

## COMPARATIVE CASE ANALYSIS OF CUSTOMARY INTERNATIONAL LAW

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### INTRODUCTION

Customary International Law is a source of international Law containing specific rules that originated from a general practice that has been accepted for a long time by states and eventually accepted as a law by many states. Article 38(1)(b) of the International Court of Justice lays down customary International Law and general principles of Law as the essential international law source. As these are unwritten rules and implied consent of the State is considered, this gives the binding force to this Law.

Time and again, the International Court has played a significant role in highlighting Customary International Law through various cases before PCIJ. Here, I will analyze three important cases by comparing the approach adopted by the International Court in determining the existence of Customary International law.

### THE CASE OF S.S. LOTUS (FRANCE V. TURKEY) 1927<sup>1</sup>

#### Facts and principles involved in this Case

The two states which are France and Turkey raised the question of jurisdiction before the International Court, which arose due to the collision on the high seas on 2nd August 1926 between the two ships 'BOZ-KOURT' and 'LOTUS' which resulted in the death of many passengers in Turkish ship (Boz-Kourt).

The Turkish Government started the criminal Trial of French ship officer 'Demon', prosecuting him for manslaughter without informing the French Government. Eventually, France came to know about this act from the Turkish Government and declared it a violation of international Law. France protested the act of the Turkish Government, stating that Turkey does not have the jurisdiction to run a criminal trial and is strictly violating the principles of international Law. This action is discriminatory, considering the French Ship helped and saved the Boz-Kourt passengers in that tragic situation.

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<sup>1</sup> The Case of the S.S. Lotus (France v Turkey) (1927) PCIJ (Ser A) No. 10.

Eventually, the Turkish Government declared that it would have no objection if this question of jurisdiction went to PCIJ. Both states signed a special agreement, and the Case reached the Permanent Court of International Justice.

French government stated before the court that by Lausanne Convention, 1923 and the principles of International Law, jurisdiction to entertain any criminal proceedings against the French Officer in the ship, in connection to the collision that occurred on the High seas between 'Boz-Kourt' and 'Lotus' rests exclusively to the French Courts<sup>2</sup>. The Turkish Government simply asks the Court to grant the jurisdiction as Turkey passengers suffered the loss. The French Government added to their argument that if navigation regulations are breached, the jurisdiction will lie with the State whose ship has that State's flag.

### **Findings of the Court about Customary International Law**

The PCIJ, in this case, laid down certain principles that came to be known as Lotus principles. These principles originated from listening to the arguments made by France and Turkey while justifying the question of jurisdiction.

Are the criminal proceedings exclusively within the jurisdiction of the State whose flag is flown? About this question, the PCIJ concluded that:

"This could only be overcome if it were shown that there was a rule of customary international Law which, going further than the principle stated above, established the exclusive jurisdiction of the State whose flag was flown. The French Government has endeavoured to prove the existence of such a rule. Lausanne conventions relate to matters of a particular kind, closely connected with the policing of the seas, such as the slave trade, damage to submarine cables, fisheries, etc., and not to common-law offences. In this sense, jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by a permissive rule derived from international custom or a convention"<sup>3</sup>.

"The conclusion at which the Court has therefore arrived is that there is no rule of international Law regarding collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown. The offence for which Lieutenant Demons appears to have been prosecuted was an act of negligence or imprudence having its origin on board the

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<sup>2</sup> WORLDCOURTS, [https://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus.htm](https://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm) ( 3rd Mar. 2024)

<sup>3</sup> WORLDCOURTS, [https://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus.htm](https://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm) ( 3rd Mar. 2024)

Lotus, whilst its effects made themselves felt on board the *Boz-Kourt*. These two elements are legally inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either State nor the limitations on the jurisdiction of each to the occurrences that took place on the respective ships would appear calculated to satisfy the requirements of Justice and effectively protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and do so concerning the incident. It is, therefore, a case of concurrent jurisdiction"<sup>4</sup>.

### **UNITED KINGDOM V. NORWAY, 1951<sup>5</sup>**

U.K. v. Norway, 1951 is the Case also known as the "Anglo Norwegian Fisheries Case". In this case, the Court was asked to decide the dispute that arose between Norway and the U.K. regarding the territorial area, basically the fisheries zone; in this case, Analysis, we will not analyze all aspects of this Case. Instead, we will focus on determining customary international Law by the International Court of Justice.

#### **Facts and Principles Involved in this Case**

The Norwegian Sea coast has a large number of bays, islands, and hills, and most of the residents earn their livelihood by fishing there. The economy of Norway is also entirely dependent on the Norwegian Sea, which is why the Norwegian Government invariably prohibits fishermen from other countries from coming there for fishing. One fine day, British fishermen entered there for fishing, and eventually, they were arrested by the Norwegian Government. Norway declared this an illegal act by issuing a decree against them. U.K. They opposed this decree, contending that Norway had a limited fisheries zone and could not arrest the British fishermen.

The United Kingdom opposed the decree and the method of measurement used by Norway to identify the fisheries zones in the International Court of Justice by raising the question of whether customary international Law would apply in this Case.

#### **Findings of the Court about Customary International Law**

The International Court, in this case, held that "consistent and sufficiently long practice was taking place without any objection to the practice from other states before this dispute; this

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<sup>4</sup> S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

<sup>5</sup> *Fisheries* (United Kingdom v Norway), [1951] ICJ Rep 116.

indicates that these states did not consider the Norwegian system to be contrary to international law"<sup>6</sup>. Thus, in this case, the Court concluded that this method of identifying the Norwegian coast was used for a long time, nearly around sixty years, and it can be seen that the U.K. itself had never contested this practice and thus can be called a 'Long practice' and therefore it is not at all contrary to customary international Law.

The judgment was rendered in favour of Norway on 18th December 1951; the Court held that Norway's use of the decree to identify fisheries zones was not contrary to international Law.

### **NORTH SEA CONTINENTAL SHELF CASE, 1969<sup>7</sup>**

This Case is the best Case to explain that international Law has been based on customary international Law; the exciting thing about customary Law is that once it is recognized, it is binding on all countries. The International Court dealt with this Case in 1969; this Case was all about the delimitation of the continental shelf in the North Sea, which is rich in oil and gas. The Case started as two separate cases involving Germany against Denmark and Germany against the Netherlands, but the Court found Denmark and Netherlands to be in the same interest. Joint proceedings were held in both cases, and a single judgment came.

#### **Facts and Principles involved in this Case**

Denmark and Netherlands stood against Germany for the disputed question of owning the North Sea Continental Shel; they filed the Case in the international Court to determine who owned the North Sea Continental Shel; The international Court joined the Case, and their joint proceedings were held in the International Court of Justice. Denmark and Netherlands proposed using the method of 'equidistance', which means that each country would claim all the areas closest to them." they claimed that the Geneva Convention supported this method and was a well-known rule of international Law. Germany opposed this method of equidistance for claiming the area. They argued in the International Court that the size of each country's adjacent land should be considered while claiming the area of the North Sea Continental Shelf, and additionally, they argued that Germany had not agreed to the Geneva Convention; therefore, that cannot be binding on Germany.

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<sup>6</sup> Anglo Norwegian Fisheries Case by Jessamine Orioque

<sup>7</sup> North Sea Continental Cases“(Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands), [1969] ICJ Rep 3.

The Case sets out the requirements for the formation of customary international Law because the main issue, in this case, was whether Germany is under a compulsion to follow the "equidistance" proposed by the party in this, Case which were Denmark and the Netherlands. Contained in the Geneva Convention's Article 6, should Germany accept it as customary international Law or not?

### **Findings of the Court about Customary International Law**

Netherlands and Denmark argued before the International Court of Justice that Article 6 is considered an accepted rule of international Law about Continental Shelf delimitation. It exists independently, and the condition is not required to agree to the Geneva Convention. Article 6 is binding on the country even if they have not agreed to the Geneva Convention.

The Court, in this case, held that the "equidistance" principle is not binding on Germany by customary international Law, "as this principle has not attained the customary international law status when written down in Geneva Convention or anytime thereafter, the basis of customary international law is that it is followed and recognized by many states from a long time, without any opposition". Therefore, the international Court held in this joint proceeding that the use of the equidistance method is not an obligation on any state for delimitation of the areas concerned, which in this case was the North Sea Continental Shelf.

### **Comparison and Analysis of the Approach of the International Court in determining the Customary International Law in the above three cases**

Different approaches have been taken by the International Court of Justice while determining Customary International Law in the S.S. Lotus, Fisheries case and the North Sea Continental Shelf case.

In the Lotus case, it was held that a nation cannot exercise its jurisdiction outside its border/territory unless they are authorized to do so by way of international treaty or customary Law. Still, in the Anglo-Norway Fisheries case, the same Court held that in exceptional circumstances, a state could exercise its jurisdiction by moving away from the expected baseline to determine its territorial waters. Additionally, in the North Sea continental Shelf case, the Court made out that the equidistance principle, although accepted by many countries now, cannot be called customary international Law. These three judgments are not in line with

each other; the International Court changed its stance from time to time and as per the facts and circumstances.

As we have discovered by analyzing each Case separately, all three cases revolve around customary international Law, but the approach of international courts when dealing with these cases differs. S.S. Lotus case emphasized the principle that a state has to abide by the customary international Law; in the absence of customary Law, the State has full sovereignty to act, but the practice should not be prohibited; this is the reason why, in this case, concurrent jurisdiction was given. But if we this with the other two cases, The Fisheries case emphasizes the role of state practice in determining the customary international Law; if the practice is followed for a long time, then suddenly, a state cannot challenge it, as in this Casework done by the United Kingdom. Compared with the North Sea Continental Shelf case, this Court laid down that the existence of a rule of customary international Law requires a settled practice together with opinion juris<sup>8</sup> and the importance of equity and fairness in developing customary international Law.

Let's compare the approach of the International Court further. We will find that in S.S. Lotus, the Court focused on the three principles, now called Lotus principles, thereby holding that this is a case of concurrent jurisdiction. In contrast, the Fisheries case emphasized the practice of customary international Law.

All three cases contributed to the development of customary international Law. But the prime difference is the approach of the International Court in determining it; if we deeply analyze, we will find that the S.S. Lotus case is of 1927, decided by the Permanent Court of International Justice, while the International Court of Justice heard the other two cases. As we can gather, S.S. Lotus is the oldest Case compared to the other two cases; therefore, we can see that the Law back then was wholly dependent on customary practice, and in the absence of customary practice, a state has full sovereignty.

North "Sea Continental Shelf, U.K. vs Norway and S.S. Lotus case present us with different aspects of customary practice and the Law of seas, as the Continental Shelf case was about the delimitation of maritime boundaries while the Lotus case was about the jurisdiction in case of

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<sup>8</sup> North Sea Continental Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands), [1969] ICJ Rep 3.

Collision in High sea". All cases dealt with customary international Law, but the prime difference was the legal principles involved in these cases.

Opinio Juris - In the North Sea Continental Shelf case, the ICJ particularly emphasized the importance of opinio juris. However, in the U.K. vs Norway<sup>9</sup>, the Court said there was no adequate state practice, so it did not address opinio juris. It could be seen that with time, the Court has become more inclined towards establishing the state practice to justify the opinio juris, as this could be clearly seen while comparing these three judgments.

It could be clear that the Court changed the approach while establishing the Customary International Law as the Court in the Continental Shelf case of 1969, which was more recent in comparison to the other two; the Court is seen to use an 'inductive approach' while dealing with CIL, and held by stating that "Not only must the acts concerned amount to a settled practice but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".

## CONCLUSION

This comparative Analysis of S.S. Lotus, U.K. v Norway and the North Sea Continental Shelf Case has examined the approach of ICJ in determining the customary international Law. While doing these analyses, it could be seen that ICJ determined the CIL based on the facts and circumstances of each Case. Sometimes, it stresses one element over the other. By this, we can gather that Customary International law is a dynamic activity, and this ICJ's dynamism raises many questions on how to explain the Court's practice.

In modern times, the CIL can be seen as a progressive international law source that can deal with all the current issues and challenges countries face. Nevertheless, the modern approach has also been criticized by many jurists. All in all, I can say all three judgments are different in their way, and the approach of the Court was also quite different while dealing with facts and circumstances that all these Case brings forth to establish customary international Law.

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<sup>9</sup> Fisheries (United Kingdom v Norway), [1951] ICJ Rep 116