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1. INTRODUCTION

Since the ninetieth century, a shift towards positivism is found under international law.[1] This paradigm embraces the absence of general international law different from the specific treaties concluded between independent States. Precisely, Dionisio Anzilloti's decisions as a judge at the P.C.I.J. propagated this voluntarist approach in continental European countries.[2] One of the most remarkable *dictum* in this sense was *the Case of the S.S. "Lotus"*[3] where the P.C.I.J. expressed this idea of international law governed by States, either as subjects and objects of the law itself.

Put in its context, *Lotus dictum* may appear suitable in the international law realm of 1927. However, issues related to (i) sources of international law and (ii) international law subjectivity, between others, have evolved since then. Accordingly, the purpose of this essay is to demonstrate how these arguments continue to be valid up-to-date in some of their statements, albeit at the same time they are outdated in others.

[1] H. Scupin, 'History of International Law, 1815 to World War I.' *Max Planck Encyclopedia of Public International Law* (OPIL 2001), paras. 1-8.
[2] F. Lachenmann, 'Legal Positivism.' *Max Planck Encyclopedia of Public International Law* (OPIL 2011), para. 28.
[3] *The Case of the SS "Lotus"* (France v. Turkey) [1927], P.C.I.J. Series A No 9, at 18.

2. THE POSITIVIST-VOLUNTARIST APPROACH INTO CONSIDERATION

Although not expressly defined in Article 38 (1) SICJ, the notion of *jus cogens* can be found in Article 53 of VCLT (1969). According to it, "[…] *a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*." This clause involves the recognition of a set of rules binding upon States without their consent, constraining their freedom to celebrate international treaties or constitute customary international rules contrary to their prescriptions. Under this naturalist perception of law, we notice how the prevailing positivism was called into question when the codifying works were held by the I.L.C. in 1966.[4]

The emergence of *jus cogens* responded to the need of protecting new collective values, such as peace, human rights, or the environment;[5] creating 'substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values'.[6] However, due to their abstract nature, peremptory norms create a great level of uncertainty when applied. Thus, in absence of an international consensus about the subject-matter of *jus cogens*,[7] the role of international organizations and courts, as well as the works of scholars, has been decisive in delimiting the concept, taking into consideration the severe effects it has regarding the termination and validity of treaties.[8]

Nevertheless, there are several issues at stake that induce us to believe that the positivist approach has not been completely displaced with the appearance of peremptory norms.

First, the necessity of 'acceptance' and 'recognition' of the international community of states of a *jus cogens* norm. As said before, peremptory norms are not codified in any legal instrument, nor emanate from any legislative authority. Therefore, the consensus of the States, along with the jurisprudence of international tribunals, are the only

[4] I.L.C. *Draft Articles on the Law of the Treaties*, Report of the I.L.C., Yearbook 1966, Vol. II, p. 248.
[5] S. Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law', *EJIL* (2010), pp. 387-419.
[6] I.L.C. *Draft Articles on State Responsibility*, Commentary on Article 40, para. 3, p. 283.
[7] U. Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?', *EJIL* (2007), pp. 853-871.
[8] See, in this regard, Article 64 and 71 VCLT.

mechanisms to provide their full content.[9] This fact induces us to think that, while peremptory norms limit the free consent of States, it also relies upon on what States agree or perform. Indeed, it was the I.C.J. in the *Nicaragua Case*, who clearly stated that the peremptory rule prohibiting the use of force was based not on some exotic source, but on the two most commonly used and established sources of law: treaty and custom.[10] Subsequently, if a large majority of States' conduct contravenes a hitherto peremptory norm, might the norm be changed if it is considered to have the same character of *jus cogens* by the international community.

Second, the existence of delimited areas where peremptory norms are abundant, suggests that the 'informal hierarchy' of sources of international law cannot be accepted in its all extent. The I.L.C. have given some examples of *jus cogens* norms: 'prohibition of aggression, slavery and slave trade, genocide, racial discrimination and apartheid, torture, basic rules of international humanitarian law applicable in armed conflict and the right to self-determination.'[11] Also, the I.C.J.,[12] the I.C.T.Y.,[13] and scholars like Brownlies or Higgins have listed similar instances.[14] We can realize that all these peremptory norms belong to a specified realm of international law, namely human rights and humanitarian law. Thus, there are other fields excluded where voluntarism continues to be the rule. This shows that States have not renounced to the protection of other individual interests in their mutual relations, reinforced by the specific rules governing the international law-making.[15] The fact that a treaty cannot be bound upon a Third Party,[16] or the international custom cannot be opposable to a persistent objector,[17] shows that sovereignty of States

[9] Report of the Study Group of the I.L.C., M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006), pp. 166-190, para. 376.
[10] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America) [1986] I.C.J. Rep. 14, paras. 190-199.
[11] M. Koskenniemi. *Ibid.,* p. 283-284.
[12] For example, in the *Barcelona Traction case* (p. 32), the I.C.J. stated the prohibition of aggression, genocide, and breaches of rules concerning the basic rights of the human person. See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951], I.C.J. Rep. 15, p. 24.
[13] The prohibition of genocide was held by the I.C.T.Y. in *Prosecutor v. Anto Furundzija*, IT-95-17/1 (1998).
[14] M. Koskenniemmi, *Ibid.*, para. 374.
[15] S. Villalpando, *Ibid.*, pp. 387-419.
[16] See, *a contrario*, Article 26 VCLT.
[17] As recognized in the *Asylum Case* (Colombia v. Peru) [1950] I.C.J. Rep. 266, p. 277-278, customary international law is created by the tacit consent of States; therefore, the persistent objector can drop out these obligations. However, it has been demonstrated that this fact depends

continues to be central in the system of international law, which has nevertheless adapted to the structural transformations in international relations.

On these grounds, and taking into consideration the dynamics of international law, we can only assert that the *Lotus dictum* is partially over-dated. With the inclusion of concerns linked to the protection of the international community interests, the international legal order has had to encompass the traditional principle of consensuality with the anti-voluntarist nature of *jus cogens*. Therefore, there is not a complete transformation of the international law, but an attempt to balance this two, and apparently contradicted issues.

on the tribunal which leads the contention. Occasionally, the customary international law located in society can create a great consensus, binding on States regardless their will.

3. FROM THE WESTPHALIAN STATE-CENTERED MODEL TO A BROAD PERSPECTIVE ON INTERNATIONAL LAW SUBJECTIVITY

Since the end of the Second World War, the rise of human rights' law has led to the emergence of new subjects of international law; that is, individuals. As such, individuals enjoy direct rights and responsibilities, they are entitled to bring international claims and can participate, although indirectly, in the creation, development, and enforcement of international law.[18] Albeit these are not the only actors that form the international community,[19] I will solely assess the impact of the incursion of individuals in international law. In particular, I will focus my attention on the rights and obligations of individuals under international law.

There are numerous sources of international–and regional–law from which emanate international rights and obligations of individuals: from the U.N. Charter,[20] to the U.D.H.R., the Covenants of 1966 and subsequent Protocols, and other specialized documents. Consequently, international law governs not only the relations between independent States–as *Lotus dictum* suggests–, but also between States and non-State actors.

If we deeply examine these legal instruments, we realize that the sort of international rights they embrace is limited mainly to human rights. In this sense, and bearing in mind what was said before, they are mostly part of *jus cogens*; thus, they are binding upon all States, regardless their participation in the referred treaty. Then, it follows that States have duties owed to individuals within their own territory not freely consented.[21] Furthermore, a clear example of these rights is the right to self-determination,[22] where we witness a confrontation between individuals and States in a similar position in the international law.

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[18] R. McCorquodale 'The Individual and the International Legal System' in M. D. Evans (ed.) *International Law* (2010) pp. 289-290.

[19] E.g., as stated by the I.C.J. in *Reparation for Injuries,* p. 179, 'the [U.N.] Organization was intended to exercise and enjoy, and is in fact exercising an enjoying, functions and rights which can only being explained on the basis of the possession of a large measure of international personality […] the Court has come to the conclusion that the Organization is an international person.'

[20] See the Preamble, Articles 1, 55(c), 56, 62, 68 and 76 of the U.N. Charter.

[21] T. Christakis, 'The I.C.J. Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?' *Leiden Journal of International Law* (2011), pp. 79-80.

[22] Expressly recognized in Article 1(2) U.N. Charter, Article 1 ICCPR, U.N.G.A. Res. 1514 (XV), U.N.G.A. General Assembly Resolution 1541 (XV), and the U.N.G.A. Res. 2625 (XXV) Also see *Accordance with International Law of the Unilateral Declaration of Independence in Respect*

Nevertheless, it must be noticed that when it comes to international rules that do not conform *jus cogens*, the State consent is required in order to assure the respect and protection of the individuals' rights. Further, human rights norms do not apply horizontally between individuals, in parallel to or in substitution to the applicable national law.[23] This is essentially what differences States full international legal personality from individual limited legal personality. Likewise, every single State has ratified at least one treaty containing legal obligations to protect and promote human rights,[24] something that could explain why States comply with them, beyond the role of individuals in the international plane.

Additionally, as long as human rights claims from individuals arise against the State, the fact that their consent to international adjudication continues to be indispensable,[25] makes the Westphalian model, as shown in *Lotus dictum*, still valid. As far as such claims can only be brought if the State has ratified the relevant treaty or has accepted the Article of the treaty that allows individuals to bring claims, their enforcement relies upon the States. Perhaps for these reasons of self-preservation, the I.C.J. has demonstrated that it continues to adhere to the State-centric vision of the international community;[26] even though it has recognized the continuing role of individuals in the international legal system. Moreover, individuals must exhaust domestic remedies before bringing an international claim, so the States have the opportunity to deal with these issues at a national level in the first place.[27] This difference is also relevant when considering the legal personality of both actors.

In conclusion, it is evident that the international legal system is no longer considered as exclusively compound by States. Nowadays we have a much broader conception of the actors who enjoy international legal personality and international law now embraces the regulation of State conduct in relation with these other non-State actors. However, States maintain their centrality, from which they have dealt with these issues as legitimate

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of Kosovo (Advisory Opinion) [2010] I.C.J. Rep 403, para. 79; and *Western Sahara* (Advisory Opinion) [1975] I.C.J. Rep. 12, para. 55.

[23] J. Crawford, *Brownlie's Principles of Public International Law* (2012), p. 121.

[24] R. McCorquodale, *Ibid.*, p. 290.

[25] F. Lachenmann, *Ibid.*, para.32.

[26] G. I. Hernández, 'The concept of 'international community' and the International Court of Justice' (OUPblog, 11 November 2013) <https://blog.oup.com/2013/11/international-community-court-of-justice-law-pil/> accessed 27 September 2017.

[27] R. McCorquodale, *Ibid.*, p. 295.

concerns of the international community.[28] States, either by treaty and practice have placed human rights in the international legal system. As Koskenniemi has pointed out: "*[b]y establishing and consenting to human rights limitation on their own sovereignty, states actually define, delimit, and contain those rights, thereby domesticating their use and affirming the authority of the state as the source from with such rights spring.*"[29] Eventually, individuals do neither act as 'law-makers' nor control the access to the international legal order in the way States do,[30] despite they actually perform this role at the national level.

[28] OHCHR, 'Vienna Declaration and Programme Action' (1993), para. 4., recalls the necessity of international cooperation between the Members of U.N.
[29] M. Koskenniemi, 'The Future of Statehood'. *Harvard International Law Journal*, (1991), p. 406.
[30] K. Parlett. *The Individual in the International Legal System. Continuity and Change in International Law.* (2010) pp. 297-298.

4. CONCLUSION

After reviewing the *Lotus dictum* in two of its implications, only one thing can be asserted: the positivist approach it relies on is neither completely valid nor totally outdated. We are embedded in a circular reasoning where States, non-States actors, and the sources international law are interconnected. This leads us to reflect on the increased importance of the 'international community' both for the establishment of new sources of international law and the recognition of new subjects of international law. But, since the concept of 'international community' remains contentious, a unique explanation on these matters cannot be addressed.

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