

Chapter 2

EXTRATERRITORIAL APPLICATION OF NATIONAL LEGISLATION VIS-À-VIS NORMS AND PRINCIPLES OF INTERNATIONAL LAW

2.1. Introduction

‘Extraterritorial Application of National Legislation’ (EANL), as the term suggests, implies the application of the laws of one sovereign State in the territory of another State by the former. *Prima facie*, the practice appears to be an act of intervention in the domestic affairs of the state, and in violation of the principle of sovereign equality of states, which has been enshrined in the UN Charter.¹ It appears to be at odds with the fundamental territorial basis for exercise of jurisdiction in international law by a State, as was recognized in the leading Lotus case² even before the entry into force of the UN Charter.

The Permanent Court of International Justice (hereinafter PCIJ) in the Lotus case held that “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.”³

In fact, the Lotus case established the fundamental dictum of international law that what is not prohibited by international law is permitted and is generally understood to

¹ A. Paulus, ‘Article 2’ in Simma, B. et al., *Charter of the United Nations: A Commentary*, 3rd edn, OUP, 2012, p. 121.

² *The Case of the S.S. Lotus (France v Turkey)* PCIJ Rep A No 10.

³ *Ibid*, 18.

constitute what is recognized as the space for the freedom of actions for the state or the *domaine réservé*.⁴

The UN Charter recognizes the concept of *domaine réservé*, in Article 2(7) which is framed in the form of a non-obstante clause and circumscribes the sphere of the actions of the UN in respect of a Member States in the following words:

“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

While, on the one hand, it restricts actions of the UN, on the other it carves out an exception for action under Security Council resolutions adopted under Chapter VII of the UN Charter for the maintenance of *international peace and security*.

It is generally accepted that the language of article 2(7) may only declare actions of the UN as *ultra-virus* but does not generally spell out any right or obligations for other States.⁵

The question arises as to which sources of international law there are that prohibit States from applying their legislations on the territory of other States, thereby violating the *domaine réservé* of other States, to what extent it is permitted, and whether there are any conditions or limitations on the exercise of this freedom of action by States

⁴ Hertogen, A., ‘Letting lotus bloom’, European Journal of International Law 26.4, 2015, pp. 901-926.

⁵ G. Nolte, ‘Article 2(7)’ B. Simma et al., *op. cit.*, p. 280.