Comment: neither Sunken Vessel nor Blooming Flower! The Lotus Principle and International Humanitarian Law

Pia Hesse

A. Introduction

The *Lotus* case of the PCIJ is one of the most cited cases in international law. Formulating the voluntarist paradigm with international law as rules emanating from the free will of independent States, *Lotus* serves as an important point of reference for deliberations on legal positivism. From the appraisal that it is State consent that gives international law its binding force, the Court infers that

> … [t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[1]

This *Lotus* formula is often invoked as a meta-concept attesting international law a prohibitive nature and thereby reflecting a rigid positivist approach to international law. In their paper, *Katja Schöberl* and *Linus Mührel* essentially analyse the relevance of this concept to IHL.

In this comment, I argue that this frequently referenced passage of the PCIJ's case cannot be read in isolation, but must rather be understood in its context. In this way, the *Lotus* principle loses its significance as a doctrine to explain the nature of international law as a whole. To use *Katja Schöberl's* and *Linus Mührel's* words: The flower is not in full bloom, but it is much more than a sunken vessel. The *Lotus* formula is part of the PCIJ's more detailed elaborations on the broader question of jurisdiction in international law. Its relevance thus spans beyond the single case of the collision between a French and a Turkish steamer back in 1926. In fact, jurisdiction is the gist of the *Lotus* case. Understanding the *Lotus* formula

1 The Case of the S.S. "Lotus" (*France v Turkey*) [1927] PCIJ Series A No 10, para 44 (hereafter '*The Case of the SS Lotus*').

https://doi.org/10.5771/9783845289557-80 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

cited above as one statement of the Court's larger deliberations on jurisdiction, this comment claims that the *Lotus* formula is not readily applicable to IHL.

As a first step, I will turn to the international law on jurisdiction in more general terms. On this basis, I will then demonstrate how it relates to IHL and thereby underpin my assertion that *Lotus* is not apt to determine the nature of IHL.

B. The International Law on Jurisdiction

International law on jurisdiction is a vast field. It is basically a procedural mechanism to determine the application *ratione loci* of different substantive regulations.[2] In 1927, when the PCIJ was asked to resolve the dispute between the French and the Turkish government, substantive regulations were predominantly found in the domestic legal orders of States. In a decentralised international system of independent States, the key role of international law was to delimit spheres of competence between co-existing States. The substantive legal framework to then govern the given situation was the domestic law of the competent State. International law as a legal order performing a task of co-ordination between sovereign States: This was 'the spirit of the times'[3] and this is the image of international law adopted by the PCIJ in the *Lotus* case.

The question the PCIJ was confronted with was whether States actually need to 'point to some title *to* jurisdiction'[4] or whether States are free to exercise jurisdiction unless there is a rule of international law prohibiting it[5]. The exercise of jurisdiction can be performed by prescribing rules, or by enforcing these rules either through the executive branch or through courts. Here, and this is central to this comment, it is essential to make a differentiation. There is a distinction between the rules that are prescribed or enforced and the rules that provide the authorisation to prescribe or

---

2 Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 2 (hereafter 'Ryngaert, *Jurisdiction*').

3 Declaration of President Bedjaoui in Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para 12 (hereafter 'Declaration Judge Bedjaoui').

4 This was the position of the French Government in the *Lotus* case, see *The Case of the SS Lotus* (n 1) para 41; emphasis added.

5 The position of the Turkish Government in the *Lotus* case, ibid.

https://doi.org/10.5771/9783845289557-80 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

enforce – the title 'to' jurisdiction. Whereas the former usually is found among domestic laws of States, the latter is one of international law. The *Lotus* formula, however, exclusively refers to the latter type of rules – those granting or not granting a title to jurisdiction.

International law on jurisdiction thus aims at demarcating the fields of competence between sovereign States and, thereby, at reducing conflicts between them.[6] As a consequence, the decision of the PCIJ that is put in a nutshell by the above cited *Lotus* formula can, originally, only apply to international rules concerning the 'if' of the exercise of jurisdiction by States in their international relations. The essential phrase supposedly explaining the nature of international law, '[r]estrictions upon the independence of States cannot therefore be presumed', is to be taken as meaning '[r]estrictions upon the exercise of jurisdiction by States cannot therefore be presumed'.

However, this statement, reflecting the consent theory underlying the positivist paradigm, is only half of the truth. The PCIJ made a distinction between different forms of exercising jurisdiction and established different relationships of rules and exceptions for them. Whereas States are generally free, if not restrained by a prohibitive rule of international law, to prescribe rules (prescriptive jurisdiction) even concerning situations and persons outside their territorial boundaries, the enforcement of its rules (enforcement jurisdiction) using coercive power in another State's territory is generally prohibited, unless a permissive rule to the contrary exists.[7] The international law of jurisdiction, however, has since developed and other principles have emerged, especially under customary international law.[8] But these need not be further elaborated here, as international law of jurisdiction is not the topic of this comment. This brief digression served only to demonstrate that the *Lotus* formula first and foremost is concerned with international jurisdiction and that the PCIJ in its decision adopted a view that regards international law as inter-State law, a system that operates in the horizontal dimension, regulating the relationship between independent entities.[9]

---

6 John E. Ferry, 'Towards Completing the Charm: The Woodpulp Judgment' (1989) 10 European Competition Law Review 58.

7 *The Case of the SS Lotus* (n 1) para 45.

8 See Ryngaert, *Jurisdiction* (n 2).

9 Roman Kwiecien, 'On Some Contemporary Challenges to Statehood in the International Legal Order: International Law Between Lotus and Global Administrative Law' (2013) 51 Archiv des Völkerrechts 281.

https://doi.org/10.5771/9783845289557-80 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

IHL, however, is the best illustration of the fact that international law is more than inter-State law, which, at the same time, disqualifies it from being subject to the *Lotus* doctrine.

C. The International Law on Jurisdiction and International Humanitarian Law

As has been shown, an allocation of competence by the law of international jurisdiction determines a State's scope of action and, as a corollary, the scope of application *ratione loci* of its laws. How does IHL relate to this differentiation between rules of international law that provide the ground of jurisdiction and a State's rules that are prescribed or enforced in exercising that jurisdiction?

As *Katja Schöberl* and *Linus Mührel* point out, IHL 'constitutes a distinct body of law with several specificities'. IHL's particularity within the international legal order also becomes evident when compared to international law on jurisdiction. IHL is an example of successful substantivism[10] and, as such, is quite the opposite of an instrument of co-ordination. IHL does not allocate competences in the sense of *Lotus,* but it presents a branch of international law that regulates a particular subject matter in substantive terms – the means and methods of warfare. This, of course, is due to the fact that, traditionally, the nature of the object of regulation of IHL – war – had a purely international character. As IHL is the applicable law to armed conflict in substantive terms, there is no need to (1) determine the competent State that then (2) applies its laws to the situation. The applicable substantive law can be found in international law itself, in IHL. Put bluntly, there is no room for *Lotus*. Whereas the law of jurisdiction is a procedural mechanism managing action of independent States within a decentralised system, IHL is a branch of international law providing for substantive regulation of a subject matter in a centralised manner. *Lotus* and international jurisdiction are concerned with territoriality and sovereignty. Non-State values, like the protection of those not participating in hostilities as is the case for IHL, are not addressed.

Katja Schöberl and *Linus Mührel* put forward the example of the alleged Taliban fighter *Serdar Mohammed* to accentuate the necessity of either

10 Cedric Ryngaert, 'The Limits of Substantive International Economic Law: In Support of Reasonable Extraterritorial Jurisdiction' in Bert Keirsbilck et al (eds), *Facing the Limits of the Law* (Springer 2009) 242.

https://doi.org/10.5771/9783845289557-80 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

'fill[ing] possible gaps in positive law' or alternatively determining the nature of IHL in order to be able to make sense of perceived gaps in positive law. This case provoked the debate about whether IHL provided for an authorisation to detain in NIACs and, as a consequence, evoked a debate about the nature of IHL itself.

Seen through the *Lotus* lens, the detention of *Serdar Mohammed* in Afghanistan carried out by the British armed forces in 2010 was an exercise of extraterritorial enforcement jurisdiction. Of course, this exercise of jurisdiction required an international principle of law to allow for this otherwise unlawful violation of Afghanistan's territorial integrity. The international principle of law, here, is the legal basis for the UK's overall military engagement in Afghanistan (initially the right of collective self-defence in support of the US, later the resolution of the UN SC mandating ISAF). However, the authorisation of foreign States was not required in order to identify the domestic law applicable to govern the situation, as international law itself provides for the substantive laws for situations of armed conflicts: IHL. As mentioned above, *Lotus* does not say anything about the actual exercise of jurisdiction by a State; rather, it concerns the permission/prohibition to exercise jurisdiction in the first place. Once the sovereignty hurdle has been overcome, here in the form of *jus ad bellum* norms, the *Lotus* principle is satisfied. The next step, namely the question of which law governs this exercise of jurisdiction, is based on other considerations, especially on those inherent to IHL, as offered by the humanitarian-law-specific approach of *Katja Schöberl* and *Linus Mührel*.

D. Conclusion

When claims are made that the *Lotus* principle is outdated as it is reflective of 'the spirit of an international society which as yet had few institutions and was governed by an international law of strict co-existence, itself a reflection of the vigour of the principle of State sovereignty',[11] I agree. I do not agree, though, that this is the reason why *Lotus* is unable to explain the nature of IHL. Whether Lotus is still the leading doctrine to regulate international jurisdiction or not is not of concern to this comment. The important finding is rather that this was its initial purpose. As shown above, the rule that '[r]estrictions … cannot therefore be presumed' only applies to those international laws that qualify as rules allocating competences

11 Declaration Judge Bedjaoui (n 3) para 12.

https://doi.org/10.5771/9783845289557-80 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

between States. IHL does not qualify as such. It is true that the distinction between the two categories of rules established above is not always easily made. In fact, rules of international law may, at the same time, contain coordinating elements determining the State that is competent to exercise power, and are thus to be categorised as principles of international law within the meaning of *Lotus* on the one hand, and, on the other hand, may contain substantive elements that are applied by the State in the execution of its jurisdiction. IHL, however, clearly pertains to the second set of rules, which is also mirrored in the strict dichotomy of the *jus ad bellum* and the *jus in bello.*

When claims are made 'that international humanitarian law is mainly restrictive in nature, … meaning that belligerent conduct is permitted if not prohibited by law', I agree. I do not agree, though, that this is so because IHL, as a branch of international law, follows the logic of *Lotus.* As elaborated above, the *Lotus* formula provides the starting point in the law of international jurisdiction. As such, it has a meaning beyond the specific case before the PCIJ. It is more than the sunken vessel in the Mediterranean Sea. However, it does not serve to explain the nature of all international law. Especially developments discussed under the catchwords 'institutionalisation', 'integration', and 'globalisation', that advance the shift from an international society of co-existence to one of co-operation, prevent *Lotus* from coming to full bloom. The legal order increasingly emerges from one of allocating competences between independent States to one addressing global phenomena in substantive terms.

This, of course, is not to say that the question about the nature of IHL as either permissive or restrictive as *Katja Schöberl* and *Linus Mührel* raise it, is irrelevant. Exactly the opposite is true. But the answer to this question cannot be drawn from the *Lotus* doctrine. For this reason, *Katja Schöberl's* and *Linus Mührel's* analysis of the norm structure of IHL provides a very important contribution to the academic discourse on the topic.

https://doi.org/10.5771/9783845289557-80 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

https://doi.org/10.5771/9783845289557-80 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY