

APPROACH OF THE INTERNATIONAL COURT IN DETERMINING THE EXISTENCE OF CUSTOMARY INTERNATIONAL LAW: COMPARISON & ANALYSIS

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ABSTRACT

“Customary International Law is one of the most venerable sources of law. Certain behaviors and practices amongst the state have taken the aegis of time and have been formed as an integral facet of International Law which upon a time-to-time basis seeks the express validation of the International Court of Justice. The consistent comportment of the states has formed and gained the sanctity of law. In this manuscript, We will compare and analyze the approach of the International Court in determining the existence of Customary International Law in certain cases. The customs over time become legal obligations and are not explicitly written under conventions and treaties but preached as a matter of practice.¹⁷⁰⁷ Custom is the method to create legally binding rules ever since the commencement of the international community. The implied consent of the states is present in the scenario of Customary International Law. There is also a lack of aptness and they cannot be regarded to have ceased to exist if they transformed into treaty rules. They pose an important source of International law and are deemed to be an idiosyncratic transaction of practices between two states.”¹⁷⁰⁸

KEYWORDS : Equidistance, Questionability, Jurisdiction, Judgement, Customary International Law

GRASP - EDUCATE - EVOLVE

¹⁷⁰⁷ Cornell Law School Legal Information Institute
[https://www.law.cornell.edu/wex/customary_international_law#:~:text=Customary%20international%20law%20results%20from,for%20visiting%20heads%20of%20state.\(12-03-2024\)](https://www.law.cornell.edu/wex/customary_international_law#:~:text=Customary%20international%20law%20results%20from,for%20visiting%20heads%20of%20state.(12-03-2024))

¹⁷⁰⁸ H.O AGARWAL, INTERNATIONAL LAW & HUMAN RIGHTS, (26,27) (CENTRAL LAW PUBLICATIONS 2021)

INTRODUCTION

This case pertains to the criminal trial between France & Turkey which exhibits the conflict between two countries' vessels that took place on August 2, 1926, leading to the death of 8 Turkish officials by the French who were taken to Turkey and tried for manslaughter. The question raised by the French was Whether there was a questionability about the jurisdiction and Whether France had violated Article 15 of the Lausanne Convention. The then Permanent Court of Justice decided in this case and the case relates to the scrutinizing the condition of jurisdiction. The later assertion by the Hon'ble Court transcends that Although France had the jurisdiction in a complete sense owing to the flag aviated on the ship, International Law hadn't provided complete jurisdiction and authority to them. And, turkey was correct in filing the suit against France and did not act in contravention the International Law contradictory to Article 15 as demanded by the French authority. The International Court also ruled that there exists no law in the International Law under which a state whose ship is affected by a collision of ships, cannot prosecute an offender. Turkey has the right to try the offense and has not infringed the International Law. France's argument as to the flag in the vessel on the high sea was not applicable here as no international law compelled Turkish negotiation as their ship was destructed.¹⁷⁰⁹ This case also transcends the factor of customary law and its importance in the absence of an explicit treaty. The contentions from both sides were treated to be of paramount importance. One side contained the accused while the other, the victim. The final decision was in support of Turkey that it has not acted against the tenets of international law under Turkish Law. The court also postulated that the reasoning given by the French government is inconsistent. Also, there is no rule of international law concerning collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State

whose flag is flown. The case also concluded the 'Lotus Principle' which signifies 'free will of the states', which cannot be created without the consent of the states. The case is a testament to the fact that the aggrieved country Turkey cannot be further aggrieved by the questionability of jurisdiction to act as a further hound on it. The country on the pretext of the collision of the high seas lost 8 of its officials and the high seas are not indicative of any particular jurisdiction. The very judgment of the Hon'ble Court in its very premise is historic and is and will be construed as a precedent for future events as this case pertains to an important dictum upon creating customary international law.¹⁷¹⁰

The judgement by the Hon'ble court in United Kingdom v. Norway, 1951 exposition was a testament summarising a prolonged disputation between the United Kingdom and Norway which earlier accrued substantial engrossment in other maritime states. Norway, In the year 1935 sanctioned a decree purporting the autonomy of certain fishing grounds situated off its northern coast and reserving them for proprietarily for their fishermen. The main issue that was pertinent was 'whether the decree which purports and lays down a method for drawing the baselines from which the width of the Norwegian territorial waters had to be calculated, was validly International Law'. The Norwegian coastal zone had intricacies such as fjords, bays, islands, islets, and reefs. The UK contended that the baselines drawn through the decree were not by the general direction of the coast and there was a lacuna of them being drawn with reasonability. The Court held on 18 December 1951, upon finding that in total conflict with the testaments given by the UK, neither the method nor the actual baseline stipulated under the decree of 1935 was in contravention to the facets of International Law. The very factor of the presence of elements on the coast may have posed a reasonable questionability upon the UK that the Norwegian

¹⁷⁰⁹ Legal Service India <https://www.legalserviceindia.com/legal/article-6371-the-case-of-the-s-s-lotus-france-v-s-turkey.html> (13-03-24)

¹⁷¹⁰ S.S. Lotus, (France v. Turkey), 1927, judgement I.C.J. Report (Sept. 7)

coast may have had an inaccuracy in drawing the baselines. In this case, the UK posed a general and notional question upon the inaccuracy of the baseline however the very statement by the UK was disregarded by the International Court of Justice. The very act of Norway segregating certain fishing grounds for exclusively their own country's fishermen signifies an act of autonomy. This case is a testament to the arbitrament of the ICJ which is an embodiment of the lack of politicization in the International Forum of Law. The approachability of countries to the ICJ with great ease is also a factor of consideration. This case also posed as a blueprint to the other states that also have garnered considerable interest in maritime which entails being an instance and a precedent to similar cases in the International Law forum.¹⁷¹¹

The case of North Sea Continental Shelf, 1969 pertains to the confinement of the continental shelf of the North Sea between Denmark and the Federal Republic of Germany, & between the Netherlands and the Federal Republic, and was submitted to the court by Special Agreement. The Parties viably contested for the court to state and explicitly mention the proposition and regulation of International law that are felicitous for the delimitations acted upon. Through the order of 26 April 1968, Both Denmark and Netherlands clubbed as parties on the pretext of the same contentions and junctured the case/legal proceedings in both cases. In its judgment on 20 February 1969, Through considering certain factors, The court's findings were that the borderline in questionability was to be created based on agreement betwixt the parties and concerning the equitable principles such as to leave to each party, those areas of the continental shelf which constituted the inherent prolongation of its land territory under the sea, indicative of certain nuances to be taken in emolument. The court disregarded the proposition that the delimitations in questionability be carried out concerning the

principle of equidistance postulated under the 1958 Geneva Convention on the Continental Shelf. The Court also ruled and took into account the factor that the Federal Republic had not ratified that Convention and conclusively held that the equidistance principle was not intrinsic in the fundamental conceptualization of continental shelf rights, and ruled that this very principle was not a rule of customary international law. This case pertains to the candor of the countries for them to approach the International Court of Justice and for them to cohere whilst having an aligning design. The very judgment of the court emphasizes and lays importance upon the definition of the 'Principle of Equidistance' postulated under 'Geneva Convention-1958 on the Continental Shelf'. The very judgment predicates the significance of The Geneva Convention and disregards its alignment with customary international law. In the scenario of Customary International Law, A large emphasis is put upon the factum of implied consent in which two states inherently give consent to certain practices and there is no scope for dispute between the two. There naturally accrues, no scope of questionability or conflict but a sense of mutual consideration upon certain practices which in its very essence was a lacuna in this case.¹⁷¹²

The first case i.e. FRANCE V. TURKEY raised the questionability of the jurisdiction in cases of criminal cases accruing at high seas conducive to the applicability of Customary Law in International Law, The second case namely UNITED KINGDOM V. NORWAY postulates the contention of The UK contradicted by the ICJ on the pretext that the baseline drawn by Norway was apt in its essence and there raises no questionability upon that. Thirdly, THE NORTH SEA CONTINENTAL SHELF CASE emphasized on the factor of the inherent demarcation of the borderline under the sea. All of these cases draw a parallel and justify the factum of Customary Law on the International Law front.

¹⁷¹¹ Fisheries (United Kingdom v. Norway), 1969, judgement I.C.J. Reports (Dec. 18)

¹⁷¹² North Sea Continental Shelf (Federal Republic of Germany/Netherlands), 1969, judgement I.C.J. Report (Feb. 20)

Customary Laws are implied, inhibit consent, and have mutual respect for the states intertwined. The main lacuna accrues to the lack of documentation of the said rules which over due course of time may be subject to varied interpretations by the states in this case, The ICJ plays the role of the decipherer taking in consideration all the factors concerning the case passes the judgement. The ICJ in totality acts as a neutral third party since different states are concerned passes non-discriminatory and historic judgment.

CONCLUSION

France v. Turkey, 1927 is as per my assertions, an important testament to the facet of customary law in the context of International Law. With regards to the criminal jurisdiction, It was important for the Hon'ble court to reprimand France for its deeds to create a deterrent effect for the other countries, and to justify the trial done for the French officials at the Turkish Court. The court also signified the facet of concurrent jurisdiction and how the jurisdiction is not explicitly mentioned. Conclusively the ruling that states that Turkey has not violated Article 15 of the Lausanne Convention is also important to note. Here the phrase 'the pot calling the kettle black' can be very well established as accordingly, Turkey had accrued loss as in the manslaughter done by the French officials to the Turkish officials, Furthermore, Questioning the jurisdiction signifies the blatant act of the justification of its deeds. The Hon'ble PCIJ has in its very essence ruled the exemplary judgment which is for future prospects, to be dealt with and known as well as be a celebrated case law. Fisheries (United Kingdom v. Norway) is under my estimation poses an example of the lack of hierarchy in the International forum of law. The United Kingdom through its very predominance in the global sphere was through the ICJ repulsed by its contention that supposed the inaccuracy of the baselines drawn by Norway. This case in totality can be a glorious testament to the sanctity and existence of the Hon'ble International Court of Justice. The submissions by The UK were blatantly contradicted by the

ICJ upon assessment. North sea continental shelf case, 1969 is as per my assessment, This case is an illustrious specimen to note the definition of Customary Law in the International Law sphere and that the Hon'ble International Court of Justice can be approached during instances of conflict between the states however not every nuance under the conflict between states come under the aegis of Customary Law. The questioning done by the parties to the court is a valid action that also transcends the autonomy of the particular countries to have the sanctity of natural prolongation of their respective territory under the sea as a judgment.

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