international obligation. This relaxation of the unanimous state consent-requirement will become highly relevant in this article's later discussion of the law relating to state jurisdiction.

For now, it can be concluded that the state-centric voluntarism which had guided the PCIJ's formulation of the *Lotus* rule in 1927 is no longer an adequate—and certainly not a comprehensive—characterisation of today's international legal order. The next section will explore what this finding means for the status of the *Lotus* presumption in contemporary international law.

## **B. The continuing practical relevance of the *Lotus* presumption logic**

As has been illustrated, the theoretical underpinnings of the *Lotus* principle's initial articulation have become outdated. However, and crucially, this does not in itself imply that the more practical presumption of state freedom embodied in this principle has also become obsolete—the *derivation* of the *Lotus* theorem is not identical with the *content* of this rule. With this distinction in mind, this section will argue that the presumption that lies at the core of the *Lotus* approach is still valid today and is actually compatible with the trends presented in the previous section.

### *(1) Jurisprudence of the ICJ*

As a reminder, the *Lotus* presumption (or residual rule) provides that any state conduct is considered lawful unless it can be demonstrated to violate a prohibitive norm of international law. The implication is that the starting point for the determination of whether a given state action is lawful ought to be the search for an applicable international obligation. Where no such obligation can be

found, the default conclusion will be that the state has acted in accordance with international law—so long as there is no prohibition, a state is not required to demonstrate a permissive norm specifically allowing its behaviour.

From there, it can be shown that this presumptive logic underlies much of the jurisprudence of the ICJ.<sup>73</sup> Thus, when asked to rule on the legality of Norwegian coastal baselines in the 1951 *Fisheries Case*, the Court approached the issue in precisely the way outlined above: It queried not whether there was a rule of international law authorising Norway to fix its baselines in the way that it had, but rather whether there were any norms precluding such conduct.<sup>74</sup> Accordingly, in the *dispositif*, the Court's conclusion was that Norway's behaviour was 'not contrary to international law'.<sup>75</sup> Similarly, in the *Haya de la Torre Case*, the underlying issue was whether Colombia had a duty to surrender a refugee who had unlawfully been granted diplomatic asylum to the local Peruvian authorities. The Court observed that the applicable convention contained no definitive rules regulating this question. Rather than declaring the Colombian action of prolonging the asylum unlawful due to the lack of an international norm permitting such conduct, the majority went on to hold that the absence of specific legal rules 'cannot be interpreted as imposing an obligation'.<sup>76</sup> Consequently, it concluded that this matter was left to 'decisions inspired by considerations of convenience or of simple political expediency'.<sup>77</sup> In keeping with the permissive *Lotus* logic, the Court thereby equated a lack of an international prohibition or prescription with the freedom of states to act as they desired.

Another even more explicit endorsement of the *Lotus* approach can be found in the ICJ's *Nicaragua* judgment. On the question of the lawfulness of Nicaraguan militarisation, the Court declared that 'in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be

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<sup>73</sup> Koskenniemi (n 2) 256.; Prosper Weil, "The Court Cannot Conclude Definitively..." "Non Lique Revisited" (1998) 36 *Columbia Journal of Transnational Law* 109, 113.

<sup>74</sup> *Fisheries Case* (n 6) 132.

<sup>75</sup> *ibid* 143.

<sup>76</sup> *Haya de la Torre Case*, Judgment, I.C.J. Reports 1951, 71, at 80.

<sup>77</sup> *ibid* 81.

limited'.<sup>78</sup> Once again, absent an international rule to the contrary, the ICJ assumed that Nicaragua was at liberty to militarise and did not have to invoke an explicit norm entitling it to do so.

A more recent example which calls for a slightly more extensive discussion is the Court's 1996 *Nuclear Weapons* Advisory Opinion. In this opinion, the ICJ had declared that it 'cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence'.<sup>79</sup> These remarks were interpreted by many commentators as a finding of *non liquet*, that is, a situation in which there was a gap in the law which left the Court unable to decide the issue one way or another.<sup>80</sup> This, some scholars have gone on to assert, is incompatible with the *Lotus* residual principle: The latter, so the reasoning goes, precludes findings of *non liquet* as it dictates that any lacuna in international law be resolved in favour of states' freedom of action—the absence of a legal rule prohibiting the threat or use of nuclear weapons would, under *Lotus*, mean that such conduct is permitted.<sup>81</sup> And yet, these publicists argue, the Court left the matter undecided and did not default to the discretion of states to use atomic weapons, indicating a rejection of the *Lotus* presumption.<sup>82</sup>

While correctly characterising the *Lotus* residual rule in the abstract, the position that the ICJ's statements in *Nuclear Weapons* are incompatible with this residual logic seems to be based on an incomplete reading of the Advisory Opinion. The Court only refrained from adopting a clear position on the legality of using nuclear weapons *under extreme circumstances*. It did nonetheless hold that there were rules of international law—namely Article 2(4) of the UN Charter as well as the principles of humanitarian law—which generally prohibited the use of such weapons or the threat thereof.<sup>83</sup> The subsequent finding of a partial *non liquet*

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<sup>78</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Merits, Judgment, I.C.J. Reports 1986, 14, para 269.

<sup>79</sup> Nuclear Weapons (n 24) para 105.

<sup>80</sup> Martti Koskeniemi, "Case Analysis: Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons" (1997) 10 Leiden Journal of International Law 137, 142; Weil (n 74) 109.

<sup>81</sup> Dissenting Opinion of Judge Shahabuddeen in Nuclear Weapons (n 24) I.C.J. Reports 1996, 375, at 389.

<sup>82</sup> Handeyside (n 3) 88.

<sup>83</sup> Nuclear Weapons (n 24) para 105(2)(C) and (E).

resulted from the ICJ's inability to answer definitively whether, despite this general prohibition, extraordinary situations of self-defence could justify the threat or use of atomic weapons.<sup>84</sup> In other words, there were applicable rules of law covering the threat or use of nuclear weapons, and the decisive question to which there was no conclusive answer concerned the scope of the *exceptions* to these prohibitive rules. The crucial point, then, is that the finding of such norms which generally prohibit the threat or use of nuclear weapons displaces—and, in a way, reverses—the *Lotus* presumptive logic. *Lotus* assumes the lawfulness of state conduct unless it violates a prohibitive norm; but once an applicable prohibition *is* identified, the conduct in question is *prima facie* unlawful, *unless* a relevant exception to this prohibition can in turn be found. If such exceptions exist in the case of the prohibition of nuclear weapons, states would be entitled to use these weapons *by virtue of these limited justificatory exceptions*. Alternatively, if there are no such exceptions, the aforementioned prohibitions would apply, and states would be precluded from ever making use of their nuclear arsenals. In neither of these two cases is the recourse to the *Lotus* residual rule warranted, and therefore the ICJ's failure to definitively decide between the two is irrelevant for the present purposes. What matters is that the Court's refusal to make use of the *Lotus* principle for closing legal gaps did not amount to a rejection of this residual principle, because once a generally applicable prohibition had been found, there simply was no gap to be closed.

In fact, on a more basic level, the general approach that the ICJ adopted in answering the underlying question actually signalled support for the *Lotus* rule: Instead of searching for a norm entitling states to use nuclear weapons, the Court's starting point was the search for relevant prohibitions.<sup>85</sup> Thus, in a nod to the *Lotus* logic, the majority expressly remarked that 'the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition'.<sup>86</sup>

As has become apparent, throughout its case law—including in the *Nuclear Weapons* opinions—the ICJ subscribed to the *Lotus* approach when deciding on the

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<sup>84</sup> *ibid* paras 95-97.

<sup>85</sup> An Hertogen, 'Letting Lotus Bloom' (2015) 26 *European Journal of International Law* 901, 902.

<sup>86</sup> *Nuclear Weapons* (n 24) para 52.

lawfulness of state conduct. This may seem surprising considering that the Court has accepted—and at times even spearheaded—the key developments referred to above which now distinguish modern international law from the state-centric model underlying the PCIJ's *Lotus* dictum. As such, in its *Reparations for Injuries* Advisory Opinion, the legal personality of an international organisation (namely the UN) was authoritatively affirmed for the first time.<sup>87</sup> Moreover, in the 1971 *Namibia* Opinion, the ICJ reinforced the authority of the Security Council to adopt binding decisions.<sup>88</sup> Finally, dismissing a strictly positivist understanding of adjudication, the Court has acknowledged that considerations of justice can play a role in deciding cases before it through the gateway of general principles of international law.<sup>89</sup> In a sense, the ICJ seems to reject the theoretical assumptions on which the *Lotus* principle was initially predicated, but at the same time endorses the *Lotus* presumption of state freedom in its own jurisprudence. The following subsection will attempt to resolve this apparent contradiction in the Court's position.

## *(2) Reconciling Lotus with modern international law*

It has previously been shown that the *Lotus* principle was initially formulated with a state-centric, voluntarist model of international law in mind. This section will argue that the presumption of state freedom that lies at the heart of *Lotus* can nevertheless be conceptually divorced from these positivist origins and thereby reconciled with the structure of contemporary international law. In so doing, the continuing relevance of the *Lotus* approach that is reflected in the ICJ's jurisprudence will be defended.

Specifically, it is proposed that the *Lotus* presumption can be separated from the state-centric and voluntarist axioms to which it was originally connected. *Lotus* prescribes a permissive approach to assessing the legality of state conduct whereby such conduct is lawful unless an applicable prohibition is found. By

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<sup>87</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, 174, at 179.

<sup>88</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, 16, para 116.

<sup>89</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, 18, para 71.

contrast, when condensed to its core, this approach does not dictate *how* such prohibitions need to be derived. This most crucial point reveals how the *Lotus* doctrine can be reconciled with the emergence of non-consensual rules of international law: The starting point of the legal analysis continues to be the presumption that the given state conduct is lawful until it is found to contravene an international obligation; however, the *sources* from which such obligations are inferred can vary and might not necessarily involve the consent of states. To return to an example mentioned above, imagine a state which is accused of torture, but which has not ratified the Torture Convention, nor has it ever expressed any *opinio juris* in support of a customary prohibition of torture—in short, a state which cannot be said to have ever consented to such a prohibition. Under the permissiveness of *Lotus*, this state's policies would, like all state conduct, initially be presumed to be lawful. However, once these policies are confirmed to constitute torturous practices, the state could be found in violation of the international prohibition of torture, as the latter is considered a peremptory norm which binds all states without exception<sup>90</sup>. In this scenario, the behaviour in question would thus be held unlawful despite the lack of a legal obligation emanating from the affected state's sovereign will—and this would be perfectly consonant with the *Lotus* presumption, since the conduct is *first* considered lawful and is only deemed illegal once it is shown to breach the applicable *jus cogens* obligation.

Following this same pattern, it is equally possible to accommodate legal obligations developed by international organisations within the *Lotus* framework. Again, all that is required by the permissive logic of *Lotus* is that one searches for an applicable prohibition when assessing the lawfulness of state conduct, and that this conduct is assumed to be lawful if no such prohibition can be found. The sources on which one relies when looking for such prohibitive norms, on the other hand, are not directly defined by this presumptive principle. As such, while the *Lotus* theorem does stipulate that any state action be lawful until it can be shown to contravene an obligation, it does not prevent the derivation such obligations from, say, resolutions of the Security Council. By the same token, because the *Lotus* logic only requires that state action be lawful until it is demonstrated to violate a prohibition, but does not prescribe a specific source for

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<sup>90</sup> See above in n 49.



such prohibitions, it is also compatible with the view that state obligations may be established through judicial decisions. So long as the *in dubio pro libertate*-postulate governs scenarios in which no prohibition can be deduced from any of these sources, there is no contradiction with the *Lotus* rule. Accordingly, the *Lotus* approach does not stand in the way of the codification and progressive development of international norms by international courts and tribunals<sup>91</sup>. Considered in this light, the *Lotus* logic may still be upheld in today's international legal environment in which the normative value of decisions by courts and international organisations can hardly be denied, and *Lotus* does not necessarily have to imply excessive deference to state consent.

Additionally, this model even allows a reconciliation of the *Lotus* model with a possible recognition of natural law obligations. The presumed lawfulness of all state conduct remains the analytical starting point, while it is simultaneously granted that international norms entailing the unlawfulness of state conduct must not always be laid down as positive law but may also be inferred from moral values. If the lawfulness of the relevant state conduct continues to be the default rule applied in situations where no pertinent obligations can be found in either positive or natural law, this approach is consistent with the *Lotus* logic. This demonstrates that the validity of the *Lotus* presumption can be preserved even where positivism in the narrow sense—i.e., the exclusion of morality as a source of law—is rejected.

As becomes clear, the core *Lotus* presumption is in principle compatible with the emergence of norms in whose formation the sovereign will of states plays only a limited role or is potentially even entirely irrelevant. Once again, this approach was certainly not what the PCIJ had in mind at the time of its judgment, as it clearly linked the *Lotus* presumptive logic to a voluntarist model of international law. Yet, as shown, it is possible to abstract from these positivist origins by acknowledging that the sovereign consent of states has lost its monopoly on international law-making and by applying the *Lotus* rule *mutatis mutandis* to these present-day realities.

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<sup>91</sup> This criticism of *Lotus* was voiced by Judge Weeramantry, Dissenting opinion in Nuclear Weapons (n 24) I.C.J. Reports 1996, 429, at 495.

Furthermore, just as the presumption of state freedom does not predetermine the sources of international obligations, neither does it logically require the relevant legal rules to serve a particular *purpose*. Consequently, it is entirely conceivable that the unlawfulness of state conduct may stem from, for instance, a breach of an international human rights norm designed to protect individuals rather than to regulate the relations among states *inter se*. Here too, there is no incompatibility with the *Lotus* logic, so long as the given state act does not require prior authorisation, but is instead taken to be lawful unless it violates an applicable (human rights) obligation. As for the expansion of the corpus of international legal rules, this only takes from the *practical relevance* of the *Lotus* rule: Naturally, there are now fewer areas in which there is no applicable legal norm and in which the presumption of lawfulness would provide the residual answer. By contrast, this does not undermine the validity of the *Lotus* principle where such a situation *does* arise. Put differently, the greater density of international legal rules only means that the triggering of the *Lotus* residual rule is now less likely, but it does not imply that this principle has become legally obsolete.

It may of course be objected that if the *Lotus* principle is stripped of all its state-centric, voluntarist elements and is considered purely as an analytical presumptive rule, it bears so little resemblance to the original idea formulated by the PCIJ that it is misleading to continue referring to it as the '*Lotus* presumption'. Indeed, this very confusion about what the term '*Lotus* principle' denotes may well explain why, as pointed out in the introduction, scholars are so divided in their views about whether this principle is still valid today: Some commentators' primary association with *Lotus* may be about this rule's positivist theoretical origins which are now considered anachronistic, leading them to adopt an unfavourable position towards *Lotus* overall.<sup>92</sup> Others, however, seem to understand the *Lotus* principle primarily in terms of its quintessential presumptive content and therefore conclude that this rule is still valid.<sup>93</sup> This semantic ambivalence may also be the reason why the ICJ—which, as detailed above, clearly adheres to the *Lotus* presumption logic in practice—nevertheless seems reluctant to refer to the *Lotus* principle under this name,<sup>94</sup> as the Court may be

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<sup>92</sup> cf Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice* (Cambridge University Press 2004) 249.

<sup>93</sup> Alford (n 4) 203.

<sup>94</sup> Handeyside (n 3) 80.

looking to avoid direct connections with the positivist outlook of the PCIJ. In any case, this terminological confusion can be prevented by recognising that the presumption of state freedom can and should be dislocated from the conceptual underpinnings of its initial articulation and that, in this purified form, *Lotus* is compatible with the structure of contemporary international law.

In an article published in 1999, Bruno Simma and Andreas Paulus advanced an ‘enlightened version’ of international legal positivism.<sup>95</sup> They acknowledged that state consent is no longer the ultimate source of all international legal norms, but nonetheless stressed the importance of maintaining *some* canon of formal sources from which to derive the rules of international law.<sup>96</sup> Borrowing from their terminology, and in the wake of the foregoing considerations, the present article proposes and defends an ‘enlightened reading of the *Lotus* principle’: one which preserves the basic presumption of the lawfulness of state conduct, but which also recognises that the nature of international law has changed since the PCIJ’s dictum and integrates these structural shifts—and namely the emergence of legal sources beyond the sovereign will of states—into this presumptive logic. The next subsection will offer a brief normative defence of this ‘enlightened *Lotus* approach’.

### *(3) In defence of a modernised Lotus principle*

So far, it has been argued that the *Lotus* principle *can* be adapted to the modern realities of international law. On a more normative level, it is further proposed that this principle *should* continue to govern the legality of state conduct. The alternative to the permissive model of *Lotus* would consist in a prohibitive approach to international law, whereby states would require a positive authorisation for all of their behaviour. The *Lotus* presumption of lawfulness would thus be reversed, as state action would be presumed to be unlawful unless it could be based on a permissive rule of international law.<sup>97</sup>

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<sup>95</sup> Bruno Simma and Andreas Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts’ (1999) 93 American Journal of International Law 302, 303.

<sup>96</sup> *ibid* 307.

<sup>97</sup> Klabbers (n 1) 26.

This, however, is hardly a workable conception of the international legal system.<sup>98</sup> While great advances have been made in the codification of international norms, international law still cannot be said to regulate *ex-ante* all conceivable scenarios in which there may be a need for state action.<sup>99</sup> By implication, if international law was interpreted as a system which provides only limited permissions for certain state behaviour, this would prevent states from acting when they face a new problem. Imagine, for instance, a situation in which states are denied the right to adopt measures in response to an unexpected pandemic, on the grounds that no international norm had yet formed which specifically authorised such steps. States would thus be forced into inaction lest they violate international law.<sup>100</sup> Meanwhile, because supranational decision-making is still relatively undeveloped in the current international system,<sup>101</sup> international institutions would likely lack the legal and factual means to take states' place in effectively addressing the issue. Therefore, in this scenario, the prohibitive approach to international law would result in a considerable and undesirable limitation of the overall scope for policy action. Thus viewed, this prohibitive model would mean that in precisely those unforeseen and acute situations in which swift policy measures are particularly required, such measures would be unlikely to materialise as states would first have to await the emergence of a new permissive legal rule. It is plain that neither states themselves nor their respective citizenries would accept such a restrictive understanding of international lawfulness which would preclude policy action where it is most needed.<sup>102</sup>

These considerations illustrate that states, because of their factual potency in a system with relatively weak supranational decision-making structures, must retain the competence to react to novel circumstances and unprecedented challenges without awaiting prior authorisation. It therefore seems preferable to preserve the freedom of states to act as the default position until an international

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<sup>98</sup> cf Hertogen (n 86) 915.

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.*

<sup>101</sup> Achilles Skordas and Luke Dimitrios Spieker, 'Supranational Law' Max Planck Encyclopedia of Public International Law, (Oxford University Press 2008) <[www.mpepil.com](http://www.mpepil.com)> accessed 7 November 2021, para 79.

<sup>102</sup> Hertogen (n 86) 915.

obligation has formed. Importantly however, the modern conception of sovereignty outlined above means that this presumptive state freedom is derived from international law itself, rather than from a pre-legal state right. This, as pointed out, means that obligations which limit the freedom of states must no longer necessarily emanate from their own individual free will.

Having therefore formulated and defended an ‘enlightened version’ of the *Lotus* principle, the following section will be dedicated to testing the validity and explanatory power of this modernised *Lotus* approach by examining whether the international rules on state jurisdiction conform to this model.

### III. *LOTUS* AND THE EXERCISE OF STATE JURISDICTION

This section will first elucidate the generally accepted contours of the international law of jurisdiction, before inquiring into whether these principles reflect the ‘enlightened *Lotus* logic’.

#### A. The law relating to the exercise of state jurisdiction

For the present purposes, the concept of jurisdiction denotes a state’s entitlement to regulate the conduct of natural and judicial persons through its domestic laws.<sup>103</sup> This encompasses, on the one hand, the authority to pass legislation and to assert its applicability to defined situations (*prescriptive* or *legislative jurisdiction*); on the other, it also includes the competence to enforce these laws through executive actions such as police operations (*executive* or *enforcement jurisdiction*).<sup>104</sup>

With this in mind, the following tenets of the international law of jurisdiction can be identified. Enforcement jurisdiction is, by and large, territorial, meaning that states may not enforce their laws in the territory of another state except where the government of this foreign state has given its consent to such

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<sup>103</sup> Bruno Simma and Andreas Müller, ‘Exercise and Limits of Jurisdiction’ in James Crawford and Martti Koskeniemi (eds), *Cambridge Companion to International Law* (Cambridge University Press 2012) 135.

<sup>104</sup> Roger O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2000) 2 *Journal of International Criminal Justice* 735, 736.

action.<sup>105</sup> This prohibition was already articulated by the PCIJ itself in the *Lotus* decision.<sup>106</sup> On the point of enforcement jurisdiction, there is thus a great degree of normative continuity between the law as it currently stands and the principles articulated in *Lotus*. By contrast, the legal rules pertaining to prescriptive jurisdiction have changed fundamentally since the PCIJ's dictum. The Permanent Court had affirmed that states had a plenary right to exercise jurisdiction by virtue of their sovereignty, and that unlike in the domain of enforcement action, there were no rules of international law placing comprehensive restrictions on states' authority to extend the applicability of their laws to extraterritorial conduct.<sup>107</sup> Today, however, in line with what two dissenting judges had already proposed in the *Lotus* case,<sup>108</sup> it is generally accepted that the exercise of prescriptive jurisdiction is only lawful if there is a recognised jurisdictional head linking the state to the activity in question.<sup>109</sup> Naturally, a state has plenary jurisdiction to regulate affairs within its own territory; beyond this, international law allows for nationality and, more controversially, a state's essential security interests, as well as the notion of universal jurisdiction as grounds for exercising extraterritorial prescriptive jurisdiction.<sup>110</sup> What matters in the present context is not so much the extent to which these different jurisdictional links are truly recognised in international law, but rather the requirement that the exercise of prescriptive jurisdiction needs to be based on an permissive title in the first place. This restrictiveness seems to conflict with the (enlightened) *Lotus* approach to international law, as the latter would suggest that states may exercise jurisdiction as they please, so long as they do not thereby contravene any prohibitive norms. The next section will thus discuss whether the contemporary law on prescriptive jurisdiction amounts to a refutation of the *Lotus* principle.

### Is the law on prescriptive jurisdiction compatible with the *Lotus* logic?

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<sup>105</sup> Mills (n 12) 195.

<sup>106</sup> *Lotus* (n 7) 18.

<sup>107</sup> *ibid* 19.

<sup>108</sup> Dissenting Opinion of Judge Weiss in *Lotus* (n 7) at 42; Dissenting Opinion of Judge Finlay in *Lotus* (n 7) at 52.

<sup>109</sup> Simma/Müller (n 104) 137; Hovell (n 36) 438.

<sup>110</sup> James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 442-447 and 451.

On the basis of the jurisprudence of the ICJ, it has been shown that a general reversal of the permissive *Lotus* model—i.e., an approach in which any state behaviour would require an international authorisation—does not correspond to the current state of international law. Nevertheless, if it is indeed the case that the exercise of prescriptive jurisdiction does not violate a prohibitive rule of international law but still needs to be based on a permissive title, then this would mean that, in the domain of jurisdiction, the *Lotus* principle is no longer valid.<sup>111</sup>

Upon closer examination however, the restriction of states' freedom to exercise jurisdiction does take the form of a prohibitive rule. That is because, as a matter of deontic logic, there is simply no difference between an *authorisation requirement* and a *prohibition of unauthorised conduct*. The point and function of a legal authorisation is that it allows behaviour which, failing such an authorisation, would not be permitted—i.e., prohibited. By this logic, if international law allows certain state action only under specific conditions, it thereby necessarily prohibits this action in cases where these conditions are not met—these aspects are the two proverbial sides of the same coin. Viewed in this way, the legal requirement to base jurisdictional assertions on a permissive title is indistinguishable from a *prohibition* of exercises of jurisdiction where there is no such recognised title. Mills himself seems to acknowledge this somewhat trivial yet highly relevant point when he notes that '[t]he rules of international jurisdiction authorise an exercise of regulatory authority in limited and defined circumstances—an authorisation which can only be necessary because a regulatory act would be prohibited in its absence'.<sup>112</sup> Ryngaert, in his comprehensive monograph on jurisdiction, also formulates the issue in terms of a prohibitive rule: 'Under customary international law [...] extraterritorial prescriptive jurisdiction is prohibited in the absence of a permissive rule.'<sup>113</sup>

The US Restatements of Foreign Relations Law provide further support for this equivalence between the authorisation requirement and the prohibition of non-authorised prescriptive jurisdiction. While the Second (1965) and Fourth (2018) Restatements suggest that the power to exercise prescriptive jurisdiction

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<sup>111</sup> As argued by Mills (n 12) 199.

<sup>112</sup> *ibid* 193 (emphasis added).

<sup>113</sup> Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2008) 39.

needs to be specifically attributed to states by customary international law,<sup>114</sup> the Third (1987) edition instead assumed that international law places limitations on a state's inherent authority to prescribe<sup>115</sup>. The fact that no explanation is provided for this back and forth between the two approaches indicates that there is no real substantive difference between them: The need for an international permission to exercise jurisdiction and the prohibition of non-authorised jurisdiction are merely two different ways of framing the relevant law.

Now, if the requirement for a permissive title to prescriptive jurisdiction is but the logical flipside of a customary norm prohibiting the unauthorised exercise of such competences, then there no longer is an inconsistency with the *Lotus* rule:<sup>116</sup> the latter precisely entails that the freedom of states can only be restricted through prohibitive norms, and this condition is fulfilled in the field of jurisdiction. In this sense, the law relating to the exercise of prescriptive state authority does not refute the *Lotus* presumptive approach—it is simply another area in which the presumption of lawfulness of state conduct is overturned once a prohibitive rule is found to exist, and here the relevant prohibition is the one which precludes those exercises of prescriptive jurisdiction which cannot be based on an accepted permissive title. The basic approach that the legality of state conduct is assessed in terms of applicable prohibitions has thus remained intact. What has changed since the 1927 *Lotus* decision is just that, unlike at the time of this judgment, there now is a comprehensive prohibition of (unauthorised) jurisdictional assertions.

Thus understood, a domain-specific authorisation requirement does not imply an inconsistency with the *Lotus* presumption. Such authorisation requirements can always be viewed as the expression of a corresponding prohibition of unauthorised behaviour in this particular field, with this prohibition in turn being a limited exception to states' presumptive freedom. A genuine reversal of the *Lotus* principle would only be realised if this freedom of action

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<sup>114</sup> Restatement (Second) of the Foreign Relations Law of the United States (1965), §6; Restatement (Fourth) of the Foreign Relations Law of the United States (2018), §407.

<sup>115</sup> Restatement (Third) of the Foreign Relations Law of the United States (1987), §401. See also Kathleen Hixson, 'Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States' (1988) 12 Fordham International Law Journal 127, 131.

<sup>116</sup> cf Ryngaert (n 114) 39.



would cease to be the default position of states in international law overall. One possible way in which this could come about in the future would be that supranational entities are entrusted with ever greater competences, such that supranational decision-making becomes the rule and state rights the exception that requires a specific authorisation. This inversion of the attributed powers-logic<sup>117</sup> across all areas of international law would truly invalidate the *Lotus* rule, including its ‘enlightened’ reading. For the time being, however, states still enjoy this presumptive freedom to act, and the fact that they must invoke a permissive title in the limited domain of prescriptive jurisdiction does not fundamentally challenge the validity of *Lotus*.

Nevertheless, short of amounting to a refutation of the *Lotus* presumption, what is embodied in the international law on prescriptive jurisdiction is the possibility of international obligations which can only scarcely be traced back to state consent. The shift towards a model which recognises a limited number of authorising principles for exercising prescriptive jurisdiction is commonly traced back to the 1935 Harvard Research Draft Convention on Jurisdiction with Respect to Crime.<sup>118</sup> Yet this scholarly document, which endorsed the principle that states must base the extraterritorial projection of their laws on a permissive title of international law, never materialised into a treaty.<sup>119</sup> By the conventional standard, this work alone would certainly not constitute enough evidence to establish the existence of a customary obligation. Beyond this one central element however, there have only been cursory references to relevant state practice and *opinio juris* among publicists affirming that prescriptive jurisdiction may only be exercised where there is a recognised jurisdictional link.<sup>120</sup> And yet, the existence of this rule is no longer questioned in practice.<sup>121</sup> Thus, it seems that the prohibition of non—authorised exercises of prescriptive jurisdiction has *de facto*

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<sup>117</sup> See above in n 59.

<sup>118</sup> Dan Jerker B Svantesson, ‘A New Jurisprudential Framework for Jurisdiction’ (2015)

109 *American Journal of International Law* 69, 69.

<sup>119</sup> Ryngaert (n 114) 39.

<sup>120</sup> *ibid*; Michael Akehurst, ‘Jurisdiction in International Law’ (1972) 46 *British Yearbook of International Law* 145, 167; Curtis A Bradley, ‘Universal Jurisdiction and U.S. Law’ (2001) 16 *University of Chicago Legal Forum* 323, 323.

<sup>121</sup> Ryngaert (n 114) 33; Mills (n 12) 194.

formed primarily through scholarly and judicial assertions of its existence<sup>122</sup>, rather than on the basis of sufficiently widespread practices and opinions among states as required by the traditional standard.<sup>123</sup>

This, in turn, is indicative of the broader relativisation of state consent in the process of international law-making: Under the modernised conception of international law as the foundation of state sovereignty rather than a product thereof, legal obligations must no longer always be based on the consent of states. It is instead conceptually possible that, in the formation of a norm of international law, states and their sovereignty play only a secondary role, while other sources, like judicial decisions and scholarly writings, are of greater importance. If the rule that exercises of prescriptive jurisdiction require a permissive legal title, and are unlawful in the absence of such a title, is precisely one such example of a norm which has developed despite insufficient evidence of its acceptance by states.

On this account, it is submitted that the international rules on prescriptive jurisdiction are best explained through the lens of the ‘enlightened *Lotus* principle’ proposed by the present contribution. The reason why a state which asserts prescriptive jurisdiction has to rely on a permissive legal principle is not that there has been a general reversal of the presumption of state freedom, but rather that there is a customary *prohibition* of prescriptive jurisdiction absent a permissive basis—to that extent, this is compatible with the *Lotus* doctrine. On the other hand, the way this prohibition has emerged testifies to the attenuation of the sovereign consent requirement in international law. The law relating to the exercise of prescriptive jurisdiction thus reflects and summarises this article’s quintessential argument: that the lawfulness of state acts still needs to be assessed in terms of whether these acts contravene a prohibitive norm; but that the methods for establishing the existence of such prohibitions have diversified and moved away from the state-centric voluntarism on which *Lotus* was initially based.

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<sup>122</sup> See Separate Opinion of Sir Gerald Fitzmaurice in *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, 64, at 103-105; Separate Opinion of President Guillaume in *Arrest Warrant* (n 5) I.C.J. Reports 2002, 35, at 37.

<sup>123</sup> On the general phenomenon of courts asserting customary law rather than deducing it from state practice, see Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology and the Idyllic World of the ILC’ (2015) 26 *European Journal of International Law* 417, 441.

## CONCLUSION

The results of the foregoing discussions can be summed up along two strands of arguments. First, the PCIJ's initial formulation of the presumption of state freedom in the *Lotus* case was based on a voluntarist and state-centric outlook on international law. This perspective has been invalidated by the structural shifts that have since occurred: The subjects of international law have multiplied, and norms have emerged whose *source* is not reducible to state consent and whose *purpose* lies in protecting individuals rather than merely regulating inter-state relations. This latter point refers back to the introductory issue of this article, i.e., the question of the basic function of a legal order. Under the classical positivist view, international law would serve as a mere instrument of state interests. Nowadays, however, the international legal order is increasingly considered to provide the constitutive basis for the sovereignty of states, rather than vice versa. This allows international law to serve a more autonomous function, namely the promotion of humanitarian objectives.

Conversely, this contribution's second main thesis has been that these changes in international law have not gone so far as to overturn the *Lotus* presumption. The latter merely assumes state conduct as lawful until an applicable prohibitive rule is found, but it does not demand that such prohibitions stem from a particular source or serve a pre-defined purpose. As such, in this 'enlightened' understanding, the *Lotus* principle is compatible with the rise of individual-oriented and non-consensual norms in international law, including with the modern rules on state jurisdiction.

The overarching conclusion that brings together these two core findings, then, is that progress in international law is not precluded by the continued application of the *Lotus* rule. Since 1945, the institutionalisation of international relations,<sup>124</sup> as well as the formulation of individual human rights, have been possible within the framework provided by *Lotus*. In this manner, the *Lotus* presumption of state freedom has accompanied the progressive development of international law. It is both desirable and likely that the *Lotus* principle and the

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<sup>124</sup> Crawford (n 111) 6.

furtherance of international law's normative aspirations will continue to go hand in hand in the future.