Michigan Journal of International Law

Volume 29 | Issue 1

2007

The *Lotus* Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?

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STUDENT NOTE

THE *LOTUS* PRINCIPLE IN ICJ JURISPRUDENCE: WAS THE SHIP EVER AFLOAT?

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I. INTRODUCTION

The decision of the Permanent Court of International Justice (PCIJ) in the *Case of the S.S. "Lotus"*[1] has attracted more attention than any of that court's other opinions,[2] and its impact as a source of foundational principles in various areas of international law has been lasting. Hersch Lauterpacht noted that the decision "forms a mine of valuable material upon the subject of Jurisdiction,"[3] Louis Henkin labeled it "one of the landmarks of twentieth-century jurisprudence,"[4] and Bin Cheng opened

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1. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) [hereinafter *Lotus*].

2. OLE SPIERMANN, INTERNATIONAL LEGAL ARGUMENT IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE: THE RISE OF THE INTERNATIONAL JUDICIARY 247 (2005).

3. 1 OPPENHEIM'S INTERNATIONAL LAW 270 n.2 (H. Lauterpacht ed., 5th ed. 1937).

4. Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 9, 278 (1989 IV).

his oft-quoted volume with a full paragraph from *Lotus*.[5] Teachers of international law routinely use the *Lotus* principle or presumption—the PCIJ's pronouncement that "[r]estrictions on the independence of States cannot . . . be presumed"[6]—as a general departure point for the study of public international law.[7]

But *Lotus* has perhaps drawn as much criticism as affirmation. Ian Brownlie observes that "[i]n most respects the Judgment of the Court is unhelpful in its approach to the principles of jurisdiction, and its pronouncements are characterized by vagueness and generality."[8] Nor does there appear to be any clear consensus on the decision's core holdings; in fact, commentators have read the decision in alarmingly divergent ways.[9] This Note avoids the legal cacophony surrounding the specific holdings of the *Lotus* decision, focusing instead on the *Lotus* principle. Scholars have persistently (and often uncritically) taken the *Lotus* principle at face value, citing it for the sweeping proposition that everything that is not prohibited in international law is permitted.[10] This interpretation of the principle, if it ever accurately captured the reasoning of the PCIJ in the *Lotus* case, no longer appears warranted. But even narrower interpretations of the principle remain problematic, particularly given the expansion of international law throughout the twentieth century. This Note examines various potential interpretations of the *Lotus* principle and then queries whether such interpretations find support in the jurisprudence of the International Court of Justice (ICJ). It concludes that the

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5. BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 29 (1953).

6. *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 18.

7. *See* John F. Murphy & Jeff Atik, *International Legal Education*, 37 INT'L LAW. 623, 626 (2003) (noting that in the University of Michigan Law School's trend-setting required course on Transnational Law, the *Lotus* presumption is taught as a fundamental international principle, or "[g]roundrule").

8. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 301 (6th ed. 2003).

9. *See* Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071, 1081–82 (2006) (citing *Lotus* for the notion that extraterritorial exercise of power is impermissible); Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 278 (2005) (citing *Lotus* as indicating that international law permits extraterritorial jurisdiction); *see also* John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT'L L. REV. 283, 302 (2003) (noting that *Lotus* indicates that customary international law binds states regardless of their consent); Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 141 (2005) (citing *Lotus* for the proposition that states cannot be bound by international law absent their consent).

10. *See, e.g.*, Roger P. Alford, *Reflections on* US—Zeroing: *A Study in Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSNAT'L L. 196, 203 (2006); Tawia Ansah, *War: Rhetoric & Norm-Creation in Response to Terror*, 43 VA. J. INT'L L. 797, 850 n.180 (2003); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 912 (2005).

Court, from its early days, has viewed the principle at best as inapposite and at worst as an inaccurate statement of the principles of international law.

Part II reviews the factual background of the *Lotus* decision and the judgment of the PCIJ. It also outlines potential interpretations of the *Lotus* principle given the ambiguity of the decision itself and the varied ways in which the dissenting judges appeared to interpret the majority opinion. Part III examines the principle through the lens of ICJ decisions that either potentially or directly implicated it. In contrast to the commonplace invocation of the *Lotus* principle in academic literature, the ICJ has only infrequently visited the principle in its decisions. This relative silence should not be interpreted as an indication of support; rather, the ICJ's choice not to rely on the principle in various instances suggests that the Court has found it to be of little utility. More important, perhaps, is that in the few instances in which the Court has addressed the *Lotus* principle more directly, its reasoning can logically be construed as repudiating the principle's basic premises. The Court's approach to *Lotus* calls into question the degree to which the decision should continue to be viewed as elaborating a "groundrule" of international law.[11]

II. THE *LOTUS* DECISION AND SUBSEQUENT INTERPRETATION

The facts of the *Lotus* case are well known. On August 2, 1926, the S.S. Lotus, a French steamship, collided on the high seas with the Boz-Kourt, a Turkish collier.[12] The Boz-Kourt split in two and sank, and eight of its crew members were killed. The Lotus remained to assist the survivors of the Boz-Kourt, including its captain, Hassan Bey, and then continued with the survivors to Constantinople. Turkish authorities subsequently requested that Lieutenant Demons, the officer of the watch on board the Lotus when the collision occurred, come ashore to give evidence. At the conclusion of the questioning, Turkish authorities placed Demons and Hassan Bey under arrest pending trial on charges of manslaughter. At trial, Demons argued that the Turkish court lacked jurisdiction, but the court convicted both Demons and Hassan Bey, sentencing each to a term of imprisonment. The French government protested the arrest and the conviction and requested that the case be transferred to a French court. Turkey proposed, and France agreed, to pose the following question to the PCIJ: "(1) Has Turkey . . . acted in conflict with the principles of international law—and if so, what

11. *See* Murphy & Atik, *supra* note 7, at 626.
12. *See Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 10–13.

principles—by instituting . . . criminal proceedings in pursuance of Turkish law against M. Demons . . .?"[13]

The French government invoked the 1923 Convention of Lausanne in arguing against Turkish jurisdiction. Article 15 of the Convention indicated that "all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law."[14] France maintained that such principles precluded criminal jurisdiction in this case. The Court, somewhat significantly, condensed the positions of the parties in the following way:

> The French Government contends that the Turkish Courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by international law in favour of Turkey. On the other hand, the Turkish Government takes the view that Article 15 allows Turkey jurisdiction whenever such jurisdiction does not come into conflict with a principle of international law.[15]

Having thus framed the question as one inquiring whether international law is essentially permissive or prohibitive, the Court then issued its famous dictum:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[16]

The Court ultimately ruled, in a six-six split with President Huber casting the deciding vote, that trying Demons was not an exercise of power on the territory of another State, that the Court could deduce no rule or principle of international law preventing Turkey from exercising jurisdiction, and that under the circumstances France and Turkey had concurrent jurisdiction.[17]

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13. *Id.* at 5.
14. *Id.* at 16.
15. *Id.* at 18.
16. *Id.*
17. *Id.* at 30–31. Treaty law subsequently rejected the ruling of concurrent jurisdiction for collisions on the high seas, favoring instead jurisdiction only in the courts of the ship's flag state or the state of the officer's nationality. *See* Geneva Convention on the High Seas art. 11, Apr. 29, 1958, 40 U.N.T.S. 82; U.N. Convention on the Law of the Sea art. 97, Dec. 10, 1982, 1833 U.N.T.S. 397.

A. *Majority and Dissent*

The apparent majority view—that unless France could prove the existence of a rule prohibiting Turkey's conduct, the conduct did not violate international law—has long been considered a classic articulation of international legal positivism, the notion that "[l]aw is regarded as a unified system of rules that . . . emanate from state will."[18] The decision is also closely associated with the voluntarist approach to international law—in short, "where there is State will, there is international law: no will, no law."[19] Of course, like any uncompromising perspective, the majority view has been subject to significant criticism. J.L. Brierly complained not long after the decision that the majority opinion

> was based on the highly contentious metaphysical proposition of the extreme positivist school that the law emanates from the free will of sovereign independent States, and from this premiss . . . that restrictions on the independence of States cannot be presumed. Neither . . . can the absence of restrictions; for we are not able to deduce the law applicable to a specific state of facts from the mere fact of sovereignty or independence.[20]

According to Brierly, the Court's view ignored the substantial development of international law as the result of agreement or consensus within a society of States.[21]

Brierly's criticism echoed those of the *Lotus* dissenters, several of whom expressed doubts that the majority position was consonant with accepted principles of international law. Judge Loder characterized Turkey's position as "based on the contention that under international law everything which is not prohibited is permitted. In other words . . . every door is open unless it is closed by treaty or by established custom."[22] Judge Weiss claimed that the majority opinion meant that Turkey "can do as she thinks fit as regards persons or things unless a specific provision in a treaty or an established custom in international relations prevents her from so doing. This power is thus in its essence unlimited . . . ."[23] Judge Nyholm wrote of the majority opinion that "[i]f

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18. Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 304 (1999).

19. Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 AUSTL. Y.B. INT'L L. 22, 22, 26 (1988–89).

20. J.L. Brierly, *The* 'Lotus' *Case*, 44 L.Q. REV. 154, 155 (1928), *reprinted in* THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS 143–44 (Sir Hersch Lauterpacht ed., 1958).

21. *Id.*

22. *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 34 (dissenting opinion of M. Loder).

23. *Id.* at 42 (dissenting opinion of M. Weiss).

this reasoning be followed out, a principle of public international law is set up that where there is no special rule, absolute freedom must exist."[24] The dissenters therefore interpreted the dictum that became the *Lotus* principle as applicable beyond the facts of the case—an attempt by the Court to articulate a general principle of international law that governs whenever no applicable law constraining state behavior can be discerned.

It could be argued, however, that the majority did not intend to promulgate such a sweeping rule of international relations, and that in fact the dissenters' somewhat exaggerated interpretation of the *Lotus* dictum has subsequently been accepted as an accurate expression of the majority position even if the majority intended a more limited reading. The majority referred to international law in terms of "co-existing independent communities" and "common aims,"[25] hardly language that seems intended to support a conception of States as benefiting from absolute freedom. As Spiermann notes, "[w]hat the Court had in view was an international law of cooperation."[26] Moreover, if the majority did intend to articulate a generally applicable vision of international law as prohibitive, not permissive, it seemed to depart from that vision immediately. After declaring that "restrictions upon the independence of States cannot . . . be presumed," the Court proceeded to presume one such restriction:

> Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[27]

The phrase "failing the existence of a permissive rule to the contrary" appears to undermine directly the vision of international law—a view of the law as a series of prohibitions, not permissions—that the dissenters attributed to the majority. Henkin observes that "instead of the presumption of State independence and autonomy, [the Court] seemed to begin with a presumption that a State was not fully autonomous: it may not

24. *Id.* at 60 (dissenting opinion of M. Nyholm).

25. *Id.* at 18.

26. Ole Spiermann, Lotus *and the Double Structure of International Legal Argument, in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 143 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

27. *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 18–19.

exercise jurisdiction outside its territory."[28] It may therefore be reasonable to discount somewhat the dissenters' view of the decision because the majority may not have intended to pronounce as extreme a principle as the dissenters claimed. The PCIJ was already deeply divided over the *Lotus* decision; if the majority did not intend such an expansive reading, the traditional understanding of the *Lotus* principle has always rested on shaky ground.

B. *Potential Interpretations of the* Lotus *Principle*

Determining how the ICJ has interpreted the *Lotus* principle—or what various ICJ decisions may indicate about the principle's viability—requires further inquiry into the various interpretive options that the principle poses. Given that the principle could be interpreted in various ways, and given the degree of divergence between the majority and dissent, several possibilities are worth noting.

1. Positivism or Normativity: Is There a Gap in the Law?

Most broadly, the dichotomy between positivism and normativity is relevant to interpreting the *Lotus* principle. While strict positivists confine their legal analysis to the law as an objective reality,[29] norm-based theorists expand the analysis to incorporate norms and ideals that may not appear as "hard" law.[30] This dichotomy arises in regard to what qualifies as a substantive gap, or lacuna, in international law. If an international tribunal encounters an area of the law to which no formal custom or treaties apply, must it necessarily conclude that a gap exists, or can it invoke "soft" norms or draw on analogous areas of the law to find that, in fact, there is no gap in the law?

As noted above, *Lotus* has long been considered the touchstone of international legal positivism. In its analysis, the majority queried existing rules and customary international law before concluding that "there is no rule of international law in regard to [such] collision cases."[31] Moreover, the majority tended to use the terms "rule" and "principle" interchangeably, requiring either to be explicit in order for it to govern the case. The dissenters, on the other hand, claimed that requiring the parties to cite explicit rules was too exacting a burden. Lord Finlay distinguished between rules and principles, noting that in the *compromis*

28. Henkin, *supra* note 4, at 278–79.

29. *See* Simma & Paulus, *supra* note 18, at 304.

30. *See generally* Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 481–83 (2005) (surveying norm-based theories of international law).

31. *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 30.

"[t]here is no mention of any 'rule' but only of 'principles.'"[32] This approach conceived of principles as a more normative, fungible concept that would allow the Court to consider fairness to the parties in determining whether any international law applied. International law was therefore "a manifestation of *international legal ethics*" or a "general *consensus of opinion* among the countries which have adopted the European system of civilization,"[33] not a fixed, unchanging code under which States labored.

2. Lacuna, *Non Liquet*, or Law: Does the Gap Survive the Decision?

The foregoing discussion raises the question of how an international tribunal is to respond if, indeed, it encounters a lacuna in the law. One way would be to find that municipal law precedes international law and governs in the absence of international law. This approach would leave the lacuna in place. Another approach would be to declare a *non liquet* and find that "the law does not permit a conclusion *one way or the other* concerning the issue in question."[34] A *non liquet* would essentially mean the court abstains from ruling on the issue, leaving the parties without a solution.[35] Finally, a court could respond to a gap in the law by using a residual principle or presumption to decide the issue. This approach would fill gaps in the law through judicial decisionmaking.

The *Lotus* decision offers fairly conclusive insights on this score. Although some early commentators compared *Lotus* to *non liquet*,[36] it seems clear enough that, despite finding a gap in the law, the PCIJ decided the issue conclusively in favor of Turkey. It also seems clear that the Court did not rely on municipal law in doing so; it repeatedly emphasized that its purpose was to determine "whether or not the *principles of international law* prevent Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish law."[37] That leaves the final possibility—that the Court was filling a gap in international law through the application of a residual principle or presumption.

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32. *Id.* at 52 (dissenting opinion by Lord Finlay).

33. *Id.* at 60 (dissenting opinion by M. Nyholm) (emphasis in original).

34. Daniel Bodansky, Non Liquet *and the Incompleteness of International Law*, *in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS, *supra* note 26, at 153, 154 (emphasis in original).

35. Some international jurists have argued that a finding of *non liquet* is prohibited in international judicial decisionmaking. *See* Hersch Lauterpacht, *Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law*, *in* 2 INTERNATIONAL LAW: COLLECTED PAPERS (Elihu Lauterpacht ed., 1975). *But see* Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 MICH. J. INT'L L. 399 (1997).

36. *See* SPIERMANN, *supra* note 2, at 250 n.207.

37. *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 15 (emphasis added).

3. Residual Principle or Presumption: What Form Should the Response Take?

If an international tribunal is to fill a gap in the law, the difference between residual principles and presumptions becomes relevant. Ole Spiermann notes that a residual principle "attaches consequences to an antecedent . . . . The principle is 'residual' because the condition (the 'if-clause') to which it attaches a consequence (the 'then-clause') is the absence of rules or other principles."[38] A presumption, on the other hand, "is the action of supposing something to exist or to be true."[39] A residual principle need not presume anything: it might only apply when it is clear that there are no rules. If it is undetermined whether other rules or principles pertain to a situation, a residual principle would apply only through the use of a presumption of some kind. For instance, when the rules are unclear, it could be presumed that there are no rules, allowing application of a residual principle.

Applying this distinction to *Lotus* yields three possibilities. First, the *Lotus* principle could be interpreted as a pure residual principle: when there are no other governing principles or rules of international law, States are free to act as they please. The majority opinion clearly could be read this way, as it first endeavored to "ascertain whether or not there exists a rule of international law limiting the freedom of States to extend the criminal jurisdiction of their courts" to collisions on the high seas.[40] When the Court concluded that there was no such rule,[41] it applied the residual principle of freedom of action and ruled that Turkey had not violated international law.

Second, the *Lotus* principle could be interpreted as a residual principle to which a presumption is attached: when it is unclear whether rules of international law apply to a situation, it is presumed that there are no rules and that States are free to act. This perspective could be attributed to Judges Moore and Altamira, whose primary disputes with the majority opinion appeared to involve the conclusion that no rule of international law governed, not the underlying premise of freedom of action.[42] Brierly may also have assumed this to be the majority's approach when he criticized it by arguing that "we are not entitled to deduce the law applicable

38. Spiermann, *supra* note 26, at 132.

39. *Id.* at 133.

40. *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 21.

41. *Id.* at 30.

42. *See id.* at 94, 102. Altamira wrote that "a State which . . . acts so as to impose, by virtue of the principle of the admitted freedom in internal legislation, and in disregard of the principle whereby consent is requisite, further exceptions to another principle . . . will have acted in contravention of international law." *Id.* at 104.

to a specific state of facts from the mere fact of sovereignty or independence."[43]

Finally, the *Lotus* principle could be interpreted as a pure presumption: States are presumed to be unrestrained by international law absent some proof of restraint. Under this conception, the "burden of proof" in determining whether international law restrains a State lies with the State alleging the existence of the restraint. Most of the dissenters appear to have interpreted the majority opinion this way, leading to their complaints that according to the majority, "every door is open unless it is closed by treaty,"[44] or "where there is no special rule, absolute freedom must exist."[45]

It is worth noting that, regardless of whether the Court was applying a residual principle, a presumption, or a combination of the two, the *Lotus* principle would appear to foreclose the possibility of an international tribunal ever leaving a substantive gap in place or declaring a *non liquet*.[46] As a catch-all tool for deciding issues in the face of incompleteness or ambiguity in international law, the *Lotus* principle should mean that international law is complete.

III. THE *LOTUS* PRINCIPLE IN THE JURISPRUDENCE OF THE ICJ

Part II reviewed the facts of the *Lotus* decision, the positions of the majority and dissent, and various interpretive possibilities the decision presents. Part III will now attempt to discern the position of the ICJ on the *Lotus* principle given various decisions that have (or could have) implicated it. A word on precedent is warranted here. Although the ICJ is not technically bound by its own decisions, the Court clearly relies on them as highly persuasive sources of authority on points of law.[47] The Court also has sought to establish consistency in its jurisprudence throughout its existence. It therefore makes sense to examine the long-term posture of the ICJ toward the *Lotus* principle and query what this posture indicates about the principle's viability both at the Court's inception and today.

The ICJ has only rarely construed the *Lotus* case. In fact, *Lotus* appears only three times in ICJ decisions on the merits,[48] and of those, only

43. Brierly, *supra* note 20, at 144.

44. *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 34 (dissenting opinion of M. Loder).

45. *Id.* at 60 (dissenting opinion of M. Nyholm).

46. *See* Bodansky, *supra* note 34, at 161–65.

47. *See generally* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT (1996).

48. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 238–39 (July 8) [hereinafter *Nuclear Weapons*]; Military and Paramilitary Activities

one, *Legality of the Threat or Use of Nuclear Weapons*, refers directly to the *Lotus* principle.[49] Various separate or dissenting opinions mention *Lotus* and its specific holdings, but again, few address the *Lotus* principle itself. On the one hand, this general reticence is surprising, considering that parties to contentious proceedings and *amici curiae* have more frequently referred to the *Lotus* principle in their submissions. The Court has had plenty of opportunities to interpret the principle and generally has chosen not to do so. On the other hand, the ICJ's silence on the *Lotus* principle is entirely understandable given that, regardless of how the Court were to interpret the principle, doing so would involve broad, sweeping issues of state sovereignty and freedom of action, areas that clearly warrant caution in judicial decisionmaking. Still, the ICJ's silence notwithstanding, it is possible to discern the Court's position on the *Lotus* principle through the separate opinions of the judges, the rare occasions in which the Court has construed the principle, and, indeed, the instances in which the Court has chosen not to address the principle. The following sections trace the Court's treatment of the principle (or lack thereof), beginning with its early decisions and continuing through more recent cases.

A. *Early Skepticism*

The ICJ's early cases present some insights into the Court's initial approach to the *Lotus* principle and suggest that the Court sought to distance itself in many respects from the general precepts of the principle. In *Reparation for Injuries Suffered in the Service of the United Nations*,[50] the ICJ faced an early test of its willingness to infer or imply powers that were not explicitly enumerated in an international agreement. The U.N. General Assembly referred to the ICJ the question of whether the United Nations can bring a claim against a State when U.N. personnel are injured in a manner that implicates the responsibility of that State. The Court therefore confronted the threshold question of whether the United Nations was an international legal person, which it answered in the affirmative. It also concluded that the United Nations had the power to bring a claim against a responsible government for injuries to its personnel.[51]

Although neither the Court nor any of the parties who submitted briefs mentioned the *Lotus* principle, the holdings and reasoning of the

(Nicar. v. U.S.), 1986 I.C.J. 14, 24 (June 27) [hereinafter *Nicaragua*]; North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

49. *Nuclear Weapons*, 1996 I.C.J. at 238–39.

50. Reparation for Injuries Suffered in Service of United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) [hereinafter *U.N. Reparations*].

51. *Id.* at 180–81.

Court do shed light on some of the principle's core elements. Most generally, the Court's opinion cut against the primary ontological foundation of the *Lotus* principle—that "[i]nternational law governs relations between independent States."[52] The finding that the United Nations is an international legal person did not completely obviate this part of the *Lotus* principle, but it did carve out a new species of obligation in international law from what had previously been the exclusive preserve of States. Similarly, if the *Lotus* principle is taken to mean that the powers or duties that flow from a treaty must be explicitly enumerated in the treaty and cannot be inferred from it, the *U.N. Reparations* case challenged the principle on that score as well. The Court opined that "[u]nder international law, the Organization must be deemed to have those powers which, *though not expressly provided in the Charter*, are conferred upon it by necessary implication as being essential to the performance of its duties."[53] This statement distanced the Court from the more strictly positivist orientation of the *Lotus* majority.[54] Finally, despite the dearth of available "hard" law on the matter, the Court seemed to avoid concluding at any point that it faced a gap in the law, which could have required it to choose a method for filling the gap. Instead, the Court explained that the U.N. Charter and the 1946 Convention on the Privileges and Immunities of the United Nations necessarily implied legal personality for the United Nations.[55] The *Lotus* principle therefore did not come into play.

Another early decision, the *Asylum Case (Colombia/Peru)*,[56] is relevant to understanding the ICJ's initial posture toward the *Lotus* principle. After the leader of a political rebellion in Peru took refuge in the Colombian embassy in Lima, Colombia offered him political asylum and requested that the Peruvian authorities grant him safe conduct out of the country. In contentious proceedings before the ICJ, Colombia claimed that it had the right to qualify the offense with which the leader had been charged as political, making him eligible for asylum. The Colombian government cited, *inter alia*, the Bolivarian Agreement of 1911, in which signatories recognized the institution of asylum "in conformity with the principles of international law."[57]

In ruling against Colombia, the ICJ noted that "the principles of international law do not recognize any rule of unilateral and definitive

52. *Lotus*, 1927 P.C.I.J. (ser. A) No. 10, at 18.
53. *U.N. Reparations*, 1949 I.C.J. at 182 (emphasis added).
54. *See* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 285 n.114 (Robert W. Tucker rev. & ed., 1966) (1952).
55. *U.N. Reparations*, 1949 I.C.J. at 179.
56. 1950 I.C.J. 266 (Nov. 20).
57. *Id.* at 274.

qualification by the State granting diplomatic asylum."[58] The Court went on to conclude that none of the other bases advanced by Colombia established the existence of the right. The Court therefore confronted a gap, or at least ambiguity in the law, roughly analogous to that of the *Lotus* case, particularly in that the most relevant convention, the Bolivarian Agreement, referred only to general principles of international law. Yet, rather than requiring Peru to show that Colombia's conduct was prohibited under international law—or resolving the apparent ambiguity in the law in favor of Colombia's freedom of action—the Court prioritized Peru's territorial sovereignty and required Colombia to show that its conduct was permitted under international law. This approach could be read as indicating that, even if the *Lotus* principle could be considered residual, it was subject to the countervailing logic of other residual principles—in this case, territorial sovereignty. Regardless, the judgment seemed to reject implicitly the notion that *Lotus* required a presumption in favor of Colombia's autonomy and independence.

Finally, in the *Fisheries Case (United Kingdom/Norway)*,[59] the majority's reasoning again foreclosed direct treatment of the *Lotus* principle, but the Court's underlying attitude was one of hostility to the principle. When the United Kingdom challenged Norway's delimitation of its territorial sea as inconsistent with international law, Norway cited the *Lotus* principle in arguing that doubt over the legality of Norway's "act of sovereignty" had to be construed in its favor, because a restriction on that sovereignty could not be presumed.[60] The United Kingdom vigorously disputed this reading of the *Lotus* principle, claiming that "the presumption against restrictions on independence can only operate *within the areas of State activity left in principle by international law to the discretion of the State*."[61] According to the United Kingdom, because the matters in dispute in the case were not within Norway's discretion—and because Norway was seeking to restrict the generally accepted principle of freedom of the high seas—Norway's conduct would have to be justified with a special permissive rule.[62] This reading would be consistent with the view of the *Lotus* principle as a pure residual principle, not a presumption.

Although the Court ruled against the United Kingdom, it did not do so on the basis of the *Lotus* principle. Instead, it concluded that Norway's

58. *Id.*

59. 1951 I.C.J. 116 (Dec. 18).

60. Counter-Memorial of Norway, Fisheries Case (U.K. v. Nor.), 1951 I.C.J. Pleadings 418 (July 31, 1950).

61. Reply of the United Kingdom, Fisheries Case (U.K. v. Nor.), 1951 I.C.J. Pleadings 461 (Nov. 28, 1950) (emphasis in original).

62. *Id.* at 463.

method of delimitation was consistent with international law, and that in any event the United Kingdom had not objected to Norway's long-term practice. The Court therefore displayed flexibility in concluding that no gap in international law existed, making inquiry along the lines of *Lotus* unnecessary.[63] In a separate opinion, Judge Alvarez addressed the *Lotus* principle directly:

> This principle, formerly correct, in the days of absolute sovereignty, is no longer so at the present day: the sovereignty of States is henceforth limited not only by the rights of other States but also by other factors . . . which make up what is called the new international law: the Charter of the United Nations, resolutions passed by the Assembly of the United Nations, the duties of States, the general interests of international society and lastly the prohibition of *abus de droit*.[64]

Although not part of the majority opinion, this broad rebuke of the *Lotus* principle reflects the Court's general departure from strict positivism at the time. It also underscores the Court's willingness to draw on new sources of international law, bypassing altogether any analysis that would implicate the *Lotus* principle.

B. *1960s–1980s: Ambiguity*

The ICJ's early (if largely implicit) rejection of the *Lotus* principle was followed by a period of ambiguity in which the Court flirted with a resurrection of the PCIJ's positivist tradition but also displayed continued doubt about the viability and scope of the *Lotus* principle. In the *South West Africa* cases, the Court essentially ruled that Ethiopia and Liberia did not have standing to challenge South Africa's conduct in South West Africa under the League of Nations mandate system.[65] In so ruling, the Court took pains to remind the parties that the ICJ "is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form."[66] It rejected the notion that principles such as the "sacred trust of civilization" could be used to derive applicable legal rules: "the principle of the sacred trust has no residual juridical content which could . . . operate per se to give rise to legal rights and obligations . . . and . . . such rights and obligations exist only in so far as there is actual provision for them."[67] In this way, the

63. *See Fisheries*, 1951 I.C.J. at 132.
64. *Id.* at 152 (separate opinion of Judge Alvarez).
65. South West Africa (Eth. v. S. Afr., Liber. v. S. Afr.), 1966 I.C.J. 6 (July 18).
66. *Id.* at 34.
67. *Id.* at 35.

Court seemed to reposition itself much closer to the formal, positivist approach of the *Lotus* majority on the issue of the permissible sources of international law. Still, despite this call to formalism, the Court did not renounce its ability to infer or imply legal rights and obligations from sources other than "hard" law. Indeed, the Court during this period developed significant judicial mechanisms—such as the use of the principle of equity in maritime delimitation—that lacked the hard law pedigree of the Court's traditional decisionmaking tools.[68]

More significantly, in *Fisheries Jurisdiction (United Kingdom v. Iceland)*,[69] the Court appeared not only unwilling to embrace a strictly positivist outlook, but also unreceptive to the logic of the *Lotus* principle. Following the general reasoning of *South West Africa* may not have allowed the Court, as it did in *Fisheries Jurisdiction*, to invoke equitable principles as a basis for its specific holdings or to require the parties to negotiate in good faith over the degree to which U.K. vessels would be granted access to the area in question. Moreover, in ruling that Iceland could not unilaterally exclude U.K. vessels from fishing in the area just beyond its territorial sea,[70] the Court implicitly rejected Iceland's claim that the *Lotus* principle enabled it to declare that area exclusively within its jurisdiction. Judge Dillard, concurring in the majority opinion, found it necessary to address *Lotus* directly. Responding to Iceland's argument that the divergence in state practice on the matter—and the United Kingdom's failure to prove the existence of a prohibition on Iceland's conduct—left a lacuna in the law in which Iceland was free to operate, Dillard opined:

> while the burden of proof problem may have some relevance in determining factual and jurisdictional issues, it has little bearing on the present case. Likewise with the notion of freedom of State action. Borrowing from Lauterpacht, I would put the matter as follows: if the exercise of freedom trespasses on the interests of other States then the issue arises as to its justification. This the Court must determine in light of the applicable law and it does not advance the enquiry to attempt to indulge in a presumption or to lean on a burden of proof.[71]

Dillard's pragmatic approach therefore squarely denied the viability of *Lotus* as an across-the-board presumption, or even residual principle,

68. *See, e.g.*, North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20); Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18 (Feb. 24); Continental Shelf (Libya v. Tunis.), 1985 I.C.J. 13 (June 3).

69. 1974 I.C.J. 3 (July 25).

70. *Id.* at 34.

71. *Id.* at 59 (separate opinion of Judge Dillard) (internal citations omitted).

that could be applied with consistency in international law. In its place, he offered the simple requirement that conduct that negatively affects the interests of other States must be justified.

Still, *Fisheries Jurisdiction* did not present the Court with a situation in which no treaties, agreements, or customary international law could be said to govern a matter, leaving open the question of whether the Court would have to find a lacuna in the law in such a context and proceed accordingly. The Court encountered such a lacuna in *Military and Paramilitary Activities (Nicaragua v. United States) (Nicaragua)*, and it adhered to a *Lotus*-like approach to state freedom of action. The United States had argued that Nicaragua's purchase and stockpiling of arms amounted to such over-militarization as to justify countermeasures. The Court roundly rejected this argument: "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 limited, and this principle is valid for all States without exception."[72] This position appears consonant with the notion of *Lotus* as a residual principle: in the absence of applicable law governing the level of military weaponry a State can maintain, the State is at liberty to maintain the level it chooses. Although that reasoning did not encompass a situation in which the applicable law was indeterminate, the position of the Court still appeared to favor the general formula of the *Lotus* principle.[73] This approach is unsurprising given that, in the words of the Court, "[a] State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems."[74] In this way, the Court emphasized that state sovereignty remained a core value in international law, but because this was relatively uncontroversial, the implications of the *Nicaragua* decision for the viability of the *Lotus* principle during this period should not be overstated.

C. *The* Nuclear Weapons *Opinion*

In December 1994, the U.N. General Assembly referred to the Court the following question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The resulting advisory opinion involved the most extensive treatment of the *Lotus* principle in the ICJ's history. Indeed, the declarations and separate opinions of the judges offer a range of insights into the Court's perspective on the prin-

72. *Nicaragua*, 1986 I.C.J. at 135.
73. *See* Spiermann, *supra* note 26, at 132–33.
74. *Nicaragua*, 1986 I.C.J. at 131.

ciple, despite the fact that the opinion itself only briefly addresses it. The Court's opinion spawned academic debate, some of which has discussed the subsequent status of the *Lotus* principle,[75] but few commentators have critically evaluated the opinion in light of the Court's previous posture toward the principle or the various potential interpretations of it. This section attempts to do so, first by inquiring into what the *dispositif* itself says about the *Lotus* principle, then by reviewing the broader reasoning of the opinion, and, finally, by examining the individual positions of the judges. On balance, the *Nuclear Weapons* opinion establishes more explicitly what the ICJ had already signaled quietly: that neither a strict interpretation of the *Lotus* principle nor a general presumption of legality in the absence of a prohibition accords with the Court's view of international law today.

1. The *Dispositif*

Several important conclusions involving the *Lotus* principle can be gleaned from the *dispositif* alone. Following the paragraphs of the *dispositif* as a line of logic that could have implicated the *Lotus* principle underscores the degree to which the Court did not adhere to the principle. Major nuclear-weapons States had submitted to the Court straightforward arguments under *Lotus*. The following passage from the U.S. submission is representative:

> It is a fundamental principle of international law that restrictions on States cannot be presumed but must be found in conventional law specifically accepted by them or in customary law generally accepted by the community of nations. There is no general prohibition on the use of nuclear weapons in any international agreement. There is likewise no such prohibition in customary international law.[76]

The Court structured the *dispositif* in a way that partly corresponded to the basic premises of the *Lotus* principle—that is, it queried whether international law contained a specific prohibition on the threat or use of nuclear weapons. However, the Court first concluded unanimously in paragraph (2)A that "[t]here is in neither customary nor conventional international law any specific *authorization* of the threat or use of nuclear weapons."[77]

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75. *See generally* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS, *supra* note 26.

76. Written Statement of the Government of the United States of America Concerning Request of United Nations General Assembly for Advisory Opinion on Legality of Threat or Use of Nuclear Weapons, at 8, *Nuclear Weapons*, 1996 I.C.J. 226 (June 20, 1995), *available at* http://www.icj-cij.org/docket/files/95/8700.pdf (last visited Mar. 1, 2008).

77. *Nuclear Weapons*, 1996 I.C.J. at 266 (emphasis added).

The very inclusion of this statement (not to mention the Court's unanimity on it) is anathema to the notion of the *Lotus* principle as a presumption, for under that approach the existence or non-existence of an authorization for conduct is irrelevant—only a prohibition would matter.

The Court next turned to the issue of prohibition. In paragraph (2)B, it concluded by eleven votes to three that "[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such."[78] The Court therefore determined that international law did not provide a specific answer to the question of the legality of a threat or use of nuclear weapons *per se*. What follows from this conclusion is thus highly relevant to understanding the Court's position on *non liquet* or the potential use of a residual principle. A strict interpretation of *Lotus* as a residual principle would have dictated that, because formal, "customary or conventional" international law did not provide an answer, States must be free to act, and the threat or use of nuclear weapons must be permissible.

The Court did not adopt this approach. Instead, in paragraphs (2)C and D, it noted that a threat or use of nuclear weapons that did not comply with either the requirements for the use of force in the U.N. Charter or international humanitarian law would be unlawful.[79] Read separately, these paragraphs would seem to indicate that the threat or use of nuclear weapons must ultimately be permissible; otherwise the Court would not need to indicate the applicable bodies of law governing their use. But the ensuing paragraphs do not support that reading. In paragraph (2)E, the Court concluded (by seven votes to seven, by the President's casting vote) that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."[80] Progressing as the Court did here from the indeterminacy of the law on the specific matter at hand—the lack of either an authorization or a prohibition *per se*—to the likelihood that it is generally illegal is incompatible with the notion of *Lotus* as a residual principle combined with a presumption. Indeterminacy would mean applying the residual principle of freedom of action, not positing that the threat or use of nuclear weapons is generally "contrary to the rules of international law."

The second part of paragraph (2)E also eschews application of a *Lotus*-like residual principle. After concluding that the threat or use of nuclear weapons would generally be illegal, the Court continued,

78. *Id.*
79. *Id.*
80. *Id.*

"[h]owever, in view of the current state of international law . . . the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[81] This conclusion looks remarkably like *non liquet*, which may not be surprising given the hypothetical nature of the question posed to the Court and the fact that it was issuing an advisory opinion. Some controversy has arisen over whether the Court's decision does constitute *non liquet* and, if so, whether such an outcome is permissible.[82] Nonetheless, the Court's conclusion indicates at the very least that it chose not to embrace a residual principle of freedom of state action even in extreme circumstances; instead, the Court decided this was one instance (perhaps one of the very few) in which a specific determination of legality or illegality need not be made.

Taken together, the paragraphs of the *dispositif* therefore suggest that the Court did not look favorably on the *Lotus* principle as a presumption, a residual principle, or a combination of the two. The possibility that the decision amounted to *non liquet* reinforces this conclusion, because as noted above, *non liquet* should not have been possible if a residual principle of freedom of state action were at play.

2. The Court's Reasoning in the *Motifs*

The Court's approach in the *motifs* provides support for, and further insight into, the foregoing conclusions. The logical starting point is the passage in which the Court addressed the *Lotus* principle directly. Nuclear-weapons States had argued not only that the principle dictated a presumption of the legality of nuclear weapons in the absence of specific prohibitions, but also that the phrasing of the question posed to the Court—whether the threat or use of nuclear weapons was "in any circumstance permitted"—conflicted with the "very basis of international law," which dictates that "States are free to threaten or use nuclear weapons unless it can be shown that they are bound not to do so by reference to a

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81. *Id.*

82. *See id.* at 590 (dissenting opinion of Judge Higgins) ("That the formula chosen is a *non liquet* cannot be doubted . . . ."); *id.* at 389 (dissenting opinion of Judge Shahabuddeen) ("There is no *Non Liquet.*"); *cf. id.* at 279 (declaration of Judge Vereshchetin) (arguing that the prohibition on *non liquet* should apply only to contentious proceedings, not advisory proceedings); *id.* at 390 (dissenting opinion of Judge Shahabuddeen) ("The fact that these are advisory proceedings and not contentious ones makes no difference; the law to be applied is the same in both cases."); *see also* Bodansky, *supra* note 34; Richard A. Falk, *Nuclear Weapons, International Law and the World Court: A Historic Encounter*, 91 AM. J. INT'L L. 64, 73 (1997); Timothy L.H. McCormack, *A Non Liquet on Nuclear Weapons—The ICJ Avoids the Application of General Principles of International Humanitarian Law*, 316 INT'L REV. RED CROSS 76 (1997); Perez, *supra* note 35.

prohibition in either treaty law or customary international law."[83] The Court acknowledged the PCIJ's famous "dicta" from *Lotus*—that "restrictions upon the independence of States cannot . . . be presumed"[84]—and noted similar language from the *Nicaragua* decision, which it also labeled dictum.[85]

In this way, the Court confronted the *Lotus* principle directly for the first time in its history. Its response was not supportive. The Court disposed of these arguments by noting that nuclear-weapons States had accepted that their independence to act was limited by international humanitarian law; "[h]ence, the argument concerning the legal conclusions to be drawn from the use of the word 'permitted,' and the questions of burden of proof to which it is said to give rise, are without particular significance for the disposition of the issues before the Court."[86] Two conclusions can reasonably be drawn from this approach. First, the Court suggested that the only instance in which the *Lotus* principle would come into play would be one in which no principles or rules of international law could be said to restrict the state behavior in question. Second, any such rules or principles, in order to be considered applicable law, need not be explicitly intended to govern a specific factual situation. Together these conclusions amount to an extraordinarily exacting definition of what constitutes a lacuna. Despite the Court's finding that international law did not provide an answer on the *specific issue* of the threat or use of nuclear weapons, the Court's reasoning indicated that broader principles embedded within bodies of law—in this case humanitarian law—can serve as the basis for deciding the question. Therefore, there was no lacuna in the law, and the *Lotus* principle did not factor into this decision, which explains why the logic of the *dispositif* does not accord with the *Lotus* principle. Indeed, one is left wondering when, if ever, the *Lotus* principle could apply in today's international system.

Throughout the rest of the *motifs*, the Court remained consistently open to the possibility that the applicable law—in essence, the determination that no lacuna existed and that the *Lotus* principle was inapt—could come from various sources, not all of them of the traditionally positivist type. Immediately after disposing of the arguments invoking the *Lotus* principle, the Court continued its opinion this way: "In seeking to answer the question put to it . . . the Court must decide, after consideration of the great corpus of international law norms available to it, what might be the relevant applicable law."[87] By framing its inquiry in

83. *Nuclear Weapons*, 1996 I.C.J. at 238.
84. *Id.*
85. *Id.*
86. *Id.* at 239.
87. *Id.*

terms of "international norms," the Court ensured that a broad range of potential sources—including international environmental law, international human rights law, humanitarian law, or U.N. resolutions—would be available in evaluating the question. The likelihood of finding a gap in the law in which anything akin to the *Lotus* principle might operate was therefore virtually nil. This more normative outlook also found form in the final paragraph of the *dispositif*, in which the Court unanimously identified "an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[88]

3. The Separate Opinions of the Judges

While the *dispositif* and the Court's direct treatment of the *Lotus* principle speak for themselves, the separate and dissenting opinions of the judges in the *Nuclear Weapons* case confirm that skepticism of the *Lotus* principle ran deep on the bench. Judge Bedjaoui argued that the principle should be limited to the facts of the *Lotus* case:

> It would be to exaggerate the importance of that decision . . . and to distort its scope were it to be divorced from the particular context, both judicial and temporal, in which it was taken. No doubt this decision expressed *the spirit of the times*, the spirit of an international society which as yet had few institutions and was governed by an international law of strict coexistence, itself a reflection of the vigour of the principle of State sovereignty. It scarcely needs to be said that the face of contemporary international society is markedly altered.[89]

Judge Bedjaoui sought to ensure that the Court's opinion would be interpreted as a rejection of the *Lotus* principle, noting that "from the uncertainties surrounding the law and the facts [the Court] does not infer any freedom to take a position. Nor does it suggest that such license could in any way whatever be deduced therefrom."[90] According to Bedjaoui, any observers who assumed the legality of nuclear weapons from the indeterminacy of the Court's opinion would be mistaken.

Each of the three judges who dissented on the issue of whether customary or conventional international law prohibited the threat or use of nuclear weapons *per se* objected to the form of that inquiry—a form that could be taken as supporting the basic structure of the *Lotus* principle.

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88. *Id.* at 267.

89. *Id.* at 270 (separate opinion of Judge Bedjaoui) (emphasis in original); *see also id.* at 495 (dissenting opinion of Judge Weeramantry) (arguing that the *Lotus* decision adjudged a context far removed from that which the Court faced in the *Nuclear Weapons* case).

90. *Id.* at 271 (separate opinion of Judge Bedjaoui).

Echoing J.L. Brierly, Judge Koroma argued that "the futile quest for specific legal prohibition can only be attributable to an extreme form of positivism, which is out of keeping with the international jurisprudence—including that of this Court."[91] Judge Weeramantry also condemned the search for a specific prohibition as outmoded:

> It would be an interpretation totally out of context that the *"Lotus"* decision formulated a theory, equally applicable in peace and war, to the effect that a State could do whatever it pleased so long as it had not bound itself to the contrary. Such an interpretation of *"Lotus"* would cast a baneful spell on the progressive development of international law.[92]

Judge Shahabuddeen, in particular, disapproved of the formulation in paragraphs (2)A and B of the *dispositif*, claiming that it led to the conclusion "[o]n the received view of the *Lotus* decision" that States have a right to use nuclear weapons—a conclusion with which he disagreed.[93] According to him, the *Lotus* decision "does not preclude a holding that there is no right to do such an act unless the act is one which is *authorized* under international law."[94]

Although these judges dissented because they felt the Court should have gone further in declaring the outright illegality of the threat or use of nuclear weapons, there is good reason to believe their general unwillingness to apply the *Lotus* principle enjoyed the support of the majority of the Court. In addition to the direct repudiation of the principle in the opinions of Judges Bedjaoui, Koroma, Weeramantry, and Shahabuddeen, a more subtle rejection can be detected in the opinions of Judges Ranjeva,[95] Vereshchetin (in light of his view on the permissibility of *non liquet*), and Fleischhauer. The portion of Judge Fleischhauer's opinion that appears most pertinent to the *Lotus* principle is illuminating:

> The principles and rules of the humanitarian law and the other principles of law applicable in armed conflict . . . are all principles and rules of law. None of these principles and rules is above the law, they are of equal rank in law and they can be altered by law. They are justiciable . . . In view of their equal ranking this

91. *Id.* at 575 (dissenting opinion of Judge Koroma).
92. *Id.* at 495 (dissenting opinion of Judge Weeramantry).
93. *Id.* at 390 (dissenting opinion of Judge Shahabuddeen).
94. *Id.* at 394 (emphasis added).
95. *Id.* at 294 (separate opinion of Judge Ranjeva) ("The absence of a direct and specific reference to nuclear weapons cannot be used to justify the legality, even indirect, of the threat or use of nuclear weapons.").

> means that, if the need arises, the smallest common denominator between the conflicting principles and rules has to be found.[96]

In other words, in the absence of a specific authorization or prohibition on the threat or use of nuclear weapons, the Court must arrive at a solution by inquiring into the overlapping elements of various coequal principles. Thus, no residual principle or presumption should be prioritized or applied. The only judge who explicitly indicated support for the *Lotus* principle was Judge Guillaume.[97]

IV. CONCLUSION

Aside from its opinion in the *Nuclear Weapons* case, the ICJ generally has not seen fit to address the *Lotus* principle squarely. Scholars, practitioners, and parties to proceedings before the Court therefore have continued to invoke the principle as a cornerstone of the international legal cathedral. Yet the principle's very popularity and status as a "groundrule"—not to mention its breadth and ambiguity—may have emptied it of its substantive content over the years, rendering it a platitude without any commonly accepted meaning in the field. A more rigorous inquiry into the *Lotus* principle yields various interpretive possibilities, many of which originate in the PCIJ's opinion itself and belie the notion that the opinion announced clear-cut, axiomatic rules. But even accounting for these richer, more nuanced readings of the *Lotus* opinion, little support can be found for the principle in the jurisprudence of the ICJ. When faced with the opportunity to apply the principle or something akin to it, the Court consistently has chosen routes that ensure that recourse to principle will not be necessary. When such circumvention has been more difficult—as in the *Nuclear Weapons* case—the Court's reasoning has suggested it sees the principle as unhelpful or outdated.

In *Case Concerning the Arrest Warrant of 11 April 2000*,[98] the Court again addressed the *Lotus* principle indirectly. Belgium cited *Lotus* in arguing that no rule of international law prevented it from opening an investigation into, and issuing an arrest warrant against, a foreign official who was not on its territory, making those actions permissible.[99] The Court ruled against Belgium on the merits without specifically addressing the *Lotus* principle. In a joint separate opinion, however, Judges

96. *Id.* at 308 (separate opinion of Judge Fleischhauer).

97. *Id.* at 291 (separate opinion of Judge Guillaume).

98. (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 1 (Feb. 14) [hereinafter *Arrest Warrant*].

99. Counter Memorial of the Kingdom of Belgium, ¶ 3.3.29 (Sept. 28, 2001), *Arrest Warrant*, 2002 I.C.J. 1.

Higgins, Kooijmans, and Buergenthal noted that while the PCIJ's pronouncements on international criminal jurisdiction retained value, the *Lotus* principle "represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies."[100] In light of the Court's unreceptive attitude toward the *Lotus* principle in the *Nuclear Weapons* case, this acknowledgement is a further indication that the Court will be wary of attempts to invoke it in the future.

100. *Arrest Warrant*, 2002 I.C.J. at 78 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).