File E. c.

Docket XI

Judgment No. 9

7 September 1927

PERMANENT COURT OF INTERNATIONAL JUSTICE

Twelfth (Ordinary) Session

The Case of the S.S. Lotus

France v. Turkey

Judgment

BEFORE: President: Huber
Vice-President: Weiss
Former President Loder
Judges: Lord Finlay, Nyholm, Moore, De Bustamante, Altamira, Oda, Anzilotti, Pessoa
National Judge: Feizi-Daim Bey

Represented By: France: Basdevant, Professor at the Faculty of Law of Paris
Turkey: His Excellency Mahmout Essat Bey, Minister of Justice

Perm. Link: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm

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[p5] [1] By a special agreement signed at Geneva on October 12th, 1926, between the Governments of the French and Turkish Republics and filed with the Registry of the Court, in accordance with Article 40 of the Statute and Article 35 of the Rules of Court, on January 4th, 1927, by the diplomatic representatives at The Hague of the aforesaid Governments, the latter have submitted to the Permanent Court of International Justice the question of jurisdiction which has arisen between them following upon the collision which occurred on August 2nd, 1926, between the steamships Boz-Kourt and Lotus.

[2] According to the special agreement, the Court has to decide the following questions:

"(1) Has Turkey, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law – and if so, what principles - by instituting, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamer Lotus and the Turkish steamer Boz-Kourt and upon the arrival of the French steamer at Constantinople as well as against the captain of the Turkish steamship-joint criminal proceedings in pursuance of Turkish law against M. Demons, officer of the watch on board the Lotus at the time of the collision, in consequence of the loss of the Boz-Kourt having involved the death of eight Turkish sailors and passengers?
(2) Should the reply be in the affirmative, what pecuniary reparation is due to M. Demons, provided, according to the principles of international law, reparation should be made in similar cases?"

[3] Giving effect to the proposals jointly made by the Parties to the special agreement in accordance with the terms of Article 32 of the Rules, the President, under Article 48 of the Statute and Articles 33 and 39 of the Rules, fixed the dates for the filing by each Party of a Case and Counter-Case as March 1st and May 24th, 1927, respectively; no time was fixed for the submission of replies, as the Parties had expressed the wish that there should not be any.

[4] The Cases and Counter-Cases were duly filed with the Registry by the dates fixed and were communicated to those concerned as provided in Article 43 of the Statute.

[5] In the course of hearings held on August 2nd, 3rd, 6th, and 8th-10th, 1927, the Court has heard the oral pleadings, reply and rejoinder submitted by the above-mentioned Agents for the Parties. [p6]

[6] In support of their respective submissions, the Parties have placed before the Court, as annexes to the documents of the written proceedings, certain documents, a list of which is given in the annex.

[7] In the course of the proceedings, the Parties have had occasion to define the points of view respectively adopted by them in relation to the questions referred to the Court. They have done so by formulating more or less developed conclusions summarizing their arguments. Thus the French Government, in its Case, asks for judgment to the effect that:

"Under the Convention respecting conditions of residence and business and jurisdiction signed at Lausanne on July 24th, 1923, and the principles of international law, jurisdiction to entertain criminal proceedings against the officer of the watch of a French ship, in connection with the collision which occurred on the high seas between that vessel and a Turkish ship, belongs exclusively to the French Courts;
"Consequently, the Turkish judicial authorities were wrong in prosecuting, imprisoning and convicting M. Demons, in connection with the collision which occurred on the high seas between the Lotus and the Boz-Kourt, and by so doing acted in a manner contrary to the above-mentioned Convention and to the principles of international law;
"Accordingly the Court is asked to fix the indemnity in reparation of the injury thus inflicted upon M. Demons at 6'000 Turkish pounds and to order this indemnity to be paid by the Government of the Turkish Republic to the Government of the French Republic."

[8] The Turkish Government, for its part, simply asks the Court in its Case to "give judgment in favour of the jurisdiction of the Turkish Courts".

[9] The French Government, however, has, in its Counter-Case, again formulated the conclusions, already set out in its Case, in a slightly modified form, introducing certain new points preceded by arguments which should be cited in full, seeing that they summarize in a brief and precise manner the point of view taken by the French Government ; the new arguments and conclusions are as follows:

“Whereas the substitution of the jurisdiction of the Turkish Courts for that of the foreign consular courts in criminal proceedings taken against foreigners is the outcome of the consent given by the Powers to this substitution in the Conventions signed at Lausanne on July 24th, 1923; [p7]
"As this consent, far from having been given as regards criminal proceedings against foreigners for crimes or offences committed abroad, has been definitely refused by the Powers and by France in particular;
"As this refusal follows from the rejection of a Turkish amendment calculated to establish this jurisdiction and from the statements made in this connection;
"As, accordingly, the Convention of Lausanne of July 24th, 1923, construed in the light of these circumstances and intentions, does not allow the Turkish Courts to take cognizance of criminal proceedings directed against a French citizen for crimes or offences committed outside Turkey;
"Furthermore, whereas, according to international law as established by the practice of civilized nations, in their relations with each other, a State is not entitled, apart from express or implicit special agreements, to extend the criminal jurisdiction of its courts to include a crime or offence committed by a foreigner abroad solely in consequence of the fact that one of its nationals has been a victim of the crime or offence;
"Whereas acts performed on the high seas on board a merchant ship are, in principle and from the point of view of criminal proceedings, amenable only to the jurisdiction of the courts of the State whose flag the vessel flies ;
"As that is a consequence of the principle of the freedom of the seas, and as States, attaching especial importance thereto, have rarely departed therefrom;
"As, according to existing law, the nationality of the victim is not a sufficient ground to override this rule, and seeing that this was held in the case of the Costa Ricca Packet;
"Whereas there are special reasons why the application of this rule should be maintained in collision cases, which reasons are mainly connected with the fact that the culpable character of the act causing the collision must be considered in the light of purely national regulations which apply to the ship and the carrying out of which must be controlled by the national authorities;
"As the collision cannot, in order thus to establish the jurisdiction of the courts of the country to which it belongs, be localized in the vessel sunk, such a contention being contrary to the facts;
"As the claim to extend the jurisdiction of the courts of the country to which one vessel belongs, on the ground of the “connexity" (connexite) of offences, to proceedings against an officer of the other vessel concerned in the collision, when the two vessels are not of the same nationality, has no support in international law ;
"Whereas a contrary decision recognizing the jurisdiction of the Turkish Courts to take cognizance of the criminal proceedings against the officer of the watch of the French ship involved in the collision would amount to introducing an innovation entirely at variance with firmly established precedent; [p8]
"Whereas the special agreement submits to the Court the question of an indemnity to be awarded to Monsieur Demons as a consequence of the decision given by it upon the first question;
"As any other consequences involved by this decision, not having been submitted to the Court, are ipso facto reserved;
"As the arrest, imprisonment and conviction of Monsieur Demons are the acts of authorities having no jurisdiction under international law, the principle of an indemnity enuring to the benefit of Monsieur Demons and chargeable to Turkey, cannot be disputed;

"As his imprisonment lasted for thirty-nine days, there having been delay in granting his release on bail contrary to the provisions of the Declaration regarding the administration of justice signed at Lausanne on July 24th, 1923 ;
"As his prosecution was followed by a conviction calculated to do Monsieur Demons at least moral damage;
"As the Turkish authorities, immediately before his conviction, and when he had undergone detention about equal to one half of the period to which he was going to be sentenced, made his release conditional upon ball in 6'000 Turkish pounds;
……
"Asks for judgment, whether the Government of the Turkish Republic be present or absent, to the effect:
"That, under the rules of international law and the Convention respecting conditions of residence and business and jurisdiction signed at Lausanne on July 24th, 1923, jurisdiction to entertain criminal proceedings against the officer of the watch of a French ship, in connection with the collision which occurred on the high seas between that ship and a Turkish ship, belongs exclusively to the French Courts;
"That, consequently, the Turkish judicial authorities were wrong in prosecuting, imprisoning and convicting Monsieur Demons, in connection with the collision which occurred on the high seas between the Lotus and the Boz-Kourt, and by so doing acted in a manner contrary to the principles of international law and to the above-mentioned Convention;
"Accordingly, the Court is asked to fix the indemnity in reparation of the injury thus inflicted on Monsieur Demons at 6,000 Turkish pounds and to order this indemnity to be paid by the Government of the Turkish Republic to the Government of the French Republic within one month from the date of judgment, without prejudice to the repayment of the bail deposited by Monsieur Demons.
"The Court is also asked to place on record that any other consequences which the decision given might have, not having been submitted to the Court, are ipso facto reserved."

[10] The Turkish Government. in its Counter-Case, confines itself to repeating the conclusion of its Case, preceding it, however, by [p9] a short statement of its argument, which statement it will be well to reproduce, since it corresponds to the arguments preceding the conclusions of the French Counter-Case:

"1.-Article 15 of the Convention of Lausanne respecting conditions of residence and business and jurisdiction refers simply and solely, as regards the jurisdiction of the Turkish Courts, to the principles of international law, subject only to the provisions of Article 16. Article 15 cannot be read as supporting any reservation whatever or any construction giving it another meaning. Consequently, Turkey, when exercising jurisdiction in any case concerning foreigners, need, under this article, only take care not to act in a manner contrary to the principles of international law.
"2.-Article 6 of the Turkish Penal Code, which is taken word for word from the Italian Penal Code, is not, as regards the case, contrary to the principles of international law.
"3.-Vessels on the high seas form part of the territory of the nation whose flag they fly, and in the case under consideration, the place where the offence was committed being the S. S. Boz-Kourt flying the Turkish flag, Turkey's jurisdiction in the proceedings taken is as clear as if the case had occurred on her territory-as is borne out by analogous cases.
"4.-The Boz-Kourt-Lotus case being a case involving "connected" offences (delits connexes), the Code of criminal procedure for trial-which is borrowed from France-lays down that the French officer should be prosecuted jointly with and at the same time as the Turkish officer; this, moreover ' is confirmed by the doctrines and legislation of all countries. Turkey, therefore, is entitled from this standpoint also to claim jurisdiction.

"5.-Even if the question be considered solely from the point of view of the collision, as no principle of international criminal law exists which would debar Turkey from exercising the jurisdiction which she clearly possesses to entertain an action for damages, that country has Jurisdiction to institute criminal proceedings.
"6.-As Turkey is exercising jurisdiction of a fundamental character, and as States are not, according to the principles of international law, under an obligation to pay indemnities in such cases, it is clear that the question of the payment of the indemnity claimed in the French Case does not arise for the Turkish Government, since that Government has jurisdiction to prosecute the French citizen Demons who, as the result of a collision, has been guilty of manslaughter.
"The Court is asked for judgment in favour of the jurisdiction of the Turkish Courts." [p10]

[11] During the oral proceedings, the Agent of the French Government confined himself to referring to the conclusions submitted in the Counter-Case, simply reiterating his request that the Court should place on record the reservations made therein as regards any consequences of the judgment not submitted to the Court's decision these reservations are now duly recorded.

[12] For his part, the Agent for the Turkish Government abstained both in his original speech and in his rejoinder from submitting any conclusion. The one he formulated in the documents filed by him in the written proceedings must therefore be regarded as having been maintained unaltered.

The Facts

[13] According to the statements submitted to the Court by the Parties' Agents in their Cases and in their oral pleadings, the facts in which the affair originated are agreed to be as follows:

[14] On August 2nd, 1926, just before midnight, a collision occurred between the French mail steamer Lotus, proceeding to Constantinople, and the Turkish collier Boz-Kourt, between five and six nautical miles to the north of Cape Sigri (Mitylene). The Boz-Kourt, which was cut in two, sank, and eight Turkish nationals who were on board perished. After having done everything possible to succour the shipwrecked persons, of whom ten were able to be saved, the Lotus continued on its course to Constantinople, where it arrived on August 3rd.

[15] At the time of the collision, the officer of the watch on board the Lotus was Monsieur Demons, a French citizen, lieutenant in the merchant service and first officer of the ship, whilst the movements of the Boz-Kourt were directed by its captain, Hassan Bey, who was one of those saved from the wreck.

[16] As early as August 3rd the Turkish police proceeded to hold an enquiry into the collision on board the Lotus ; and on the following day, August 4th, the captain of the Lotus handed in his master's report at the French Consulate-General, transmitting a copy to the harbour master.

[17] On August 5th, Lieutenant Demons was requested by the Turkish authorities to go ashore to give evidence. The examination, the length of which incidentally resulted in delaying the departure of [p11] the Lotus, led to the placing under arrest of Lieutenant Demons without previous notice being given to the French Consul-General - and Hassan Bey, amongst others. This arrest, which has been characterized by the Turkish Agent as arrest pending trial (arrestation preventive), was effected in order to ensure that the criminal prosecution instituted against the two officers, on a charge of manslaughter, by the Public Prosecutor of Stamboul, on the complaint of the families of the victims of the collision, should follow its normal course.

[18] The case was first heard by the Criminal Court of Stamboul on August - 28th. On that occasion, Lieutenant Demons submitted that the Turkish Courts had no jurisdiction; the Court, however, overruled his objection. When the proceedings were resumed on September 11th, Lieutenant Demons demanded his release on bail: this request was complied with on September I3th, the bail being fixed at 6'000 Turkish pounds.

[19] On September 15th, the Criminal Court delivered its judgment, the terms of which have not been communicated to the Court by the Parties. It is, however, common ground, that it sentenced Lieutenant Demons to eighty days' imprisonment and a fine of twenty-two pounds, Hassan Bey being sentenced to a slightly more severe penalty.

[20] It is also common ground between the Parties that the Public Prosecutor of the Turkish Republic entered an appeal against this decision, which had the effect of suspending its execution until a decision upon the appeal had been given; that such decision has not yet been given; but that the special agreement of October 12th, 1926, did not have the effect of suspending "the criminal proceedings .... now in progress in Turkey".

[21] The action of the Turkish judicial authorities with regard to Lieutenant Demons at once gave rise to many diplomatic representations and other steps on the part of the French Government or its representatives in Turkey, either protesting against the arrest of Lieutenant Demons or demanding his release, or with a view to obtaining the transfer of the case from the Turkish Courts to the French Courts.

[22] As a result of these representations, the Government of the Turkish Republic declared on September 2nd, 1926, that "it would have no objection to the reference of the conflict of jurisdiction to the Court at The Hague". [p12]

[23] The French Government having, on the 6th of the same month, given "its full consent to the proposed solution", the two Governments appointed their plenipotentiaries with a view to the drawing up of the special agreement to be submitted to the Court; this special agreement was signed at Geneva on October 12th, 1926, as stated above, and the ratifications were deposited on December 27th, 1926.

The Law

I. [Position of the Parties Pursuant to the Special Agreement]

[24] Before approaching the consideration of the principles of international law contrary to which Turkey is alleged to have acted thereby infringing the terms of Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and, jurisdiction - , it is necessary to define, in the light of the written and oral proceedings, the position resulting from the special agreement. For, the Court having obtained cognizance of the present case by notification of a special agreement concluded between the Parties in the case, it is rather to the terms of this agreement than to the submissions of the Parties that the Court must have recourse in establishing the precise points which it has to decide. In this respect the following observations should be made:

[25] 1. – The collision which occurred on August 2nd, 1926, between the S. S. Lotus, flying the French flag, and the S. S. Boz-Kourt, flying the Turkish flag, took place on the high seas: the territorial jurisdiction of any State other than France and Turkey therefore does not enter into account.

[26] 2. – The violation, if any, of the principles of international law would have consisted in the taking of criminal proceedings against Lieutenant Demons. It is not therefore a question relating to any particular step in these proceedings - such as his being put to trial, his arrest, his detention pending trial or the judgment given by the Criminal Court of Stamboul - but of the very fact of the Turkish Courts exercising criminal jurisdiction. That is why the arguments put forward by the Parties in both phases of [p13] the proceedings relate exclusively to the question whether Turkey has or has not, according to the principles of international law, jurisdiction to prosecute in this case.

[27] The Parties agree that the Court has not to consider whether the prosecution was in conformity with Turkish law; it need not therefore consider whether, apart from the actual question of jurisdiction, the provisions of Turkish law cited by Turkish authorities were really applicable in this case, or whether the manner in which the proceedings against Lieutenant Demons were conducted might constitute a denial of justice, and accordingly, a violation of international law. The discussions have borne exclusively upon the question whether criminal jurisdiction does or does not exist in this case.

[28] 3. – The prosecution was instituted because the loss of the Boz-Kourt involved the death of eight Turkish sailors and passengers. It is clear, in the first place, that this result of the collision constitutes a factor essential for the institution of the criminal proceedings in question; secondly, it follows from the statements of the two Parties that no criminal intention has been imputed to either of the officers responsible for navigating the two vessels; it is therefore a case of prosecution for involuntary manslaughter. The French Government maintains that breaches of navigation regulations fall exclusively within the jurisdiction of the State under whose flag the vessel sails ; but it does not argue that a collision between two vessels cannot also bring into operation the sanctions which apply to criminal law in cases of manslaughter. The precedents cited by it and relating to collision cases all assume the possibility of criminal proceedings with a view to the infliction of such sanctions, the dispute being confined to the question of jurisdiction concurrent or exclusive - which another State might claim in this respect. As has already been observed, the Court has not to consider the lawfulness of the prosecution under Turkish law; questions of criminal law relating to the justification of the prosecution and consequently to the existence of a nexus causalis between the actions of Lieutenant Demons and the loss of eight Turkish nationals are not relevant to the issue so far as the Court is concerned. Moreover, the exact conditions in which these persons perished do not appear from the documents submitted to the Court ; nevertheless, there is no doubt that their death may be regarded as the direct [p14] outcome of the collision, and the French Government has not contended that this relation of cause and effect cannot exist.

[29] 4. – Lieutenant Demons and the captain of the Turkish steamship were prosecuted jointly and simultaneously. In regard to the conception of "connexity" of offences (connexite), the Turkish Agent in the submissions of his Counter-Case has referred to the Turkish Code of criminal procedure for trial, the provisions of which are said to have been taken from the corresponding French Code. Now in French law, amongst other factors, coincidence of time and place may give rise to "connexity" (connexite). In this case, therefore, the Court interprets this conception as meaning that the proceedings against the captain of the Turkish vessel in regard to which the jurisdiction of the Turkish Courts is not disputed, and the proceedings against Lieutenant Demons, have been regarded by the Turkish authorities, from the point of view of the investigation of the case, as one and the same prosecution, since the collision of the two steamers constitutes a complex of acts the consideration of which should, from the standpoint of Turkish criminal law, be entrusted to the same court.

[30] 5. – The prosecution was instituted in pursuance of Turkish legislation. The special agreement does not indicate what clause or clauses of that legislation apply. No document has been submitted

to the Court indicating on what article of the Turkish Penal Code the prosecution was based; the French Government however declares that the Criminal Court claimed jurisdiction under Article 6 of the Turkish Penal Code, and far from denying this statement, Turkey, in the submissions of her Counter-Case, contends that that article is in conformity with the principles of international law. It does not appear from the proceedings whether the prosecution was instituted solely on the basis of that article.

[31] Article 6 of the Turkish Penal Code, Law No. 765 of March 1st, 1926 (Official Gazette No. 320 of March 13th, 1926), runs as follows:

[Translation]
"Any foreigner who, apart from the cases contemplated by Article 4, commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a [p15] minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey. The penalty shall however be reduced by one third and instead of the death penalty, twenty years of penal servitude shall be awarded.
"Nevertheless, in such cases, the prosecution will only be instituted at the request of the Minister of Justice or on the complaint of the injured Party.
"If the offence committed injures another foreigner, the guilty person shall be punished at the request of the Minister of Justice, in accordance with the provisions set out in the first paragraph of this article, provided however that:
"(1) the article in question is one for which Turkish law prescribes a penalty involving loss of freedom for a minimum period of three years;
"(2) there is no extradition treaty or that extradition has not been accepted either by the government of the locality where the guilty person has committed the offence or by the government of his own country."

[32] Even if the Court must hold that the Turkish authorities had seen fit to base the prosecution of Lieutenant Demons upon the above-mentioned Article 6, the question submitted to the Court is not whether that article is compatible with the principles of international law; it is more general. The Court is asked to state whether or not the principles of international law prevent Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish law. Neither the conformity of Article 6 in itself with the principles of international law nor the application of that article by the Turkish authorities constitutes the point at issue ; it is the very fact of the institution of proceedings which is held by France to be contrary to those principles. Thus the French Government at once protested against his arrest, quite independently of the question as to what clause of her legislation was relied upon by Turkey to justify it. The arguments put forward by the French Government in the course of the proceedings and based on the principles which, in its contention, should govern navigation on the high seas, show that it would dispute Turkey's jurisdiction to prosecute Lieutenant Demons, even if that prosecution were based on a clause of the Turkish Penal Code other than Article 6, assuming for instance that the offence in question should be regarded, by reason of its consequences, to have been actually committed on Turkish territory. [p16]

II. [Violated Principles of International Law]

[33] Having determined the position resulting from the terms of the special agreement, the Court must now ascertain which were the principles of international law that the prosecution of Lieutenant Demons could conceivably be said to contravene.

[34] It is Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, which refers the contracting Parties to the principles of international law as regards the delimitation of their respective jurisdiction.

[35] This clause is as follows:

"Subject to the provisions of Article 16, all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law."

[36] The French Government maintains that the meaning of the expression "principles of international law" in this article should be sought in the light of the evolution of the Convention. Thus it states that during the preparatory work, the Turkish Government, by means of an amendment to the relevant article of a draft for the Convention, sought to extend its jurisdiction to crimes committed in the territory of a third State, provided that, under Turkish law, such crimes were within the jurisdiction of Turkish Courts. This amendment, in regard to which the representatives of France and Italy made reservations, was definitely rejected by the British representative ; and the question having been subsequently referred to the Drafting Committee, the latter confined itself in its version of the draft to a declaration to the effect that questions of jurisdiction should be decided in accordance with the principles of international law. The French Government deduces from these facts that the prosecution of Demons is contrary to the intention which guided the preparation of the Convention of Lausanne.

[37] The Court must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself. Now the Court considers that the words "principles of international law", as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States. This interpretation [p17] is borne out by the context of the article itself which says that the principles of international law are to determine questions of jurisdiction - not only criminal but also civil - between the contracting Parties, subject only to the exception provided for in Article 16. Again, the preamble of the Convention says that the High Contracting Parties are desirous of effecting a settlement in accordance "with modem international law", and Article 28 of the Treaty of Peace of Lausanne, to which the Convention in question is annexed, decrees the complete abolition of the Capitulations “in every respect". In these circumstances it is impossible - except in pursuance of a definite stipulation - to construe the expression "principles of international law" otherwise than as meaning the principles which are in force between all independent nations and which therefore apply equally to all the contracting Parties.

[38] Moreover, the records of the preparation of the Convention respecting conditions of residence and business and jurisdiction would not furnish anything calculated to overrule the construction indicated by the actual terms of Article 15. It is true that the representatives of France, Great Britain and Italy rejected the Turkish amendment already mentioned. But only the British delegate - and this conformably to British municipal law which maintains the territorial principle in regard to criminal jurisdiction - stated the reasons for his opposition to the Turkish amendment ; the reasons for the French and Italian reservations and for the omission from the draft prepared by the Drafting Committee of any definition of the scope of the criminal jurisdiction in respect of foreigners, are unknown and might have been unconnected with the arguments now advanced by France.

[39] It should be added to these observations that the original draft of the relevant article, which limited Turkish jurisdiction to crimes committed in Turkey itself, was also discarded by the

Drafting Committee; this circumstance might with equal justification give the impression that the intention of the framers of the Convention was not to limit this jurisdiction in any way.

[40] The two opposing proposals designed to determine definitely the area of application of Turkish criminal law having thus been discarded, the wording ultimately adopted by common consent for Article 15 can only refer to the principles of general international law relating to jurisdiction. [p18]

III. [Fundamental Principles of International Law]

[41] The Court, having to consider whether there are any rules of international law which may have been violated by the prosecution in pursuance of Turkish law of Lieutenant Demons, is confronted in the first place by a question of principle which, in the written and oral arguments of the two Parties, has proved to be a fundamental one. 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.

[42] The latter view seems to be in conformity with the special agreement itself, No. I of which asks the Court to say whether Turkey has acted contrary to the principles of international law and, if so, what principles. According to the special agreement, therefore, it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings.

[43] This way of stating the question is also dictated by the very nature and existing conditions of international law.

[44] 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.

[45] 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 [p19] except by virtue of a permissive rule derived from international custom or from a convention.

[46] It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

[47] This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States ; it is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunæ in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States.
In these circumstances all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction ; within these limits, its title to exercise jurisdiction rests in its sovereignty.

[48] It follows from the foregoing that the contention of the French Government to the effect that Turkey must in each case be able to cite a rule of international law authorizing her to exercise jurisdiction, is opposed to the generally accepted international law to which Article 13 of the Convention of Lausanne refers. Having regard to the terms of Article 15 and to the construction which [p20] the Court has just placed upon it, this contention would apply in regard to civil as well as to criminal cases, and would be applicable on conditions of absolute reciprocity as between Turkey and the other contracting Parties; in practice, it would therefore in many cases result in paralysing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their jurisdiction.

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[49] Nevertheless, it has to be seen whether the foregoing considerations really apply as regards criminal jurisdiction, or whether this jurisdiction is governed by a different principle: this might be the outcome of the close connection which for a long time existed between the conception of supreme criminal jurisdiction and that of a State, and also by the especial importance of criminal jurisdiction from the point of view of the individual.

[50] Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.

[51] This situation may be considered from two different standpoints corresponding to the points of view respectively taken up by the Parties. According to one of these standpoints, the principle of freedom, in virtue of which each State may regulate its legislation at its discretion, provided that in so doing it does not come in conflict with a restriction imposed by international law, would also apply as regards law governing the scope of jurisdiction in criminal cases. According to the other standpoint, the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, ipso facto, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers; the exceptions in question, which include for instance extraterritorial jurisdiction over nationals and over crimes directed against public safety, would therefore rest on special permissive rules forming part of international law. [p21]

[52] Adopting, for the purpose of the argument, the standpoint of the latter of these two systems, it must be recognized that, in the absence of a treaty provision, its correctness depends upon whether there is a custom having the force of law establishing it. The same is true as regards the

applicability of this system - assuming it to have been recognized as sound - in the particular case. It follows that, even from this point of view, before ascertaining whether there may be a rule of international law expressly allowing Turkey to prosecute a foreigner for an offence committed by him outside Turkey, it is necessary to begin by establishing both that the system is well-founded and that it is applicable in the particular case. Now, in order to establish the first of these points, one must, as has just been seen, prove the existence of a principle of international law restricting the discretion of States as regards criminal legislation.

[53] Consequently, whichever of the two systems described above be adopted, the same result will be arrived at in this particular case: the necessity of ascertaining whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons. And moreover, on either hypothesis, this must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear. For if it were found, for example, that, according to the practice of States, the jurisdiction of the State whose flag was, flown was not established by international law as exclusive with regard to collision cases on the high seas, it would not be necessary to ascertain whether there were a more general restriction; since, as regards that restriction-supposing that it existed-the fact that it had been established that there was no prohibition in respect of collision on the high seas would be tantamount to a special permissive rule.

[54] The Court therefore must, in any event 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 a situation uniting the circumstances of the present case. [p22]

IV. [Prohibition of Prosecution under International Law]

[55] The Court will now proceed to ascertain whether general international law, to which Article 15 of the Convention of Lausanne refers, contains a rule prohibiting Turkey from prosecuting Lieutenant Demons.

[56] For this purpose, it will in the first place examine the value of the arguments advanced by the French Government, without however omitting to take into account other possible aspects of the problem, which might show the existence of a restrictive rule applicable in this case.

[57] The arguments advanced by the French Government, other than those considered above, are, in substance, the three following:

(1) International law does not allow a State to take proceedings with regard to offences committed by foreigners abroad, simply by reason of the nationality of the victim ; and such is the situation in the present case because the offence must be regarded as having been committed on board the French vessel.
(2) International law recognizes the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas.
(3) Lastly, this principle is especially applicable in a collision case.

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[58] As regards the first argument, the Court feels obliged in the first place to recall that its examination is strictly confined to the specific situation in the present case, for it is only in regard to this situation that its decision is asked for.

[59] As has already been observed, the characteristic features of the situation of fact are as follows: there has been a collision on the high seas between two vessels flying different flags, on one of which was one of the persons alleged to be guilty of the offence, whilst the victims were on board the other.

[60] This being so, the Court does not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the [p23] victim. For this contention only relates to the case where the nationality of the victim is the only criterion on which the criminal jurisdiction of the State is based. Even if that argument were correct generally speaking - and in regard to this the Court reserves its opinion - it could only be used in the present case if international law forbade Turkey to take into consideration the fact that the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged, even in regard to offences committed there by foreigners. But no such rule of international law exists. No argument has come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary, it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there. French courts have, in regard to a variety of situations, given decisions sanctioning this way of interpreting the territorial principle. Again, the Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense. Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship. Since, as has already been observed, the special agreement does not deal with the provision of Turkish law under which the prosecution was instituted, but only with the question whether the prosecution should be regarded as contrary to the principles of international law, there is no reason preventing the Court from confining itself to observing that, in this case, a prosecution may also be justified from the point of view of the so-called territorial principle. [p24]

[61] Nevertheless, even if the Court had to consider whether Article 6 of the Turkish Penal Code was compatible with international law, and if it held that the nationality of the victim did not in all circumstances constitute a sufficient basis for the exercise of criminal jurisdiction by the State of which the victim was a national, the Court would arrive at the same conclusion for the reasons just set out. For even were Article 6 to be held incompatible with the principles of international law, since the prosecution might have been based on another provision of Turkish law which would not have been contrary to any principle of international law, it follows that it would be impossible to deduce from the mere fact that Article 6 was not in conformity with those principles, that the prosecution itself was contrary to them. The fact that the judicial authorities may have committed an error in their choice of the legal provision applicable to the particular case and compatible with international law only concerns municipal law and can only affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice arises.

[62] It has been sought to argue that the offence of manslaughter cannot be localized at the spot where the mortal effect is felt ; for the effect is not intentional and it cannot be said that there is, in

the mind of the delinquent, any culpable intent directed towards the territory where the mortal effect is produced. In reply to this argument it might be observed that the effect is a factor of outstanding importance in offences such as manslaughter, which are punished precisely in consideration of their effects rather than of the subjective intention of the delinquent. But the Court does not feel called upon to consider this question, which is one of interpretation of Turkish criminal law. It will suffice to observe that no argument has been put forward and nothing has been found from which it would follow that international law has established a rule imposing on States this reading of the conception of the offence of manslaughter.

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[63] The second argument put forward by the French Government is the principle that the State whose flag is flown has exclusive jurisdiction over everything which occurs on board a merchant ship on the high seas. [p25]

[64] It is certainly true that – apart from certain special cases which are defined by international law - vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law.

[65] But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas. A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority, upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its, effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.

[66] This conclusion could only be overcome if it were shown that there was a rule of customary international law which, going further than the principle stated above, established the exclusive jurisdiction of the State whose flag was flown. The French Government has endeavoured to prove the existence of such a rule, having recourse for this purpose to the teachings of publicists, to decisions [p26] of municipal and international tribunals, and especially to conventions which, whilst creating exceptions to the principle of the freedom of the seas by permitting the war and police vessels of a State to exercise a more or less extensive control over the merchant vessels of another State, reserve jurisdiction to the courts of the country whose flag is flown by the vessel proceeded against.

[67] In the Court's opinion, the existence of such a rule has not been conclusively proved.

[68] In the first place, as regards teachings of publicists, and apart from the question as to what their value may be from the point of view of establishing the existence of a rule of customary law, it is no doubt true that all or nearly all writers teach that ships on the high seas are subject exclusively to the jurisdiction of the State whose flag they fly. But the important point is the significance attached by them to this principle; now it does not appear that in general, writers bestow upon this principle a scope differing from or wider than that explained above and which is equivalent to saying that the jurisdiction of a State over vessels on the high seas is the same in extent as its jurisdiction in its own territory. On the other hand, there is no lack of writers who, upon a close study of the special question whether a State can prosecute for offences committed on board a foreign ship on the high seas, definitely come to the conclusion that such offences must be regarded as if they had been committed in the territory of the State whose flag the ship flies, and that consequently the general rules of each legal system in regard to offences committed abroad are applicable.

[69] In regard to precedents, it should first be observed that, leaving aside the collision cases which will be alluded to later, none of them relates to offences affecting two ships flying the flags of two different countries, and that consequently they are not of much importance in the case before the Court. The case of the Costa Rica Packet is no exception, for the prauw on which the alleged depredations took place was adrift without flag or crew, and this circumstance certainly influenced, perhaps decisively, the conclusion arrived at by the arbitrator.

[70] On the other hand, there is no lack of cases in which a State has claimed a right to prosecute for an offence, committed on board a foreign ship, which it regarded as punishable under its legislation. Thus Great Britain refused the request of the United [p27] States for the extradition of John Anderson, a British seaman who had committed homicide on board an American vessel, stating that she did not dispute the jurisdiction of the United States but that she was entitled to exercise hers concurrently. This case, to which others might be added, is relevant in spite of Anderson's British nationality, in order to show that the principle of the exclusive jurisdiction of the country whose flag the vessel flies is not universally accepted.

[71] The cases in which the exclusive jurisdiction of the State whose flag was flown has been recognized would seem rather to have been cases in which the foreign State was interested only by reason of the nationality of the victim, and in which, according to the legislation of that State itself or the practice of its courts, that ground was not regarded as sufficient to authorize prosecution for an offence committed abroad by a foreigner.

[72] Finally, as regards conventions expressly reserving jurisdiction exclusively to the State whose flag is flown, it is not absolutely certain that this stipulation is to be regarded as expressing a general principle of law rather than as corresponding to the extraordinary jurisdiction which these conventions confer on the state-owned ships of a particular country in respect of ships of another country on the high seas. Apart from that, it should be observed that these conventions relate to matters of a particular kind, closely connected with the policing of the seas, such as the slave trade, damage to submarine cables, fisheries, etc., and not to common-law offences. Above all it should be pointed out that the offences contemplated by the conventions in question only concern a single ship; it is impossible therefore to make any deduction from them in regard to matters which concern two ships and consequently the jurisdiction of two different States.

[73] The Court therefore has arrived at the conclusion that the second argument put forward by the French Government does not, any more than the first, establish the existence of a rule of international law prohibiting Turkey from prosecuting Lieutenant Demons.

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[74] It only remains to examine the third argument advanced by the French Government and to ascertain whether a rule specially [p28] applying to collision cases has grown up, according to which criminal proceedings regarding such cases come exclusively within the jurisdiction of the State whose flag is flown.

[75] In this connection, the Agent for the French Government has drawn the Court's attention to the fact that questions of jurisdiction in collision cases, which frequently arise before civil courts, are but rarely encountered in the practice of criminal courts. He deduces from this that, in practice, prosecutions only occur before the courts of the State whose flag is flown and that that circumstance is proof of a tacit consent on the part of States and, consequently, shows what positive international law is in collision cases.

[76] In the Court's opinion, this conclusion is not warranted. Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true.

[77] So far as the Court is aware there are no decisions of international tribunals in this matter; but some decisions of municipal courts have been cited. Without pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions quoted sometimes support one view and sometimes the other. Whilst the French Government have been able to cite the Ortigia-Oncle-Joseph case before the Court of Aix and the Franconia-Strathclyde case before the British Court for Crown Cases Reserved, as being in favour of the exclusive jurisdiction of the State whose flag is flown, on the other hand the Ortigia-Oncle-Joseph case before the Italian Courts and the Ekbatana-West-Hinder case before the Belgian Courts have been cited in support of the opposing contention.

[78] Lengthy discussions have taken place between the Parties as to the importance of each of these decisions as regards the details [p29] of which the Court confines itself to a reference to the Cases and Counter-Cases of the Parties. The Court does not think it necessary to stop to consider them. It will suffice to observe that, as municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law which alone could serve as a basis for the contention of the French Government.

[79] On the other hand, the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown, such as the Agent for the French Government has thought it possible to deduce from the infrequency of questions of jurisdiction before criminal courts. It seems hardly probable, and it would not be in accordance with international practice that the French Government in the Ortigia-Oncle-Joseph case and the German Government in the Ekbalana-West-Hinder case would have omitted to protest against the exercise

of criminal jurisdiction have by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.

[80] As regards the Franconia case (R. v. Keyn 1877, L.R. 2 Ex. Div. 63) upon which the Agent for the French Government has particularly relied, it should be observed that the part of the decision which bears the closest relation to the present case is the part relating to the localization of the offence on the vessel responsible for the collision.

[81] But, whatever the value of the opinion expressed by the majority of the judges on this particular point may be in other respects, there would seem to be no doubt that if, in the minds of these judges, it was based on a rule of international law, their conception of that law, peculiar to English jurisprudence, is far from being generally accepted even in common-law countries. This view seems moreover to be borne out by the fact that the standpoint taken by the majority of the judges in regard to the localization of an offence, the author of which is situated in the territory of one [p30] State whilst its effects are produced in another State, has been abandoned in more recent English decisions (R. v. Nillins, 1884, 53 L. J. 157; R. v. Godfrey, L. R. 1923, 1 K. B. 24). This development of English case-law tends to support the view that international law leaves States a free hand in this respect.

[82] In support of the theory in accordance with which criminal jurisdiction in collision cases would exclusively belong to the State of the flag flown by the ship, it has been contended that it is a question of the observance of the national regulations of each merchant marine and that effective punishment does not consist so much in the infliction of some months' imprisonment upon the captain as in the cancellation of his certificate as master, that is to say, in depriving him of the command of his ship.

[83] In regard to this, the Court must observe that in the present case a prosecution was instituted for an offence at criminal law and not for a breach of discipline. Neither the necessity of taking administrative regulations into account (even ignoring the circumstance that it is a question of uniform regulations adopted by States as a result of an international conference) nor the impossibility of applying certain disciplinary penalties can prevent the application of criminal law and of penal measures of repression.

[84] The conclusion at which the Court has therefore arrived is that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown.

[85] This conclusion moreover is easily explained if the manner in which the collision brings the jurisdiction of two different countries into play be considered.

[86] The offence for which Lieutenant Demons appears to have been prosecuted was an act – of negligence or imprudence – having its origin on board the Lotus, whilst its effects made themselves felt on board the Boz-Kourt. These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect [p31] of the incident as a whole. It is therefore a case of concurrent jurisdiction.

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[87] The Court, having arrived at the conclusion that the arguments advanced by the French Government either are irrelevant to the issue or do not establish the existence of a principle of international law precluding Turkey from instituting the prosecution which was in fact brought against Lieutenant Demons, observes that in the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement. The result of these researches has not been to establish the existence of any such principle. It must therefore be held that there is no principle of international law, within the meaning of Article 15 of the Convention of Lausanne of July 24th, 1923, which precludes the institution of the criminal proceedings under consideration. Consequently, Turkey, by instituting, in virtue of the discretion which international law leaves to every sovereign State, the criminal proceedings in question, has not, in the absence of such principles, acted in a manner contrary to the principles of international law within the meaning of the special agreement.

[88] In the last place the Court observes that there is no need for it to consider the question whether the fact that the prosecution of Lieutenant Demons was "joint" (connexe) with that of the captain of the Boz-Kourt would be calculated to justify an extension of Turkish jurisdiction. This question would only have arisen if the Court had arrived at the conclusion that there was a rule of international law prohibiting Turkey from prosecuting Lieutenant Demons; for only in that case would it have been necessary to ask whether that rule might be overridden by the fact of the connexity" (connexite) of the offences. [p32]

V. [Disposition]

[89] Having thus answered the first question submitted by the special agreement in the negative, the Court need not consider the second question, regarding the pecuniary reparation which might have been due to Lieutenant Demons.

[90] FOR THESE REASONS,
The Court, having heard both Parties,
gives, by the President's casting vote - the votes being equally divided -, judgment to the effect

(1) that, following the collision which occurred on August 2nd, 1926, on the high seas between the French steamship Lotus and she Turkish steamship Boz-Kourt, and upon the arrival of the French ship at Stamboul, and in consequence of the loss of the Boz-Kourt having involved the death of eight Turkish nationals, Turkey, by instituting criminal proceedings in pursuance of Turkish law against Lieutenant Demons, officer of the watch on board the Lotus at the time of the collision, has not acted in conflict with the principles of international law, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction;
(2) that, consequently, there is no occasion to give judgment on the question of the pecuniary reparation which might have been due to Lieutenant Demons if Turkey, by prosecuting him as above stated, had acted in a manner contrary to the principles of international law.

[91] This judgment having been drawn up in French in accordance with the terms of Article 39, paragraph 1, second sentence, of the Statute of the Court, an English translation is attached thereto. [p33]

[92] Done at the Peace Palace, The Hague, this seventh day of September, nineteen hundred and twenty-seven, in three copies, one of which is to be placed in the archives of the Court, and the others to be transmitted to the Agents of the respective Parties.

(Signed) Max Huber,
President.
(Signed) A. Hammarskjold,
Registrar.

[93] MM. Loder, former President, Weiss, Vice-President, and Lord Finlay, MM. Nyholm and Altamira, Judges, declaring that they are unable to concur in the judgment delivered by the Court and availing themselves of the right conferred on them by Article ,of the Statute, have delivered the separate opinions which follow hereafter.

[94] Mr. Moore, dissenting from the judgment of the Court only on the ground of the connection of the criminal proceedings in the case with Article 6 of the Turkish Penal Code, also delivered a separate opinion.

(Initialled) M. H.
(Initialled) A. H. [p34]

Dissenting Opinion by M. Loder

[Translation]

[95] Turkey, having arrested, tried and convicted a foreigner for an offence which he is alleged to have committed outside her territory, claims to have been authorized to do so by reason of the absence of a prohibitive rule of international law.

[96] Her defence is based on the contention that under international law everything which is not prohibited is permitted.

[97] In other words, on the contention that, under international law, every door is open unless it is closed by treaty or by established Custom.

[98] The Court in its judgment holds that this view is correct, well-founded, and in accordance with actual facts.

[99] I regret that I am unable to concur with the opinion of the Court.

[100] It seems to me that the contention is at variance with the spirit of international law. This law is for the most part unwritten and lacks sanctions; it rests on a general consensus of opinion; on the acceptance by civilized States, members of the great community, of nations, of rules, customs and existing conditions which they are bound to respect in their mutual relations, although neither committed to writing nor confirmed by conventions. This body of rules is called international law.

[101] These rules may be gradually modified, altered or extended, in accordance with the views of a considerable majority of these States, as this consensus of opinion develops, but is seems to me incorrect to say that the municipal law of a minority of States suffices to abrogate or change them.

[102] It also appears to me incorrect to claim that the absence of international disputes or diplomatic difficulties in regard to certain provisions of the laws of some States, which are at variance with generally accepted ideas, can serve to show the development or modification of such ideas.

[103] International disputes only arise when a particular application of the laws in question shows them to be at variance with international law.

[104] The family of nations consists of a collection of different sovereign and independent States. [p35]

[105] The fundamental consequence of their independence and sovereignty is that no municipal law, in the particular case under consideration no criminal law, can apply or have binding effect outside the national territory.

[106] This fundamental truth, which is not a custom but the direct and inevitable consequence of its premise, is a logical principle of law, and is a postulate upon which the mutual independence of States rests.

[107] The criminal law of a State applies in the first place to all persons within its territory, whether nationals or foreigners, because the right of jurisdiction over its own territory is an attribute of its sovereignty.

[108] The criminal law of a State may extend to crimes and offences committed abroad by its nationals, since such nationals are subject to the law of their own country; but it cannot extend to offences committed by a foreigner in foreign territory, without infringing the sovereign rights of the foreign State concerned, since in that State the State enacting the law has no jurisdiction.

[109] Nor can such a law extend in the territory of the State enacting it to an offence committed by a foreigner abroad should the foreigner happen to be in this territory after the commission of the offence, because the guilty act has not been committed within the area subject to the jurisdiction of that State and the subsequent presence of the guilty person cannot have the effect of extending the jurisdiction of the State.

[110] It seems to me clear that such is the logical consequence of the fundamental principle above enunciated.

[111] It however is also clear that this consequence can be overridden by some convention to the contrary effect or by some exception generally and even tacitly recognized by international law.

[112] Like all exceptions, however, such an exception must be strictly construed and cannot be substituted for the well-established rule, to which it is an exception.

[113] Now, the rule has gradually undergone an important modification in the legislation of a somewhat large majority of civilized States, a modification which does not seem to have encountered objections and which may be regarded as having been accepted. This modification tends to except from the strict rule governing the jurisdiction over offences committed by foreigners abroad such offences, in so far as they are directed against the State itself or [p36] against its security or credit. The injured State may try the guilty persons according to its own law if they happen to be in its territory or, if necessary, it may ask for their extradition.

[114] Apart from this exception, the rule holds good.

[115] The so-called system of "protection" which Turkey claims to be entitled to apply and which is tantamount to the abrogation of the rule itself, is very far from being accepted by the great majority of States and is not in my opinion in harmony with positive international law.

[116] The alleged offence with which M. Demons is charged by Turkey, namely, involuntary manslaughter, does not fall within the scope of the exception which I have mentioned. Turkey admits that she is applying the so-called system of "protection" in pursuance of her municipal law and she holds that she is authorized to do so because she has found nowhere a positive and accepted rule prohibiting her from so doing.

[117] It will appear from the foregoing that I am of opinion that for this reason alone, Turkey must be held to have acted in contravention of [p37] the principles of international law.

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[118] The Court has been made cognizant of a definite occurrence; it has to give judgment upon a particular case. This case is the collision between the French ship Lotus and the Turkish ship Boz-Kourt.

[119] Turkey claims that both vessels, owing to faulty navigation, were jointly to blame for this collision.

[120] The result of the collision was that the Boz-Kourt sank, and that some members of the crew and passengers were drowned.

[121] Turkey argues from these facts that M. Demons, officer of the watch on board the Lotus, is guilty of manslaughter and that he is responsible for the death of the persons above mentioned.

[122] She argues that this offence took place on board the Boz-Kourt because it was there that the effects of the alleged negligence were felt.

[123] She therefore contends that the wrongful act having taken place on board the Turkish ship, its author is amenable to the jurisdiction of the Turkish Courts.

[124] If this argument be sound, in point of fact the deduction made from it is correct and the accusation of having acted contrary to the principles of international law at once falls to the ground, because every State is entitled to prosecute and sentence any foreigner who commits an offence within its territory. And the vessel Boz-Kourt must be regarded as Turkish territory.

[125] The question of the localization of the offence is therefore of capital importance for the purposes of the decision of the dispute before the Court.

[126] It is clear that the place where an offence has been committed is necessarily that where the guilty person is when he commits the act. The assumption that the place where the effect is produced is the place where the act was committed is in every case a legal fiction. It is, however justified where the act and its effect are indistinguishable, when there is a direct relation between them; for instance, a shot fired at a person on the other side of a frontler; a parcel containing an infernal machine intended to explode on being opened by the person to whom it is sent. The author of the crime intends in such cases to inflict injury at a place other than that where he himself is.

[127] But the case which the Court has to consider bears no resemblance to these instances. The officer of the Lotus, who had never set foot on board the Boz-Kourt, had no intention of injuring anyone, and no such intention is imputed to him. The movements executed in the navigation of a vessel are only designed to avoid an accident.

[128] Only an investigation by naval experts into the circumstances can show whether the manner in which the ship was navigated is to be regarded as contrary to the regulations or negligent in some respect, or whether some unforeseen movement by the other vessel contributed to the accident - and this investigation is a matter solely for the naval authorities of the country of the person responsible for navigating the ship.

[129] In these circumstances, it seems to me that the legal fiction whereby the act is held to have been committed at the place where the effect is produced must be discarded.

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[130] Turkey seeks to base her jurisdiction upon an alleged "connexity" between the movements of the two vessels. [p38]

[131] She, in fact, claims that the offence of involuntary manslaughter, imputed to M. Demons, is "connected" (connexe) with the identical charge against the captain of the Boz-Kourt and that the Turkish court has jurisdiction on this ground.

[132] This argument is also unsound.

[133] Simultaneousness is not the same as "connexity".

[134] The movements of the two vessels were independent of each other: the movement of each ship was even unknown to the officer commanding the other.

[135] The result of both movements may have been the collision, but there is no kind of "connexity" between them.

[136] A municipal statute, or a code of procedure, may, in order to simplify the conduct of two or more cases and to facilitate their examination, provide for the possibility of their joinder by reason of their being connected. Proceedings must then have been instituted in both cases before they can be joined on the ground of connection between them (connexite). And joinder will only be possible if the judge before whom the joined causes are brought has jurisdiction in respect of each of them separately.

[137] Joinder on the ground of "connexity" is a proceeding under municipal law; "connexity" doe not create jurisdiction.

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[138] The general rule that the criminal law of a State loses its compelling force and its applicability in relation to offences committed by a foreigner in foreign territory, a rule derived from the basic principle of the sovereignty and independence of States, has indeed undergone modifications and has been made subject to exceptions restricting its scope by the mutual consent of the different Powers in so far as territory properly so called is concerned.

[139] But according to a generally accepted view, this is not the case as regards the high seas. There the law of the flag and national jurisdiction have retained their indisputable authority to the exclusion of all foreign law or jurisdiction. I lay special stress on the word "foreign". A guilty person on board a ship flying the flag of a State other than the one to which he owes allegiance, may of course be indicted and sentenced by the State of which he is a national. In that case, but only then, there will be concurrent jurisdiction. [p39]

[140] But that is not M. Demons' case.

[141] A merchant ship being a complete entity, organized and subject to discipline in conformity with the laws and subject to the control of the State whose flag it flies, and having regard to the absence of all territorial sovereignty upon the high seas, it is only natural that as far as concerns criminal law this entity should come under the jurisdiction of that State. This applies with especial force to the case now before the Court. The accusation against Lieutenant Demons is that whilst navigating his ship he gave an order for a wrong manoeuvre.

[142] The rules for navigation which he was obliged to follow were those contained in his national regulations. He was responsible to his national authorities for the observance of these rules. It was solely for these authorities to consider whether the officer had observed these rules, whether he had done his duty, and, if not, whether he had neglected their observance to such a degree as to have incurred criminal responsibility.

[143] It consequently seems to me that Turkey, in arrogating to herself jurisdiction over the acts of a foreign officer doing duty on the high seas on a ship carrying a foreign flag, has acted in contravention of the principle of international law set out above.

[144] On these grounds I regret that I am unable to concur with the Court in its present judgment. [p40]

Dissenting Opinion by M. Weiss

[Translation]
[145] I also, to my very keen regret, am unable, in the case now before the Court, to share the opinion of the majority of my colleagues.

[146] The reasons which induce me to adopt this conclusion are briefly as follows:
The Peace Treaty signed at Lausanne, on July 24th, 1923, between Turkey and the Allied Powers, terminated completely and once and for all the regime established centuries ago known as the Capitulations which from the days of Francis I and until the conclusion of this Treaty had governed the legal and judicial relations between the Ottoman Empire and Christendom.

[147] Article 28 of the Treaty is as follows:

"Each of the High Contracting Parties hereby accepts, in so far as it is concerned, the complete abolition of the Capitulations in Turkey in every respect."

[148] The new Turkey therefore finds herself freed from the hampering servitudes which for so long had placed her in a situation apart, in an inferior position amongst the nations; she now becomes their equal, having like them no other sovereign than international law. And it is precisely this subjection to international law which is laid down in the Convention respecting conditions of

residence and business and jurisdiction, concluded at Lausanne on the same day as the Peace Treaty.

[149] The intention of bringing Turkish law into harmony with the international law, which has hitherto governed intercourse between the Western States, is in the first place announced in the preamble of this Convention: "Being desirous of prescribing, in accordance with modern international law, the. conditions under which nationals of the other contracting Powers may settle in Turkey and Turkish nationals may settle in the territory of those Powers, as well as certain questions relating to jurisdiction," etc.

[150] This preliminary declaration is given full effect and put into practical application by, amongst others, Articles 15 and 17 of the Convention, which run as follows: [p41]

Article 15. – "Subject to the provisions of Article 16 [pwhich relates to questions of personal status], all questions of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law."
Article 17. – "The Turkish Government declares that the Turkish Courts will ensure to foreigners in Turkey, both as regards person and property, protection in accordance with international law and the principles and methods generally adopted in other countries."

[151] Of those two clauses of the Convention of Lausanne only the first- namely Article 15 - is of direct interest for the case before the Court. It follows from it that in all cases, that is to say, in criminal cases as well as in cases of civil and commercial law, conflicts of jurisdiction which may arise between Turkey and the other signatory States are to be settled in accordance with the principles of international law.

[152] These principles – and it is quite certain that, as the Court has not failed to bring out, in this connection, the principles of general international law and no others are meant - , which are they in the present case and where are they written?

[153] The clause on which the judgment given against Lieutenant Demons appears with certainty to have been based, although no authentic copy of this judgment has been placed before us, belongs to Turkish municipal law; it is Article 6 of the Criminal Code which has been taken from the Italian Code and runs as follows:

[Translation.]
"Any foreigner who commits an offence abroad to the prejudice of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished by the Turkish Courts and in accordance with the Turkish Penal Code provided that he is arrested in Turkey. In such cases, the prosecution will only be instituted at the request of the Minister of justice or on the complaint of the injured Party."

[154] But this Article 6 is not, according to Article 15 of the Convention of Lausanne, self-contained; it must, as regards relations between Turks and foreigners, be supplemented by, and read in the light of, the principles of international law. [p42]

[155] Does international law authorize the application of Turkish law and the intervention of Turkish Courts for the repression of offences or crimes committed by a foreign subject outside Turkey, as is possible under the above-mentioned Article 6? Without attributing to the records of the preparatory work in such case a weight which might be disputed, I may well venture to recall that this was the claim put forward by the Turkish plenipotentiaries from the outset of the

Conference of Lausanne. The amendment submitted by them at the request of Ismet Pasha leaves no room for doubt on this point: In Turkey – we read in this document – "the Turkish Courts will, in criminal matters, have jurisdiction over all charges arising in Turkey against nationals of the other contracting countries, out of crimes, offences or contraventions committed by them in Turkey, as well as over charges arising out of acts committed by them in the territory of a third State, and which, according to Turkish law, fall within the jurisdiction of those Courts…"

[156] This proposal the terms of which, it should be observed in passing, leave offences committed by a foreigner upon the high seas and not upon the territory of a third State outside the limits of the cases expressly provided for therein, induced the British Delegate, Sir Horace Rumbold, to make a strong protest: he declared that it could not be accepted; and his French and Italian colleagues added their reservations in this regard to his. In view of this opposition Turkey did not insist, and Article 15 was drafted in its final form. From the absence of any reference in this article to the jurisdiction of the Turkish Courts to take cognizance of crimes or offences committed by foreigners on foreign territory, it therefore follows that no such jurisdiction was recognized as being a rule of international law.

[157] Being unable to find any support for her claim in treaty law, Turkey considerably enlarged the field of discussion; she had recourse to the general principles of international law; she pleaded the sovereignty of States upon which this law is based.

[158] Every State, she claimed, and Turkey herself from the time of the annulment of the servitudes which have for so long been a burden upon her international life, is ipso facto sovereign; this implies that she 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, and it implies as regards the young Turkish Republic, if no prohibition prevents its being exercised, [p43] an absolute right of jurisdiction over the high seas, as well as over such of her nationals as may be upon foreign territory as residents or as visitors, and even over foreigners living abroad who may have been guilty of an offence injurious to Turkey or to one of her subjects.

[159] In support of this contention and of the inferences which she deduced therefrom especially in reference to the Lotus case, Turkey .has also, with the aid of numerous quotations from authors and judicial decisions, taken from the theory and practice of many countries, brought forward a certain number of considerations or systems which, in her view, demonstrate that the proceedings instituted at Stamboul against the French officer Demons, and the sentence which was rendered against him, not only did not contravene any prohibition in international law, but were besides entirely in conformity with the practice universally followed by States. It was thus that she endeavoured to rest the jurisdiction of the Turkish Court in this case upon the duty of protection which was alleged to be incumbent upon every State as regards its nationals in foreign territory; or upon the localization of the facts constituting the offence of causing the collision, on the ship that was sunk; or finally upon the principles followed in the legislation of many countries and by French legislation in particular, relating to "connected" offences (infractions connexes).

[160] Without entering at the present moment into the details of this threefold argument which the Court has, moreover, taken care not to endorse entirely, it will be sufficient for me to observe that the Turkish Government, had it been quite certain that its contention was supported by international law, would no doubt not have thought it necessary to bring forward in addition more or less disputable reasons and theories, which could only weaken the force of the contention pleaded in its name, by revealing its weak points.

[161] The fundamental error of this contention is its endeavour to find sources of international law in places where they do not exist. International law is not created by an accumulation of opinions and systems; neither is its source a sum total of judgments, even if they agree with each other. Those are only methods of discovering some of its aspects, of finding some of its principles, and of formulating these principles satisfactorily.

[162] In reality the only source of international law is the consensus [p44] omnium. Whenever it appears that all nations constituting the international community are in agreement as regards the acceptance or the application in their mutual relations of a specific rule of conduct, this rule becomes part of international law and becomes one of those rules the observance of which the Lausanne Convention recommends to the signatory States.

[163] Among the foremost of these rules there is one which is paramount and which does not even require to be embodied in a treaty: that is the rule sanctioning the sovereignty of States. If States were not sovereign, no international law would be possible, since the purpose of this law precisely is to harmonize and reconcile the different sovereignties over which it exercises its sway.

[164] Turkey also admits, as I have just stated, the principle of the sovereignty of States, but she applies it beyond its due limits making its action to be felt in a field which is outside its proper scope.

[165] By virtue of sovereignty such as we understand it, every State has jurisdiction to sentence and punish the perpetrators of offences committed within its territory; indeed, this is a question of public security, and of public order, which a State cannot ignore without neglecting its duty as a State, and one which arises whatever the nationality of the delinquent may be.

[166] But, outside the territory, the frontier having once been traversed, the right of States to exercise police duties and jurisdiction ceases to exist; their sovereignty does not operate, and crimes and offences, even in the case of those inflicting injury upon the States themselves, fall normally outside the sanctioning force of their courts. Extra territorium jus diceni impune non paretur.

[167] That is the principle upon which case-law in the United States is based (see Cutting case) and which appears to have been sanctioned by the Treaty of International Penal Law signed at Montevideo on January 23rd, 1889, between the Argentine Republic, Bolivia, Paraguay, Peru and Uruguay. Many other States in their international legislation also admit the principle of the exclusively and absolutely territorial character of criminal jurisdiction: that is the case in Great Britain, and it was also the case for a long time in France: the right of inflicting punishment, the Cour de cassation declares in its judgment of January 10th, 1873 (Dalloz, 1873, I. 4I), is derived from the right of sovereignty, which does not extend beyond the territorial limits. [p45]

[168] It is true that of late years new rules have penetrated into the penal legislation of various countries. It is now, by a noteworthy extension of territorial jurisdiction, readily recognized that a person may be prosecuted before the courts of his own country for an offence committed abroad either against a compatriot or against the institutions, security or credit of the State of which he is a national. (See especially Articles 5 and 7 of the French Code of procedure for trial.) But this extension, which is not even always confined to nationals, and which has, properly speaking, nothing to do with the principle of the sovereignty of States in criminal matters, which it may rather be said to contradict, is explained by special considerations entirely irrelevant to the Lotus case, and this extension, to obtain its full force and to become a rule of international law, would require, as has been pointed out by the United States Department of State in its report on the Cutting case, “the

general consent of the nations or a special convention"; moreover, the reasons of expediency on which it is based are themselves very debatable in law.

[169] The criminal jurisdiction of a State therefore is based on and limited by the territorial area over which it exercises sovereignty. This is the principle, and it is an indisputable principle of international law.

[170] But what happens to this principle when the offence committed takes place not on terra firma, which is subject to the sovereignty of the State occupying it, but on the high seas outside the zone of territorial waters over which it is generally held that a State exercises rights of police and jurisdiction ?

[171] Here we come face to face with another and equally definite principle of international law: the principle of the freedom of the high seas. The high seas are free and res nullius, and, apart from certain exceptions or restrictions imposed in the interest of the common safety of States, they are subject to no territorial authority. Since, however, it is impossible to allow free scope to all the enterprises and attacks which might be undertaken against the persons and property of those voyaging upon the seas, it has appeared expedient to extend to merchant vessels on the high seas the jurisdiction of the authorities of the State whose flag they fly. These vessels and their crews are answerable only to the law of the flag, a situation which is often described by saying, with more or less [p46] accuracy, that these vessels constitute a detached and floating portion of the national territory. The effect of this is to exclude, just as much as on the national territory itself, and apart from certain exceptional cases, the exercise of any jurisdiction other than that of the flag, and in particular that of a foreign port at which a vessel may touch after the commission of some offence on the high seas. (Rules drawn up at The Hague by the Institute of International Law in 1908.)

[172] This principle has been fairly frequently applied in international cases, especially in collision cases (see the precedent of the Costa Rica Packet referred for arbitration to my illustrious colleague, Frederic de Martens); and it would not appear that there is any reason for not applying it in the case of the Boz-Kourt and Lotus. Assuming that the destruction of the former vessel was the result of a wrong manoeuvre, of an error in navigation, of an offence committed on the high seas, for which Lieutenant Demons was responsible, it is the national law, the law of the flag under which he was sailing, which alone is applicable to him, since there is in this case no territorial law or territorial sovereignty.

[173] The Turkish Government has not denied the jurisdiction of the law of the flag as regards the repression of offences committed on the high seas, especially in the case of collision between two vessels of different nationality; it has not denied that the French Courts have the right of convicting and sentencing Lieutenant Demons who was officer of the watch on board the Lotus at the time of the collision, should his guilt appear to them established. But the Turkish Government holds that this jurisdiction is not exclusive. And it alleges various circumstances arising in the particular case and various theories of international law, with a view to showing that Turkey and its courts possess concurrent rights of jurisdiction, in virtue of the general right of sovereignty which Turkey assumes even outside her own territory.

[174] It has been argued by Turkey – but the judgment which has been read does not go as far as that – that the jurisdiction claimed by the courts of Stamboul in the Lotus case was justified by the right of protection possessed by every State in respect of its nationals even beyond its frontiers. Turkey contends that the fact that the offence committed on the high seas by a foreigner should have injured some of her nationals suffices to give her power and to make it her duty to punish the offence. And this is precisely what happened in the [p47] Lotus case. This system, which has found

favour in the positive legislations of some countries, is not in itself contrary to international law, but it is outside the scope of international law: it does not in itself constitute a principle of international law capable of overcoming the principle of the freedom of the seas and that of the law of the flag which is the corollary of the former. None of the legislative or judicial evidence cited by Turkey in support of the right of protection of nationals, establishes the existence of such a principle, and it is moreover in contradiction with the rules consistently applied by courts in maritime cases for the repression of crimes and offences committed on the high seas and especially in collision cases. It will suffice for me to allude in this respect to the arbitral award given by M. de Martens in the case of the Costa Rica Packet, to which I have already referred.

[175] Other titles to jurisdiction, intended to support the argument based on Turkish sovereignty, have been put forward by the representatives of that country. They endeavoured to localize the offence, which it was sought to punish, upon the vessel which sustained the injurious result, that is to say on the vessel run down. They argued that it was the Boz-Kourt which perished in the collision of August 2nd, 1926, and that it was the passengers and sailors of that vessel who met their deaths. The offence therefore produced its effects in the Boz-Kourt, i.e., according to the generally accepted legal fiction, on Turkish territory. Consequently, it was quite natural that the Turkish Courts, that is to say the territorial courts, should exercise jurisdiction. The error here is clear and it has been fully brought out in the famous decision given in the Franconia case by the British Court for Crown Cases Reserved. In fixing the place where an offence has occurred, it is not to the place where the offence, often contrary to any reasonable anticipation, produces its injurious effects upon persons or things, that attention must be directed, but solely to the place where the punishable act has been committed and where the person responsible for that act was at the time when it was committed; it is there that the offence has really taken place.

[176] Now, in the case of the running down of the Boz-Kourt by the Lotus, the errors of navigation, with which Turkey has charged the officer of the latter vessel, and which may have led to the destruction of the Turkish collier and to the loss of several lives, could only have taken place at the spot where Lieutenant Demons exercised [p48] his command, i.e. in the vessel responsible for the collision. He never set foot on board the Boz-Kourt, and there is nothing to show that it was on board the ship and not at the bottom of the sea, into which they were no doubt immediately thrown by the force of the impact, that the seamen and passengers perished.

[177] It is therefore on the vessel responsible for the collision and not on the vessel run down that the disaster should have been localized, if any importance were attached to such localization from the point of view of jurisdiction; the law and jurisdiction of the flag under which Lieutenant Demons sailed would then apply perfectly naturally. But that is only a secondary consideration, which, in the case before the Court, tends further to support the jurisdiction of the law of the flag.

[178] What makes the application on the high seas of the law of the flag in respect of occurrences on board a merchant vessel essential, is the fact that such a vessel is not directly subject to any territorial sovereignty, but that on the other hand, regarding it as an extension of territory, it constitutes an organized entity, subject to the discipline and control of the State whose flag it flies, which State therefore is both more qualified and has more interest than any other to ensure the maintenance of order on board.

[179] The Turkish Government had finally endeavoured to link up the proceedings taken against the French officer with a theory of “connexity" (connexité), making these proceedings dependent upon those taken in pursuance of Turkish law against the Turkish officer of the Boz-Kourt; does not the close connection existing between these two sets of proceedings taken as a result of one and the same act in different countries, require indeed, in the interests of justice, that they should come

before the same judge? It is easy to reply, although the Court has not seen fit to consider this question., that “connexity” implying extension of jurisdiction only takes effect in relations between two or more courts of the same instance, sitting within the boundaries of the same State and that, according to an opinion unanimously held, this conception is completely foreign to international relations, by reason of the modifications which it would involve both as regards the law applicable to offences alleged to be "connected" (connexes) and the system of penalties which would be applicable to them. "Connexity" (connexité) is a rule of internal convenience applicable in those States which have included it in their codes of procedure ; it is ineffective outside their frontiers. [p49]

[180] None of the various grounds advanced by Turkey in support of her claim to jurisdiction – some of which have been held to be well founded by the Court – therefore remain to authorize the penal measures takn against the French officer Demons, in consequence of the loss of the Boz-Kourt.

[181] Two principles of international law clearly emerge from the controversial doctrine and contradictory judicial decisions which have been invoked as authority by both Parties in the course of the hearings:

1. First of all, there is the principles of the sovereignty of States in criminal matters, not a universal, undefined, unlimited sovereignty such as Turkey adduced, but a sovereignty founded upon and limited by the territory over which the State exercises its dominion, that is to say, territorial sovereignty.
2. Secondly, there is the principle of the freedom of the high seas, including the application of the law of the flag which is its corollary.

[182] The Turkish Government, in proceeding against the French Lieutenant Demons upon the basis of acts which had taken place outside Turkish territory on a vessel flying the French flag has disregarded those two fundamental principles of international law; it has consequently acted in contravention of Article 15 of the Lausanne Convention. And my conscience as a jurist and judge does not allow me to subscribe to the approval bestowed upon its action by the Court. [p50]

Dissenting Opinion by Lord Finlay

[183] This case arose out of a collision between the Lotus, a French liner, and the Turkish steamer Boz-Kourt. It took place off Cape Sigri, in Mitylene, not within territorial waters but on the high seas. The Boz-Kourt was sunk and eight persons, sailors and passengers, were drowned. The officer of the watch on board the Lotus was Lieutenant Demons, and on the arrival of the Lotus at Constantinople, he was arrested by the Turkish authorities and put on his trial on charge of having committed an offence under Article 6 of the Turkish Penal Code.

[184] That article is as follows:

«Quand un étranger commet contre un Turc en pays étranger un acte susceptible d'entraîner pour son auteur, d'après les dispositions du Code pénal turc, un emprisonnement de plus d'une année, cet étranger sera jugé par les tribunaux et conformément aux lois pénales de Turquie, s'il est trouvé sur le territoire turc.
«En pareil cas, les poursuites ne peuvent avoir lieu que sur la plainte de la Partie lésée ou sur celle du ministre de la Justice. »

[185] We have not got before us the documents in the proceedings before the Turkish Courts, but it is clear that Demons was charged with having brought about the collision by his negligence and thereby causing the death of the eight Turks who were drowned. He was convicted and sentenced to fine and imprisonment.

[186] The French Government alleged that the proceedings in the Turkish Courts were without jurisdiction, and by the compromis dated October 12th, 1926, made between the French and the Turkish Governments, the dispute was referred to the Permanent Court of International Justice. Article 1 of the compromis is as follows:

«La Cour permanente de justice internationale sera priée de statuer sur les questions suivantes:
«1) La Turquie a-t-elle, contrairement à 1'article 15 de la Convention de Lausanne du. 24 juillet 1923 relative à 1'etablissement et à la compétence judiciaire, agi en contradiction des [p51] principes du droit international – et, si oui, de quels principes – en exerçant, à la suite de la collision survenue le 2 août 1926 en haute mer entre le vapeur français Lotus et le vapeur Boz-Kourt et lors de l'arrivée du navire français à Stamboul, en même temps que contre le capitaine du vapeur turc, des poursuites pénales connexes en vertu de la législation turque, contre le sieur Demons, officier de quart à bord du Lotus au moment de la collision, en raison de la perte de Boz-Kourt ayant entraîné la mort de huit marins et passagers turcs?
« 2) …… . »

[187] The question for the Court is whether Turkey in this matter acted in contravention of the principles of international law; in other words, had the Turkish Courts Jurisdiction to try and convict Demons?

[188] Article 15 of the Convention of Lausanne provides that "in all matters under reserve of Article 16 questions of judicial competence shall, in the relations between Turkey and the other contracting Powers, be regulated conformably to the principles of international law".

[189] This clearly refers to the general principles of international law in the ordinary sense of the term and it applies to criminal as well as to civil proceedings. Article 16 is for present purposes irrelevant.

[190] The question for the Court is one purely of criminal law. The practice with regard to crimes committed at sea has been that the accused should be tried by the courts of the country to which his ship belongs, with the possible alternative of the courts of the country to which the offender personally belongs, if his nationality is different from that of the ship. There has been only one exception: pirates have been regarded as hostes humai generis and might be tried in the courts of any country.

[191] In the ordinary course any trial of Demons on a charge of having by criminal negligence in navigation caused the sinking of the. Turkish vessel by collision would have been held in a French court, as France was his country as well as that of the flag of the ship. He was tried and convicted by a Turkish court and according to Turkish law. [p52]

[192] The first point with which the Court has to deal is this: What is the exact meaning of the question put in the compromis: La Turquie a-t-elle agi en contradiction des principes du droit international ?

[193] It has been argued for Turkey that this question implies that France, in order to succeed, must point to some definite rule of international law forbidding what Turkey did. I am unable to read the

compromis in this sense. What it asks is simply whether the Turkish Courts had jurisdiction to try and punish Demons; if international law authorizes this, the question would be answered in the affirmative, otherwise in the negative. The compromis. cannot, with any fairness, be read so as to require France to produce some definite rule forbidding what was done by Turkey. If the Turkish proceedings were not authorized by international law, Turkey acted en contradiction des principes du droit international. There is no mention of any "rule" but only of "principles".

[194] The question is put in the compromis with perfect fairness as between the two countries and the attempt to torture it into meaning that France must produce a rule forbidding what Turkey did arises from a misconception. The question is whether the principles of international law authorize what Turkey did in this matter.

I. [Turkish Jurisdiction Argument No. 1]

[195] It was argued for Turkey that the délit committed by Demons was committed on board the Boz-Kourt when by a faulty manoeuvre of his she was struck by the Lotus, and as the Boz-Kourt was a Turkish ship she must, it was said, be regarded as part of Turkish territory and the délit was therefore committed. on Turkish territory as much as if it had been committed on shore within the territorial limits of Turkey.

[196] This is a new and startling application of a metaphor and, if it is held good, it would mean that if there is a collision on the high seas between a Turkish vessel and a ship of any other nationality, any of the officers and crew of that other ship may be arrested in any Turkish port and put on their trial before a Turkish court on a [p53] criminal charge of having caused the collision by their negligence. This view appears to be based on a misconception of the proposition that a ship on the high seas may be regarded as part of the territory of the country whose flag she flies.

[197] Turkey's case is that the crime was committed in Turkish territory, namely, on a Turkish ship on the high seas, and that the Turkish Courts therefore have a territorial jurisdiction. A ship is a movable chattel, it is not a place; when on a voyage it shifts its place from day to day and from hour to hour, and when in dock it is a chattel which happens at the time to be in a particular place. The jurisdiction over crimes committed on a ship at sea is not of a territorial nature at all. It depends upon the law which for convenience and by common consent is applied to the case of chattels of such a very special nature as ships. It appears to me to be impossible with any reason to apply the principle of locality to the case of ships coming. into collision for the purpose of ascertaining what court has jurisdiction; that depends on the principles of maritime law. Criminal jurisdiction for negligence causing a collision is in the courts of the country of the flag, provided that if the offender is of a nationality different from that of his ship, the prosecution may alternatively be in the courts of his own country.

[198] The case seems to me clear on principle, but there is also authority which points to the same conclusion.

[198] In the Franconia case (R. v. Keyn, 1877, 2 Ex. Div. 63), it was argued for the Crown that there was jurisdiction in the English Courts to try a charge of manslaughter on the very ground which we are now considering.

[199] Keyn was in command of a German ship and by his negligence he came into collision with a British vessel, the Strathclyde; the Strathclyde was sunk and an English passenger on board her was drowned. Keyn was found guilty of manslaughter at the Central Criminal Court. The question of jurisdiction was argued in the Court for Crown Cases Reserved. It was urged that there was

jurisdiction in the English Courts on the ground that Keyn had committed manslaughter on board a British ship. The collision took place within the territorial waters but this for present [p54] purposes is immaterial. As Amphlett, J.A., said (page. 118 of the Report in 2 Ex. Div.), the ground was quite independent of the three-mile zone and if valid would justify the conviction of the prisoner, had the offence been committed in the middle of the ocean. It was decided by eleven out of the thirteen judges who formed the Court that the conviction could not be supported on this ground.

[200] The point so decided is exactly the same as that which arises in the present case. The decision was that the fact that death was caused on board the British ship by the criminal negligence of the captain of the foreign ship did not give jurisdiction to the English Courts to try him on the criminal charge. This was the case of a collision between a German and a British ship and on the face of it raised a question of international law. By eleven judges to two it was held that this did not give jurisdiction to the English Court. I do not think it is correct to say that this raised only a question of English law. As the ships were of different nationalities, the decision depended on the principles of international law. International law, wherever applicable, is considered as part of the law of England, and our judges must apply it accordingly. It seems to me that it is not right to treat R. v. Keyn as if it had been a decision merely on a question of English municipal law. The judges cannot have overlooked the fact that they were dealing with vessels of different nationalities and the decision must have proceeded on the law applicably to such a case. The decision of course proceeded upon the view which the English Court took of the international law on the point, but it was international law which they had to apply. The decision is not binding upon this Court but it must be regarded as of great weight and cannot be brushed aside as turning merely on a point of English municipal law. Some expressions used by one of the two dissentient judges (Denman, J.) might give rise on a hasty perusal to the idea that the case turned on English law. These expressions occur on page 100 and page 101 of the Report (ubi supra). The learned judge was discussing the meaning of Section 22 of the Statute 4 and 5 William IV, Chapter 36, giving jurisdiction tot he Central Criminal Court to try offences committed on the high seas. He said: “This question appears to me to turn mainly upon the question: where is the offence committed? And in deciding this question I think we are bound to decide according to the principles of English law.” He we on to say that one prin[p55]ciple of English law is that a British ship as regards criminal offences committed on board of her is to be treated as British territory, and as much subject to our law as any other part of the Queen's dominions. These expressions of Mr. Justice Denman do not appear to me to have any relevance to the question of the law applicable in the case of a collision between a British and a foreign ship.

II. [Turkish Jurisdiction Argument No. 2]

[201] Turkey however, has another ground upon which she contends that there was jurisdiction. The judgment of the Permanent Court is silent with reference to this point; as the Court was in favour of Turkey upon the first point, - that with which I have been hitherto dealing, - it was thought unnecessary for them to pronounce upon this further point. But as I have the misfortune to differ from the conclusion at which the Court arrived on the first point, it is necessary for me to deal with this further point. We have had the advantage of very full and most elaborate arguments upon it.

[202] Turkey asserts that the trial of Demons before the Turkish Courts was justified by Article 6 of the Turkish Penal Code, above set out, on the ground that Demons, by his negligent navigation of the Lotus resulting in the collision and loss of Turkish lives, had been guilty of an act which, by Turkish law when he came to Turkey, rendered him liable to prosecution for it in the Turkish Courts according to that article. It has by consent been assumed for the purposes of the case that the collision off Cape Sigri was en pays étranger within the meaning of the article and the question for us is one of international law only.

[203] The passing of such laws to affect aliens is defended on the ground that they are necessary for the “protection” of the national. Every country has the light and the duty to protect its nationals when out of their own country. If crimes are committed against them when abroad, it may insist on the offenders being brought to justice, but [p56] this must be done in the proper way and before tribunals having jurisdiction. The government of the country of the injured person is entitled to bring pressure to bear upon the government of the offender to have him brought to justice, but it has no right to assert for this purpose in its own courts a jurisdiction which they do not possess.

[204] The Law of Nations does not recognize the assumption of jurisdiction for “protection”; there never has been any such general consent by the nations as would be required to make this doctrine a part of international law. Any State which finds it necessary to acquire such a power should by convention get the consent of the other States affected. Such a convention would of course have to define the limits and conditions affecting the exercise of the power. A country is no more entitled to assume jurisdiction over foreigners than it would be to annex a bit of territory which happened to be very convenient for it. Any such convention affecting the jurisdiction to try crimes by negligence in navigation would of course require the most careful consideration as to the definition of what .amounted to criminal negligence for this. purpose. It would be extraordinary if it should appear that jurisdiction had been conferred, leaving it to the court of the country in each case to determine what was criminal negligence for the purposes of such jurisdiction.

[205] I desire to refer to what was said by Mr. Oppenheim on this subject of "Protection" (Vol. 1, "Peace", p. 239, paragraph 147):

"Many States claim jurisdiction and threaten punishment for certain acts committed by a foreigner in foreign countries. States which claim jurisdiction of this kind threaten punishment for certain acts either against the State itself, such as high treason, forging bank-notes, and the like, or against its citizens, such as murder or arson, libel and slander, and the like. These States cannot, of course, exercise this jurisdiction as long as the foreigner concerned remains outside their territory. But if, after the committal of such act, he enters their territory and comes thereby under their territorial supremacy, they have an opportunity of inflicting punishment. The question is, therefore, whether States have a right [p57] to jurisdiction over acts of foreigners committed in foreign countries, and whether the home State of such an alien has a duty to acquiesce in the latter's punishment into the power of these States. The question, which is controversial, ought to be answered in the negative. For at the time such criminal acts are committed, the perpetrators are neither under the territorial nor under personal supremacy of the States concerned. And a State can only require respect for its laws from such aliens as are permanently or transiently within its territory. No right for a State to extend its jurisdiction over acts of foreigners committed in foreign countries can be said to have grown up according to the Law of Nations, and the right of protection over citizens abroad held by every State would justify it in an intervention in case one of its citizens abroad should be required to stand this trial before the courts of another State for criminal acts which he did not commit during the time he was under the territorial supremacy of such State.”

[206] This passage, in my opinion, is an accurate statement of the international law applicable. Its value is not affected by the fact referred to in the notes on page 240 that continental publicists have thought otherwise; we are concerned with the question what international law is, not what it ought to be.

[207] Mr. Oppenheim went on to refer to the case of Cutting, which arose between Mexico and the United States in 1886, the facts of which have been already stated in the course of the present proceedings. Nothing was decided in the Cutting case and the question of jurisdiction continued to

form a subject of discussion among jurists. In the British Year Book of International Law for 1925 there will be found on page 44 et sqq. an article by Mr. W. E. Beckett on "The Exercise of Criminal jurisdiction over Foreigners", in which the history of the controversy up to date is given.

[208] This Court never can have to consider whether “protection” of this sort is or is not desirable. The question for the Court must always be, in the absence of convention, simply whether it has been adopted by the common consent of nations as a part of international law. As a plain matter of fact, it appears to me [p58] that it has not yet been so adopted. The Court, of course, could never allow itself to be entangled in arguments for and against the theory. The question simply is whether, by general consent, “protection” of this kind has become a part of international law. If that question is answered in the negative, as I think it must be, Article 6 of the Turkish Penal Code did not bind France, and the jurisdiction of the Turkish Court to try Demons could not be supported on this ground.

[209] Of course, every country has the right to protect the persons and the property of its citizens. If a wrong is done, the State may demand redress and enforce it, but the assertion that any State can by any law of its own assume criminal jurisdiction in respect of alleged crimes committed abroad or on the high seas is a new one. The government of the country of the injured person may call, upon the government of the country where the injury was committed to have the offenders punished in due course by law, but it cannot make laws for their punishment in its own courts, except in pursuance of a convention with the other Power affected.

[210] In my opinion, both the grounds on which Turkey has tried to support the conviction are unsound and France is entitled to the judgment of this Court.

(Signed) Finlay. [p59]

Dissenting Opinion by M. Nyholm

[Translation]
[211] In order to reply to the question under consideration, it is necessary in the first place to ascertain whether Turkey's action falls within a domain governed by the Law of Nations and whether there exists not only a principle but a rifle of the Law of Nations which would thus represent the positive public law applicable to the particular case.

[212] In endeavouring to trace the general lines along which public international law is formed, two principles will be found to exist the principle of sovereignty and the territorial principle, accordance to which each nation has dominion over its territory and – on the other hand - has no authority to interfere in any way in matters taking place on the territories of other nations. There exists between countries an empty space over which no authority extends. In consequence of the relations which owing to the exigencies of life must necessarily be formed between nations, this empty space must be filled up by the creation of rules fixing the method to be followed in order to treat similarly, on the one hand, the material problems which arise simultaneously and often in an identical manner in the different countries, and, on the other, personal problems, namely the treatment of individuals on foreign territory, which is actually the problem in this case. As a method of regulating the relations between countries, in the first place should be mentioned more or less universal conventions concluded between States and serving to bridge over the domain not subject to any regulation. Universal laws adopted by all countries and having as their object the creation or the codification of international law would constitute a solution of the problem, but they do not exist and one can only endeavour to establish international law by custom.

[213] The ascertainment of a rule of international law implies consequently an investigation of the way in which customs acquire consistency and thus come to be considered as constituting rules governing international relations. A series of definitions tend to fix the elements necessary for the establishment of an international custom. There must have been acts of State accomplished in the domain of international relations, whilst mere municipal laws [p60] are insufficient; moreover, the foundation of a custom must be the united will of several and even of many States constituting a union of wills, or a general consensus of opinion among the countries which have adopted the European system of civilization, or a manifestation of international legal ethics which takes place through the continual recurrence of events with an innate consciousness of their being necessary.

[214] These different theories give a general idea of the necessary conditions for the existence of an international law and they show the necessity of some action ("acts", "will", "agreement") on the part of States, without which a rule of international law cannot be based on custom. This result is the consequence of the initial principle which limits every State to its territory as regards the exercise of its right of sovereignty and of its territorial jurisdiction, principles which have been definitely recognized in international law. The present case, which concerns the fact of a nation having extended its jurisdiction to a foreigner in regard to acts committed by the latter in his own country, supplies an example of an actual infringement of the principle of territoriality. This infringement cannot be legalized by mere tacit acceptance. Among nations consent must not merely be tacit, but, in most cases, express, if the situation provided by the above example is to be recognized as being authorized by public international law.

[215] Thenceforward it cannot be maintained - as the judgment sets out – that, failing a positive restrictive rule, States leave other States free to edict their legislations as they think fit and to act accordingly, even when, in contravention of the principle of territoriality, they assume rights over foreign subjects for acts which the latter have committed abroad. The reasoning of the judgment appears to be that, failing a rule of positive law, the relations between States in the matter under consideration are governed by an absolute freedom. If 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. The basis of this reasoning appears to be that it is vaguely felt that, even outside the domain of positive public international law, the situation of fact as regards relations between nations in itself embodies a principle of public law. But that is a confusion of ideas. In considering the existing situation of fact, a distinction should be drawn between that which is merely an inter[p61]national situation of fact and that which constitutes a rule of international law. The latter can only be created by a special process and cannot be deduced from a situation which is merely one of fact.

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[216] From the application of the principles set out above the following conclusions can be drawn. In the first place, two preliminary questions must be dealt with, which would, if answered in the affirmative, exercise a decisive effect upon the case.

[217] In agreement with the judgment, it must be recognized that Article 15 of the Convention of Lausanne does not constitute a special convention between France and Turkey. This provision is merely a statement of a general application of international law. Another question is raised by Turkey, who argues that the offence was committed on Turkish territory, that is to say on the Turkish ship, which, according to the accepted international law, constitutes a floating extension of Turkish territory. Without going into the various theories regarding offences producing their effect at a distance and regarding the direct and indirect effect of such offences, it will suffice to observe that this is in the main a question to be decided on the merits of the particular case: Did the alleged offence really produce the effects imputed to it, namely the death of a number of persons - since the

loss of the ship and of its cargo do not come into the question - on board the ship run down? Turkey has produced no evidence in the form of a maritime enquiry or otherwise, calculated to establish precisely where death occurred; and in view of this uncertainty as regards the establishment of the facts, since it is only the Turkish ship which, by application of a legal fiction, is to be regarded as Turkish territory, the Turkish contention is not made out and we may pass to the consideration of the other aspects of the case.

[218] The case concerns a collision on the high seas between a Turkish ship and a French ship as a consequence of which, after the arrival of the French ship in a Turkish port, criminal proceedings were instituted against the French officer. The jurisdiction of the Turkish Courts, which is disputed by France, seems to have been based on Article 6 of the Turkish Criminal Code, which extends their jurisdiction to cover certain acts committed abroad by a foreigner to the injury of a Turk. [p62]

[219] The jurisdiction claimed by Turkey is an extension of the fundamental principles of public international law which establish the territorial system. Is such an extension admissible in collision cases? To decide this point we must consider (1) the general situation prevailing between States as regards criminal jurisdiction on land; (2) the same situation as regards the high seas; (3) the case of collision in particular.

[220] In so doing our starting point is the territorial principle which is recognized as forming part of positive international law. Some exceptions to this principle are also recognized, such as jurisdiction over nationals for acts committed abroad. Is it possible to hold that an exception is also made as regards acts which are committed by foreigners abroad and by which a national is injured?

[221] The criteria for the establishment of a rule of positive law have been indicated above. It is necessary to examine conventions, judicial decisions and the teachings of publicists. From this examination, in the course of which the voluminous data at the Court's disposal have been considered, the details of which, however, cannot be set down here, it follows that, as regards inter-State relations on land, exceptions in respect of criminal law have not been recognized generally or in a manner sufficient to establish a derogation from the territorial principle which is strongly upheld by important nations. This is proved by, amongst other things, the fact that a committee of experts appointed to codify international law has set aside the question of the extension of criminal jurisdiction, as not being for the moment ready for solution.

[222] As regards the relations prevailing between States at sea, the situation is more or less the same. International law recognizes that a vessel is to be regarded as a part of the territory and as subject to the jurisdiction exercised thereon. Cases of concurrent jurisdiction are so rare that one is led to the conclusion that there is a tendency towards recognition of exclusive jurisdiction. But, even as regards relations at sea, this situation cannot be regarded as already established and as thus constituting a principle of international law.

[223] As regards collision cases, they may be assimilated either to relations on sea or to relations on land. Exclusive jurisdiction over a ship is based on the idea that a ship on the high seas, which are, free to all and are not subject to the authority of any particular [p63] nation, must retain its exclusively national character. But in the case of a collision between two vessels of different nationalities, it might perhaps be said that, as regards relations between these two vessels, the principle of exclusive jurisdiction at sea falls to the ground and that a collision should be dealt with in accordance with the principles applying to relations on land, since it is no longer a question of a vessel at sea proceeding alone, the extraterritorial character of which is derived from this circumstance, but of two vessels in contact just like two nations on land.

[224] The result, however is the same under whichever head the case of a collision be classified, since under neither is there as yet any positively established international law. Consequently the same is true as regards collision cases.

[225] It follows that the exception to the territorial principle which must be established to provide a legal sanction for the exercise of jurisdiction by Turkey and which forms the subject of the present dispute, does not exist. It is impossible to hold with the judgment that, over and above positive international law, there is a kind of international law which amounts to this: that the absence of a rule prohibiting an action suffices to render that action permissible, for not only is it in most cases inadmissible thus to deduce permission from the absence of a prohibition, but furthermore in the present case one is confronted with the territorial principle, which is definitely established, whilst the possible exception to it – and in particular the exception which would be required to give Turkey criminal jurisdiction in this case – are not.

[226] It follows from the foregoing that Turkey, by prosecuting Lieutenant Demons, acted in contravention of the territorial principle as established at the present time.

[227] It will, however, be well to remember that international law is liable to continual variations and that there would seem to be a tendency towards a relaxation in the strict application of this principle.

[228] Though therefore Turkey's action in this is not at present time justified in law, on the other hand it cannot be regarded as aggressive from a moral point of view.

[229] By establishing municipal legislation containing, amongst other things, Article 6 of the Criminal Code, on which she based her action, Turkey therefore has after all merely followed a tendency [p64] of modern legislation, to which tendency, however, an important group of nations are still opposed.

[230] It must therefore be concluded that Turkey - in this case - has acted in contravention of the principles of international law. [p65]

Dissenting Opinion by Mr. Moore

[231] On the present judgment as a whole, the vote, as appears by the judgment itself, stood six to six, and, the Court being equally divided, the President gave, under Article 55 of the Statute, a casting vote, thus causing the judgment as it stands to prevail. I was one of the dissenting six ; but I wish at the outset to state that my dissent was based solely on the connection of the pending case with Article 6 of the Turkish Penal Code, which I will discuss in due course. In the judgment of the Court that there is no rule of international law by virtue of which the penal cognizance of a collision at sea, resulting in loss of life, belongs exclusively to the country of the ship by or by means of which the wrong was done, I concur, thus making for the judgment on that question, as submitted by the compromis, a definitely ascertained majority of seven to five. But, as I have reached my conclusions, both on the general question and on the point on which I dissent, by a somewhat independent course of reasoning, I deem it to be my duty to deliver a separate opinion.

[232] Under the compromis or special agreement signed at Geneva on October 12th, 1926, France and Turkey have submitted to the Permanent Court of International justice the question of "judicial jurisdiction" (compétence judiciaire) which had arisen between the two Governments as to whether Turkey had, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting her judicial establishment (établissement) and jurisdiction, violated the principles of international law -

and, if so, what principles - by instituting against the officer of the watch of the French steamer Lotus on her arrival at Constantinople, as well as against the commander of the Turkish steamer Boz-Kourt, criminal proceedings in pursuance of Turkish legislation in respect of a collision between the two steamers outside Turkish territorial waters, as the result of which the Boz-Kourt was lost and eight Turkish sailors and passengers on that vessel lost their lives. Should the answer be in the [p66] affirmative, the Court is asked to decide what pecuniary reparation is due to M. Demons, the officer of the watch, "provided, according to the principles of international law, reparation should be made in similar cases".

[233] In presenting the case to the Court, neither of the Parties furnished a copy, authenticated or otherwise, of the decision or decisions of the Turkish tribunals or of the proceedings, including the evidence, on which such decision or decisions were based. The Court is not asked to review the proceedings of the Turkish tribunals or to examine the question whether they were in conformity with Turkish law. It is agreed that the collision took place about six miles from Cape Sigri, or perhaps three miles outside Turkish territorial waters, and the Court is asked to decide whether, by reason of the fact that the place of the collision was outside such waters, Turkey violated Article 15 of the Lausanne Convention and the principles of international law in instituting criminal proceedings in pursuance of Turkish legislation against the officer of the watch of the ship by which the Turkish steamer was sunk and lives of Turkish sailors and passengers were lost.

[234] I will consider, first, the question of the meaning and effect of Article 15 of the Convention of Lausanne.

I. [Lausanne Convention]

[235] Article 15 of the Lausanne Convention reads as follows:

"En toutes matières, sous réserve de l'article 16, les questions de compétence judiciaire seront, dans les rapports entre la Turquie et les autres Puissances contractantes, réglées conformément aux principes du droit international."

[Translation.]
"In all matters, under reserve of Article 16, questions of judicial competence shall, in the relations between Turkey and the other contracting Powers, be regulated conformably to the principles of international law."

[236] Article 16 of the Convention, to the reservation of which Article 15 is subjected, relates to personal status, and has no bearing upon the question now before the Court. [p67]

[237] The Preamble of the Lausanne Convention recites that the contracting States desired to regulate conformably to the modern law of nations (droit des gens moderne) the conditions of the establishment of their respective citizens in the territories of the other, as well as certain questions relative to judicial competence (ainsi que certaines questions relatives à la compétence judiciaire).

[238] In the Case of the French Government, and in the oral arguments made in behalf of that Government before the Court, it has been contended that a limited interpretation should be given to Article 15 of the Lausanne Convention as regards the jurisdictional rights of Turkey under international law, and this contention has been supported by citations from the negotiations that led up to the conclusion of the Treaty, but the passages cited do not in my opinion have the effect which it is sought to ascribe to them. In so saying I am not to be understood as expressing an opinion on the question whether such evidence is admissible for the purpose of throwing light upon the

interpretation of treaties. The language of Article 15 is simple and plain and does not stand in need of interpretation from any source outside the terms of the Treaty itself. When Article 15 speaks of "the principles of international law", it means the principles of international law as they exist between independent and sovereign States. It evidently was intended to recognize the right of Turkey to exercise her judicial jurisdiction as an independent and sovereign State, except so far as the exercise of national jurisdiction is limited by the mutual obligations of States under the law of Nations.

II. [Violation of the Principles of International Law]

[239] I will next consider the broad question submitted under the compromis as to whether Turkey violated the principles of international law by instituting criminal proceedings in the present case, and it is obvious that, under the interpretation I have given to Article 15 of the Lausanne Convention, this question in effect is, whether an independent State is forbidden by international law to institute criminal proceedings against the officer of a ship of another nationality in respect of a collision on the high seas, by which one of its own ships was sunk and lives of persons on board were lost. [p68]

[240] The French Government maintains the affirmative in the case before the Court. In the original protest presented by the French Chargé at Angora on August 11th, 1926, against the criminal prosecution of M. Demons, the ground was taken that, the collision having occurred "outside the territorial waters and jurisdiction of Turkey, the Turkish authorities have no competence to conduct any penal prosecution whatever against the personnel of a French ship exclusively justiciable for what takes place on the high seas (pour faits survenus en haute mer) by the French Courts". The protest, therefore, declares that M. Demons was "wrongfully arrested, and that he should be brought before the competent French court for any proceedings that might eventually be taken against him".

[241] To the broad denial thus made of the right of an independent State, by means of criminal proceedings against persons voluntarily within its territory, to protect its ships and the lives of those on board outside territorial waters, against criminal acts committed and consummated on such ships by the personnel of a ship of another nationality, I am unable to give my assent, and in proceeding to discuss the question, I will refer to certain elementary principles.

[242] 1. It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either express or implied (Schooner Exchange v. McFaddon (1812), 7 Cranch 116, 136). The benefit of this principle equally enures to all independent and sovereign States, and is attended with a corresponding responsibility for what takes place within the national territory.

[243] 2. It is an equally admitted principle that, as municipal courts, the creatures of municipal law, derive their jurisdiction from that law, offences committed in the territorial jurisdiction of a nation may be tried and punished there according to the definitions and penalties of its municipal law, which, except so far as it may be shown to be contrary to international law, is accepted by international law as the law properly governing the case. (Report of Mr. Bayard, Secretary of State, to the President, case of Antonio Pelletier, January 20th, 1887, Foreign Relations of the United States, 1887, p. 606, and the numerous authorities there cited; [p69] Wildenhus' Case, 120, U.S. 1.) This principle is not contrary, but is correlative, to the principle laid down in numerous decisions of municipal courts, that international law is to be considered as forming part of the law of the land, that it is as such to be judicially administered in all cases to which it is applicable, and that municipal enactments ought not to be so construed as to violate international any other construction

is possible (Chief justice Marshall, Murray v. Schooner Charming Betsey (1804), 2 Cranch, 64, 118; Sir William Scott, Le Louis (1817), 2 Dodson, 210, 239).

[244] 3. The principle of absolute and exclusive jurisdiction within the national territory applies to foreigners as well as to citizens or inhabitants of the country, and the foreigner can claim no exemption from the exercise of such jurisdiction, except so far as he may be able to show either:

(1) that he is, by reason of some special immunity, not subject to the operation of the local law, or (2) that the local law is not in conformity with international law. No presumption of immunity arises from the fact that the person accused is a foreigner.

[245] 4. In conformity with the principle of the equality of independent States, all nations have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation, and no State is authorized to interfere with the navigation of other States on the high seas in the time of peace except in the case of piracy by law of nations or in extraordinary cases of self-defence (Le Louis (1817), 2 Dodson, 210, 243-244).

[246] 5. It is universally admitted that a ship on the high seas is, for jurisdictional purposes, to be considered as a part of the territory of the country to which it belongs; and there is nothing in the law or in the reason of the thing to show that, in the case of injury to life and property on board a ship on the high seas, the operation of this principle differs from its operation on land.

[247] The operation of the principle of absolute and exclusive jurisdiction on land does not preclude the punishment by a State of an act committed within its territory by a person at the time corporeally present in another State. It may be said that there does not exist to-day a law-governed state in the jurisprudence of which [p70] such a right of punishment is not recognized. France, by her own Code, asserts in general and indefinite terms the right to punish foreigners who, outside France, commit offences against the "safety" of the French State. This claim might readily be found to go in practice far beyond the jurisdictional limits of the claim of a country to punish crimes perpetrated or consummated on board its ships on the high seas by persons not corporeally on board such ships. Moreover, it is evident that, if the latter claim is not admitted, the principle of territoriality, when applied to ships on the high seas, must enure solely to the benefit of the ship by or by means of which the crime is committed, and that, if the Court should sanction this view, it not only would give to the principle of territoriality a one-sided application, but would impose upon its operation at sea a limitation to which it is not subject on land.

[248] There is nothing to show that nations have ever taken such a view. On the contrary, in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. I say "piracy by law of nations", because the municipal laws of many States denominate and punish as "piracy" numerous acts which do not constitute piracy by law of nations, and which therefore are not of universal cognizance, so as to be punishable by all nations.

[249] Piracy by law of nations, in its jurisdictional aspects, is sui generis. Though statutes may provide for its punishment, it is an offence against the law of nations ; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind – hostis humani generis - whom any nation may in the interest of all capture and punish. Wheaton defines piracy by law of nations as murder or robbery committed on the high seas by persons acting in defiance of all law, and acknowledging obedience to no flag whatsoever

(Wheaton's Elements, Dana's ed., 193 et seq.). Dana, 193, Note 83, commenting on this definition, remarks that, while the attempted definitions of piracy are unsatisfactory, some being [p71] too wide and some too narrow, the offence cannot be made to embrace "all acts of plunder and violence .... simply because done on the high seas", since as every crime may be committed at sea piracy "might thus be extended to the whole criminal code". Hall says that all acts of piracy by law of nations have one thing in common, namely, that "they are done under conditions which, render it impossible or unfair to hold any State responsible for their commission"; that a pirate "either belongs to no State or organized political society, or by the nature of his act he has shown his intention and his power to reject the authority of that to which he is properly subject"; that, as the "distinctive mark" of piracy is "independence or rejection of State or other equivalent authority", it is not confined to "depredations or acts of violence done animo furandi", but that a satisfactory definition "must expressly exclude all acts by which the authority of the State or other political society is not openly or by implication repudiated". (Hall, International Law, 8th ed. (1924), paragraph 81, 33. 310-311.)

[250] It is important to bear in mind the foregoing opinions of eminent authorities as to the essential nature of piracy by law of nations, especially for the reason that nations have shown the strongest repugnance to extending the scope of the offence, because it carried with it not only the principle of universal jurisdiction but also the right of visit and search on the high seas in time of peace. For the purpose of protecting ships on the high seas, we must therefore look to a reasonable and equal interpretation and application of the principle of the territoriality of ships.

[251] As affecting this principle, the case of John Anderson has been cited and discussed in the present proceedings. It appears that Anderson, an ordinary seaman on the American bark C.O. Whitmore, in 1870, killed the first officer while the vessel was at sea on a voyage from New York to Calcutta. On the arrival of the bark at Calcutta, the American Consul-General sought to have the culprit detained, with a view to his return to the United States for trial, but the local authorities claimed jurisdiction of the crime on the ground that Anderson was in fact a British subject. When advised [p72] of these facts, the Secretary of State of the United States, in order that the case might not, as he said, be admitted "as a precedent", instructed the Legation of the United States at London to call attention to what he declared to be the "universally recognized" principle that, as merchant vessels on the high seas were under the jurisdiction of the nation to which they belonged, their national tribunals had "exclusive jurisdiction" of common crimes on board such vessels on the high seas, and to represent that the "nationality of the accused" could "have no more to do with the question of jurisdiction" than if the crime had been committed "within the geographical territorial limits" of the nation whose laws were violated. In the drafting of these statements, or perhaps rather in the signing of them, the fact evidently was overlooked that all nations to some extent punish their own citizens for crimes committed within the geographical limits of other States, and that the United States itself admits and exercises this right; and it is not strange that the British Government, in its reply, called attention to this fact. It turned out, however, that the colonial authorities at Calcutta, in holding that the High Court of that place had jurisdiction of the case, misinterpreted the Imperial Statute under which they essayed to act, with the result that the British Government, on the strength of an opinion of the Law Officers of the Crown that the trial was a nullity, expressed regret that the extradition of the offender should have been improperly refused and stated that there was no design "to question the jurisdiction of the United States in this or any similar case". (Foreign Relations of the United States, 1879, pp. 435, 436 ; 1880, p. 481, quoted in Moore, Digest of International Law, I, 932-935. See also Foreign Relations, 1887, pp. 754, 770, 779.) It is evident that this case merely shows that a diversity of nationality, as between the offender and the place of the offence, may give rise to a concurrent jurisdiction. This is fully recognized in international law, and does not materially affect the question before the Court.

[252] In considering the case before the Court, it should be observed that the question of the proper jurisdiction of the offence of murder, or manslaughter, where the injury is inflicted in one place or country, and the victim dies in another place or country, has been much [p73] discussed, and that different views of it have been taken at different times, even in the same country. In England it was once held that where a blow was struck in one county and death ensued in another county, the criminal could not be tried in either. This impotent result was due to the method of procedure, under which the grand jury could know only what took place in its own county; and in order to remedy the defect the Statute of 2 and 3 Edw. VI, c. 24, A.D. 1549, was passed, to enable the criminal to be tried in either county. Whether, in the case of different countries, where the blow is struck in one and the death occurs in the other, both or either can try the person accused of murder or manslaughter, as the case may be, has been decided differently in different jurisdictions, the decision depending upon the view taken by the court of the relation of the death to the infliction of the injury. But it appears to be now universally admitted that, where a crime is committed in the territorial jurisdiction of one State as the direct result of the act of a person at the time corporeally present in another State, international law, by reason of the principle of constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former State, should he come within its territorial jurisdiction.

[253] This question, as applied to ships of different nationality on the open sea, was much discussed in 1877 by the judges in the case of The Queen v. Keyn, L.R. 2 Exch. Div. 63, commonly called the case of the Franconia ; but, before discussing this case and other judicial decisions bearing on the question at issue, I will make one observation on the position and effect of the decisions of municipal or national courts in international jurisprudence. The Statute of the Court (Article 38), after providing that the Court shall apply (1) international conventions, whether general or special, establishing rules expressly recognized by the States in controversy, (2) international custom, as evidence of a general practice accepted as law and (3) the general principles of law recognized by civilized nations, further provides that the Court shall apply (4) "judicial decisions and the teachings of the most highly qualified publicists of the [p74] various nations", as a "subsidiary means for the determination of rules of law". These directions merely conform to the well-settled rule that international tribunals, whether permanent or temporary, sitting in judgment between independent States, are not to treat the judgments of the courts of one State on questions of international law as binding on other States, but, while giving to such judgments the weight due to judicial expressions of the view taken in the particular country, are to follow them as authority only so far as they may be found to be in harmony with international law, the law common to all countries.

[254] In the case of the Franconia, the captain of a German steamer bearing that name was convicted in an English criminal court of manslaughter for negligently sinking the British ship Strathclyde in the open sea, but within the three-mile belt, with the consequent death by drowning of a number of persons on board the latter ship. The case was then carried before the Court for Crown Cases Reserved. In this Court various questions were discussed, but only two need here be mentioned. One, which may be called the main question, was whether the offence, committed within the three-mile belt, could be punished under British Law as it then stood; and to this question the Court, consisting of thirteen judges, gave, by a bare majority of seven to six, a negative answer. By this conclusion, it must be admitted that the long established principle, with which the great names of Holt, Hardwicke and Mansfield were associated, that international law, in its full extent, was part of the law of England (Triquet v. Bath (1764), 3 Burrows, 1478; Emperor of Austria v. Day and Kossuth (1861), 2 Giffard, 628), suffered a temporary eclipse, while the rules of municipal law governing criminal jurisdiction received an evidently technical application. The sense of surprise, and indeed of apprehension, with which the judgment was received by the bar and the public, was expressed by Lord Cairns, then holding the high office of Lord Chancellor, who, in presenting in the House of Lords the bill by the enactment of which, under the title of the

"Territorial Waters Jurisdiction Act, 1878", the law as previously understood was reestablished, declared that, while the question "at first sight" appeared to be and no doubt was a question of law, [p75] "he rather thought that it was a question of that which had been described as the first law of nature - the law of self-preservation"; and, while remarking that, but for the case of the Franconia, it would "hardly have been necessary to detain their lordships by offering any observations", said that it would have been "fortunate for the vindication of the law" if the fact had been brought to the attention of the Court that by a warrant published in 1848, under the Customs Regulations Act of that year, the limits of the Port of Dover were declared to extend three miles out to sea, thus covering the waters in which the Strathclyde was sunk. Lord Selborne, a former Lord Chancellor, supporting the view of Lord Cairns, stated that, until he read the judgment in question, "he had not supposed that there was any doubt among lawyers" as to the existence of the right of sovereignty over territorial waters (Hansard, Parl. Debates, Vol. 237, 3rd series, pp. 1601-1616). Indeed, on a careful study of the case, it is difficult to avoid the conclusion that the vote of the majority was in no small measure determined by a powerful, but composite and somewhat torrential opinion of eighty pages delivered by Sir Alexander Cockburn, then Chief Justice of the King's Bench, the disturbing effects of which it was necessary to remove in order that the majestic stream of the common law, united with international law, might resume its even and accustomed flow. This was done by the Act of Parliament above mentioned which declared that the "rightful jurisdiction" of Her Majesty not only extended but had "always extended" over her coastal waters, and made British criminal law applicable to all offences committed on the open sea within a marine league of the coast measured from low-water mark.

[255] The negative answer of the majority to the right of jurisdiction over territorial waters led to the discussion, subsidiarily, of the question whether, even though British law as such did not operate on foreign ships within the three-mile belt, the British Courts might not uphold the conviction on the ground that the offence was to be considered as having been committed on a British ship and therefore within British jurisdiction. An examination of the opinions of the judges on this point, so far as they definitely expressed any, will show that a mere count of hands would be altogether misleading, and that, taking together [p76] their reasons and their conclusions, if certain principles of law, now definitely established in England, had then been applied, the conclusions would have been different.

[256] On the point subsidiarily discussed, Sir Robert Phillimore took the view that, as the collision was caused by defendant's "negligence", the act by which death was caused "was not his act, nor was it a consequence immediate or direct of his act", and that, as he "never left the deck of his own ship", or sent "any missile from it to the other ship, neither in will nor in deed" could he be it “considered to have been on board the British vessel". Had the offence been wilfully committed on the British ship, the language and reasoning of the learned judge lead to the conclusion that he would have voted to sustain the conviction. Lindley, J., while citing the case of United States v. Davis, 2 Sumner, 482, in which, in a case of manslaughter, Mr. Justice Story, of the Supreme Court of the United States, held that the offence was committed on board the ship on which the fatal act took effect, said he was “not satisfied on this point” but preferred to rest his judgment on the "broader ground" of jurisdiction over territorial waters and the liability to punishment under English law of "all persons, whether English or foreign, who recklessly navigate those waters and thereby cause others to lose their lives".

[257] Denman, J., citing as "good sense and sound law", Coombes’s case, 1 Lea Cr. C. 388, holding that a person standing on shore and shooting another in the sea who died on board a ship was within the jurisdiction of the Admiralty, declared that he saw no distinction in principle between a fatal act committed deliberately and one committed recklessly; that the defendant in so directing his ship "as to cause her bow to penetrate the Strathclyde" and make a hole through which the water rushed in,

committed a "negligent act done within British jurisdiction"; and that he felt bound to make the point clear, because it was "of vast importance to the security of British seamen and of persons of all nations sailing on British ships, and therefore entitled to the protection of our laws, throughout the world". Lord Coleridge, Chief Justice of the Common [p77] Pleas, declared himself to be "though with some doubt", of the same opinion. On the strength of Reg. v. Armstrong,13 Cox Cr. C. 184, the case would, he said, be clear, if the offence had been murder; but he thought that "the same rule should apply in manslaughter which applies in murder", and that, on this point, "the conviction was right and should be affirmed". Grove, J., having arrived at the conclusion that as the offence, "although committed by a foreigner in a foreign ship", was "committed dehors the vessel upon a British subject in the Queen's peace, within the three-mile belt", the English Court had jurisdiction, said it was unnecessary for him to give an opinion on the question whether the offence was "committed on board of a British ship". Amphlett, J., who also sustained the conviction on the ground of jurisdiction over the three-mile belt, said that he could "find no authority" for holding that a State could "punish a foreigner who at the time of the commission of the offence was not within the territory and consequently not owing it any allegiance", and that he therefore had, "with some doubt", come to the conclusion that "a foreigner who committed the offence while he was de facto outside the English territory", could not "be made amenable to British law". Brett, J. A., thought that, as between the two ships, the offence "was not committed on board of either", and that "there was no jurisdiction therefore given in respect of a complete offence committed locally within the British ship". Bramwell, J., took the purely aqueous view that as the death, resulting from a wrongful act on a Prussian ship, "was in the water", it could not be said to have taken place on a British ship. Kelly, C. B., declaring that "not one single instance" could be found "in the history of the world from the beginning of time" of the exercise by a nation of "criminal jurisdiction over the ships of other nations.... passing through the high seas (without casting anchor or stopping) between one foreign port and another", held that the right to arrest and try the defendant in England could, in his opinion, no more exist than the right to seize and try in England any foreigner for an act done in his own country .... which act may happen to constitute a criminal offence by the law of England". On the other hand, Sir Alexander Cockbum, in whose judgment Pollock, B., and Field, J., concurred, broadly taking the ground, as Bramwell, J., had done, that, unless the defendant, when the offence was committed, "was on British territory or on board of a British ship, he could not be properly brought to [p78] trial under English law, in the absence of express legislation", held that the conviction could not be sustained. He also questioned the right of the British Government, under international law, to enact such legislation in respect of the open sea even within the three-mile belt. Nevertheless, he declared that, "if the defendant had purposely run into the Strathclyde", he should, on the principle laid down in Coombes' case, "have been prepared to hold that the killing of the deceased was his act where the death took place, and consequently that.... the offence.... had been committed on board a British ship". Whether this applied to "the running down of another ship through negligence" was, he said, "a very different thing, and may, indeed, admit of serious doubt". But he found a greater difficulty in the fact that the defendant, at the time of the occurrence, was corporeally, not on an English ship, but on a foreign ship, and that a person who in one jurisdiction begins a continuous act which extends into another jurisdiction "cannot himself be at the time in both". Protection and "allegiance" being, as he said, "correlative", he thought that a foreigner could be made amenable to British jurisdiction only for acts done when he was corporeally "within the area over which the authority of British law extends". He therefore condemned and rejected, as "remarkable for much loose reasoning and idle talk about the law of nature", the decision in the leading American case of Adams v. The People, 1 Comstock (N. Y.) 173, in which a citizen of the State of Ohio who, through the instrumentality of an innocent agent, obtained money by false pretences in the State of New York, was held to have committed the offence in the latter State, and, being found there, was arrested, tried and punished. Mr. Justice Lush "agreed entirely" in the conclusions and "in the main with the reasons" of the Lord Chief Justice, but disassociated himself from the expressions of doubt as to the right of Parliament, without violating international law, to

legislate as it might think fit for territorial waters. But none of the learned judges questioned, on the contrary they strongly emphasized, the full and equal applicability of the principle of national jurisdiction to all ships on the high seas, in determining the place, where an offence is committed. [p79]

[258] The principle laid down in Adams v. The People is now definitely recognized and established in English law. The first step in this direction was taken in 1884 in the case of a person who, by means of false pretences, contained in letters written and sent by him from Southampton in England to certain persons carrying on business in Germany, had by that means induced persons carrying on business in Germany to part with certain goods, some of which were delivered to the prisoner's order at places in Germany and some at places in England. It was contended on the part of the prisoner (1) that the crime was committed in England by posting the letters there and (2) that, as the preamble of the extradition treaty between Great Britain and Germany referred to "fugitives from justice" the prisoner could not be said to be a fugitive from Germany, as he had committed the crime in England and had not been in Germany. The Court, however, held unanimously, although with some doubt on the part of one of the judges on the second point, that the crime was committed in Germany and that the prisoner was a fugitive from justice within the definition of that term given in Section 26 of the Extradition Act of 1870 and in the treaty (Reg. v. Nillins, 1884, 53, L. J. 157). This decision, perhaps by reason of its local novelty, was the subject of some adverse criticism (Clarke, on Extradition, 3rd edition, p. 225), but it was reaffirmed and followed only four years ago in another case in which the prisoner was charged with obtaining goods by false pretences in Switzerland, the pretences having been made in Switzerland by a partner at the procuration of the prisoner in England. The prisoner was not physically in Switzerland at the time when the pretences were made, nor had he been there since. He was arrested in England. The case decided by Lord Hewart, Lord Chief Justice, and Justices Avory and Sankey. The Lord Chief Justice, after expressing the opinion that the words of the treaty and the statute were [p80] "equally satisfied whether the man had physically been present in that other country or not, if he committed the crime there", said: "I do not differ in the smallest degree from the decision in Reg. v. Nillins." Mr. justice Avory said: "I think we are bound by Reg. v .Nillins, but in any case I am prepared to follow it, notwithstanding the criticism to which it has been subjected." Mr. Justice Sankey took the same view, saying: "I think we are bound by that decision, and moreover, in my view it is correct."

[259] Had the principle laid down in Adams v. The People and since established in England by Reg. v. Nillins and R. v. Godfrey been established there prior to 1877, it is to be inferred that there would have been in the case of The Queen v. Keyn a substantial majority in favour of the jurisdiction in the case of death resulting from a wilful collision and probably also in that of death resulting from a collision caused by criminal negligence. In connection with the doubts expressed by some of the judges in The Queen v. Keyn as to whether a ship could properly be regarded as an instrumentality for the commission of an offence, it will be observed that the Territorial Waters Jurisdiction Act, in defining an "offence" by a "person", expressly includes an act "committed on board or by means of a foreign ship", and defines an "offence" as meaning "an act, neglect or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force".

[260] That this principle embraces, not only acts done directly by means of the ship itself, but also acts done by means of boats belonging to the ship, was definitely held by the British Government in the well-known case of the British Columblan schooner Araunah, seized by the Russian authorities in 1888 outside territorial waters for the unlicensed taking of seals within such waters. The schooner was seized, probably six or more miles from the nearest land, by a steamer belonging to the Alaska Commercial Company, an American Corporation, but flying the Russian flag and having on board the superintendent of the Commander Islands, and was taken, with her officers and crew, to

Petropau[p81]lovski, where she was condemned on the ground that, even if she was not herself within Russian territorial waters, she was taking seals there by means of her boats, which were found fishing in such waters. Lord Salisbury, then Secretary for Foreign Affairs, after consulting the Law Officers of the Crown, instructed the British Ambassador at St. Petersburg that Her Majesty's Government were "of the opinion that, even if the Araunah at the time of the seizure was herself outside the three-mile limit, the fact that she was by means of her boats carrying on fishing within Russian waters without the prescribed license warranted her seizure and confiscation according to the provisions of the municipal law regulating the use of those waters", and that they did not, as at present advised, "propose to address any further representation to the Russian Government in regard to this case". (State Papers, vol. 92 pp. 1043-1059). This precedent was followed In subsequent cases of a similar kind. (Parl. Paper, Russia, No. 3, 1893.)

[261] Recurring to the jurisdictional limitation sought to be based on the distinction between murder and manslaughter, I will cite a leading and pertinent decision which, although given nearly sixty years ago, has not been internationally contested. I refer to the case of Commonwealth v. Macloon et al., 101 Mass., 1, decided by the Supreme Judicial Court of Massachusetts in 1869. In this case the defendants, one a citizen of the State of Maine and the other a British subject, were convicted in the Superior Court of Suffolk County, Massachusetts, of the manslaughter of a man who died in that county, in consequence of injuries inflicted on him by the defendants in a British merchant ship on the high seas. The defendants were tried and convicted under a Massachusetts Statute which provided that "if a mortal wound is given, or other violence or injury inflicted, or poison administered on the high seas, or on land either within or without the limits of this State, by means whereof death ensues in any county thereof, such offence may be prosecuted and punished in the county where the death happens". (Gen. Stats., c. 171, par. 19) The decision of the Supreme Judicial Court was delivered by Gray, J., later a Justice of the Supreme Court of the United States, who, speaking for the Court, stated that the principal question in the case was "that of jurisdiction, which touches the sovereign power of the Commonwealth to bring [p82] to justice the murderers of those who die within its borders". It was not, he said, pretended that a foreigner could be punished in Massachusetts for an act done by him elsewhere; but the Court held that, where a mortal blow was given outside and death ensued within the State, the offender committed a crime there. He further said: "Criminal homicide consists in the unlawful taking by one human being of the life of another in such a manner that he dies within a year and a day from the time of the giving of the mortal wound. If committed with malice, express or implied by law, it is murder; if without malice, it is manslaughter .... The unlawful intent with which the wound is made or the poison administered attends and qualifies the act until its final result. No repentance or change of purpose, after inflicting the injury or setting in motion the force by means of which it is inflicted, will excuse the criminal. If his unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result is not essential."

[262] In reality. the view that national jurisdiction, in the case of a foreigner not corporeally present, depends on the will of the criminal to commit his act within the particular jurisdiction is opposed to authority and is obsolete and obviously fallacious, in the case of manslaughter as well as in other cases. In the case of criminal homicide, the element of will affects the question of the degree of the offence and the penalty to be imposed rather than the question of the place where the offence is to be considered as having been committed. Manslaughter, as has been well said, may come within a hair's breadth of murder; it may be a nice and difficult question to decide, depending upon the presence or absence of “malice prepense”, on considerations of recklessness, or of negligence, gross or slight, all of which affect the quality of the act, but not the place of its consummation. It is a notorious fact that, at common law, a defendant indicted for a certain offence may be convicted of a cognate offence of a less aggravated nature, if the words of the indictment are wide enough to cover the latter, so that., on an indictment for murder, a defendant may be convicted of manslaughter.

(Halsbury's Laws of England (1909) Vol. 9, p. 971, citing Mackalley's case (1611), 9 Coke's Reports, 65 a., 67 b.) [p83] And yet, on the theory that jurisdiction depends upon the will of the criminal as to the place at which his act is to take effect, rather than upon the direct result of his criminal activity, a person who, firing across a boundary, killed his victim would, though validly indicted for murder in the place where the shot took effect, be entitled to his discharge on jurisdictional grounds if the jury should find that the killing was negligent. Such a theory would lead to other astonishing consequences. For instance, a person who placed an infernal machine in the pocket or in the automobile of a person whom he intended to injure would be exempt from punishment in the place where the injury occurred if his victim should, before the explosion took place, unexpectedly cross an international boundary. The fact may be mentioned that the master of the Araunah alleged, in exculpation of the ship, that the small boats unintentionally drifted into Russian territorial waters in a fog. It may be that the British Government did not believe him, but, had his assertion been credited, it is most improbable that that Government would have advanced the contention that the schooner was exempt from seizure because her boats were fishing in Russian waters negligently.

[263] The case of the Costa Rica Packet, so strongly urged in support of the claim of exclusive jurisdiction of the country to which an offending ship belongs, will upon examination be found to be valueless as an authority for that contention. The Costa Rica Packet, a British whaler, belonging to Sydney, New South Wales, sighted on January 24th, 1888, when perhaps 30 miles from the nearest land, what at first appeared to be a log, but was afterwards found to be a small water-logged derelict prauw (native Malayan boat) of about a ton's burden. Two boats were put off, which, finding goods aboard the prauw, towed it alongside the ship, and there were then transferred from the prauw to the deck of the Costa Rica Packet 10 cases of gin, 3 cases of brandy, and a can of kerosene oil. The prauw was then cast loose, being of no value. The gin and brandy were damaged by sea water; but the ship's crew, by indulging in the admixture, soon became drunk and got to fighting, and the spirits were by order of the captain thrown overboard, except a small quantity which the crew secreted. During the next four [p84] years the ship from time to time visited Dutch East Indian ports; but in November, 1891, at Ternate, where the ship had put in for provisions, the captain was arrested and sent to Macassar, 1000 miles away, on a charge of theft, in having seized the prauw and maliciously appropriated the goods in it. The warrant charged that the alleged criminal act was committed not more than three miles from land, but the evidence showed that it was at least fifteen or twenty. The captain was held in prison at Macassar until November 28th, 1891, when he was released through the intercession of the governor of the Straits Settlements. The British Government preferred a diplomatic claim for damages, and, after a prolonged discussion, the two Governments signed on May 16th, i895, a convention of arbitration by which they agreed to invite the government of a third Power to select the arbitrator. The selection eventually fell to the Russian Government, which named as arbitrator M. F. de Martens, counsellor to the Russian Foreign Office. In his award, dated February 13th (25th), 1897, M. de Martens, after reciting that the prauw, when taken possession of, not only was "floating derelict at sea" but was "incontrovertibly outside the territorial waters of the Dutch Indies"; that "the appropriation of the cargo of the aforesaid prauw .... having taken place on the high seas, was only justiciable by the English tribunals, and in nowise by the Dutch tribunals"; that "even the identity of the above-mentioned derelict" with the prauw claimed by a Dutch subject was "nowise proved", and that all the evidence went to prove "the absence of any real cause for arresting" the captain of the Costa Rica Packet, allowed damages for his arrest and detention, and for the consequent losses of the ship's owners, officers and crew. In his recitals the arbitrator also stated that "the right of sovereignty of the State over territorial waters is determined by the range of cannon measured from low-water mark", and that "on the high seas even merchant vessels constitute detached, portions of the territory of the State whose flag they bear, and, consequently, are only justiciable by their respective national authorities for acts committed on the high seas". As to the first recital, it may be

observed that the arbitrator's statement regarding the extent of territorial waters, if it meant the range of cannon in 1897, was not in conformity with international law as then or as now existing. The second recital may be accepted as affirming the general'principle of the quasi-territorial jurisdiction of [p85] nations over their ships at sea; but it is also to be taken in connection with the arbitrator's other recital that the prauw, when found, was "derelict". The word "derelict", in maritime law, means "a boat or vessel found entirely deserted or abandoned on the sea, without hope or intention of recovery or return by the master or crew, whether resulting from wreck, accident, necessity, or voluntary abandonment". (Black's Law Dictionary, 2nd ed., 1910, s. v. "Derelict". See, to the same effect, Bouvier's Law Dictionary and the cases there cited, and the Oxford Dictionary.)

[264] Without regard to any question as to the proper disposition of goods found derelict at sea, and the right of the owner to claim them on payment of salvage (The King v. Properly Derelic (1825), 1 Haggard's Adm. 383), it might not be unreasonable to maintain that, on the facts as the arbitrator declared them to be, the principle of territoriality and national jurisdiction could no more be invoked for the protection of the derelict prauw than it could have been for the floating log which the prauw was at first supposed to be; but, in order to determine the weight to be given to what the arbitrator said as to the operation of the principle of territoriality at sea it is not necessary to decide that question. The prauw either was to be treated as a subject for the application of the principle of national jurisdiction, or it was not to be so treated. If the arbitrator considered the principle to be applicable, he violated it in holding that the persons, no matter from what quarter they came, who boarded the prauw, took possession of her and transferred her cargo to the ship, did not in so doing place themselves under the dominion of Dutch laws, and his ruling on this point cannot be accepted as law. If, on the other hand, he did not consider the principle of territoriality to be applicable to the prauw, there was no room for jurisdictional competition, and his decision has no bearing on the question now before the Court. [p86]

[265] I will next consider three cases discussed in the documents before the Court and mentioned in its judgment. The first is that of the collision between the ships Ange-Schiaffino and Gironde, in 1904, tried by the French courts in Algiers. The collision took place 7 miles off the Algerian coast, and the Gironde was sunk with loss of life. The Correctional Court at Bône, by which the two captains, one of whom was of Italian origin, were jointly tried for involuntary homicide, overruled an exception to the jurisdiction of the Court based on the ground that the collision occurred outside territorial waters and this decision was affirmed on appeal by the Cour d'Alger. In the Turkish Mémoire, the case is cited as relating to ships of different nationality, one French, the other foreign; but in a letter from the procureur général near the Cour d'Alger of May 6th, 1927, addressed to the Agent of the French Government, it is stated that both ships were French. The case therefore need not be further considered in this place. (See Turkish Mémoire, pp. 15-17, 22-23, citing Clunet, Journal du Droit international privé, vol. 36 (1909), p. 735 ; French Contre- Mémoire, pp. 13, 15, 42.)

[266] The second case is that of the ships Ortigia and Oncle-Joseph, one Italian and the other French, which collided on the high seas in 1880. The 0ncle-Joseph was sunk, with much loss of life. The survivers from the Oncle-Joseph, including the captain, were taken on the Ortigia to Leghorn, where the two captains were jointly prosecuted for want of skill and failure to observe the rules of navigation. The Court at Leghorn, finding that the collision was due to the fault of the captain of the French ship, condemned him to four months' imprisonment, two months' suspension of rank, and payment of damages. This decision was affirmed on appeal by the Court of Florence in 1882. Subsequently, however, the French Court of Aix declined to enforce the judgment in France on the ground that, the offence having been committed on the high seas, the captain of the 0ncle-Joseph was not justiciable by the tribunal at Leghorn, and that, besides, the article of the Italian Code on

which the prosecution was based was exclusively applicable to Italian ships and sailors. It does not appear that the case gave rise to diplomatic correspondence. (See Turkish Mémoire, pp. 16-17, citing Clunet, 1885, p. 287; French Mémoire, citing Clunet, [p87] 1885, p. 286, and Sirey, 1887, 2, 217; French Contre- Mémoire, pp. 16, 21, 38.)

[267] In the third case, a tender, in tow of the German steamer Ekbatana, on the night of December 14th-15th, 1912, ran into the Belgian lightship West-Hinder, moored on the high seas about 19 miles from the Belgian coast. The West-Hinder was sunk, and her crew of ten men perished. The Correctional Court at Bruges entertained a criminal prosecution of the captain of the German ship, on the charge of having negligently caused the death of the crew of the West-Hinder. The case does not appear to have given rise to any diplomatic representations. The Agent of the French Government, however, lays emphasis upon the fact that the Belgian court in its judgment refers to the lightship as having been installed by the Belgian State in the interest of the safety of navigation, with due notice abroad, and as having been entitled, both as an extension of Belgian territory and as a ship engaged in the public service of the State, to special protection and immunities. For this reason the Agent of the French Government maintains that the case was not altogether comparable with that of a Belgian commercial vessel from the point of view of the competence of the Belgian Government to deal with facts affecting it. (See Turkish Mémoire, pp. 18-21, citing Clunet, 1912, p. 1328; French Contre- Mémoire, pp. 17-21, with additional citations.) But while it is undoubtedly true that public ships enjoy, not only at sea but also in foreign ports, jurisdictional immunities to which a merchant vessel is not entitled, it is necessary to point out that those immunities are not considered as conferring on such ships, or on the countries to which they belong, jurisdiction over the vessels, public or private, of other nations on the high seas.

[268] In the discussion of questions similar to that now before the Court, considerations of convenience have been invoked on the one side and on the other. This was so in the case of The Queen v. Keyn, where those who were against sustaining the conviction strongly urged the inconveniences that might ensue from holding the entire body of English penal law to be applicable to foreign ships in territorial waters; and the force of the argument was recognized in the clause of the Territorial Waters Jurisdiction Act, requiring, in the case of a foreign prisoner a certificate by a Principal [p88] Secretary of State that in his opinion the trial of the prisoner is expedient. Immense quantities of shipping, bound from one foreign port to another, daily pass, on their regular course, through, the territorial waters of third States; and yet international law permits such third States to enforce their municipal law upon such shipping. On the other hand, in the case of many countries with long coast lines, a vast tonnage in the coastwise trade daily passes, in regular course, in and out of the three-mile belt ; and is it to be said that, save in the extreme and exceptional case of piracy by law of nations, international law forbids the country, to which this coastwise shipping belongs, to take cognizance of criminal acts done in or upon it by or from foreign ships, when it is temporarily outside territorial waters, should the offenders afterwards voluntarily come within such waters? A collision may result from chance, from negligence, or from a wilful act. By the rules of navigation a ship is required to avoid a collision if it can do so, even though the other ship is faultily navigated ; and a navigating officer who, from anger or other cause, violated this rule, would, I assume, be chargeable with something more than negligence. The importance of such considerations is not lessened by the increase in the number and size of the ships and the vast increase in the number of persons daily transported at sea. Nor is the advantage of a trial near the scene of a disaster, with witnesses on both sides available, over a proceeding in a distant place, perhaps with the witnesses on only one side present, to be overlooked. More than a hundred years ago a great judge, of unsurpassed experience in Admiralty cases, commented upon the "great discordance of evidence" frequently existing in such cases as to the person at fault, and upon the fact that the testimony of the witnesses was “apt to be discoloured by their feelings and the interest which they take in the success of the cause". (Sir William Scott, case of the Woodrop Sims (1815), 2 Dodson, 83.)

[269] It is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people (United States v. Arjona [p89] (1887), 120 U. S. 479), and if the principle of territorial jurisdiction, as it exists in respect of ships on the high seas, has a special and one-sided operation in favour of the nation to which the offending ship belongs, one might expect to find a corresponding special liability. But this is not the case. In the negotiation of the Treaty concluded between the United States and Great Britain on February 29th, 1892, for the arbitration of the fur-seal question, the United States proposed to empower the arbitrators to award compensation not only to British subjects whose vessels should be found to have been unwarrantably seized, but also to the United States, for any injuries resulting to the United States, or its lessees of the seal islands, by reason of the killing of seals in Behring Sea, outside territorial waters, "by persons acting under the protection of the British flag", if such killing should "be found to have been an infraction of the rights of the United States". (Blue Book, "United States, No. 3 (1892)", 72.) To this proposal the British Government objected on the ground that it appeared "to imply an admission on their part of a doctrine respecting the liability of governments for the acts of their nationals or other persons sailing under their flag on the high seas, which is not warranted by international law, and to which they cannot subscribe". The claim was not pressed, the discussion of it ending with the insertion in the treaty of a stipulation to the effect that, the Parties having been unable to agree on the point, either Party might submit to the tribunal "any question of fact involved in said claims, and ask for a finding thereon, the question of the liability of either Government upon the fact found to be the subject of further negotiation".

III. [Turkish Penal Code]

[270] I now come to Article 6 of the Turkish Penal Code. The judgment of the Court expresses no opinion on the question whether the provisions of that article are in conformity with the rules of inter[p90]national law. This abstention appears to be based (1) upon the fact that the article is not mentioned in the compromis, and (2) on the view that an error in the choice of the legal provision applicable to the case was essentially a matter of internal law which could affect international law only so far as a conventional rule or the possibility of a denial of justice should enter into account.

[271] The compromis asks the Court to find whether Turkey violated international law "by instituting .... joint criminal proceedings in pursuance of Turkish legislation" (en vertu de la Iégislation turque) against the watch officer of the Lotus. No doubt this may be so interpreted as to mean that the Court is asked solely to say whether Turkey was precluded from taking any criminal proceedings whatever against the officer. But the compromis speaks of proceedings under Turkish legislation, and, although the Court has not been furnished with a copy of the actual proceedings, Article 6 is, as an integral part of them, before the Court in the documents submitted by the Parties, and forms the subject of much of their arguments. This being so, I am unable to concur in the view that the question of the international validity of the article is not before the Court under the terms of the compromtis.

[272] Article 6 reads as follows:

[Translation.]
"Any foreigner who, apart from the cases contemplated by Article 4, commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey. The penalty shall however be reduced by one third and instead of the death penalty twenty years of penal servitude shall be awarded.

"Nevertheless, in such cases, the prosecution will only be instituted at the request of the Minister of Justice or on the complaint of the injured Party.
"If the offence committed injures another foreigner, the guilty person shall be punished at the request of the Minister of Justice, in accordance with the provisions set out in the first paragraph of this article, provided however that: [p91]
"(1) the article in question is one for which Turkish law prescribes a penalty involving loss of freedom for a minimum period of three years;
"(2) there is no extradition treaty, or that extradition has not been accepted either by the government of the locality where the guilty person has committed the offence or by the government of his own country."

[273] The Court, not being empowered by the compromis to inquire into the regularity of the proceedings under Turkish law, or into the question of the applicability of the terms of Article 6 to the facts in the case, must take the article and its jurisdictional claim simply as they stand. The substance of the jurisdictional claim is that Turkey has a right to try and punish foreigners for acts committed in foreign countries not only against Turkey herself, but also against Turks, should such foreigners afterwards be found in Turkish territory. In saying that Turkey makes this claim, I intend nothing invidious. The same claim is made by a number of other countries, and it is from the codes of these countries that Article6 was taken. But, without regard to the source from which the claim was derived, I cannot escape the conclusion that it is contrary to well-settled principles of international law.

[274] Without entering at this time into an elaborate exposition of the reasons on which this conclusion is based, I will quote from Hall, an eminent authority on international law, the following passage:

"The municipal law of the larger number of European countries enables the tribunals of the State to take cognizance of crimes committed by foreigners in foreign jurisdiction. Sometimes their competence is limited to cases in which the crime has been directed against the safety or high prerogatives of the State inflicting the punishment, but it is sometimes extended over a greater or less number of crimes directed against individuals ... Whether laws of this nature are good internationally; whether, in other words, they can be enforced adversely to a State which may choose to object to their exercise, appears, to say the least, to be eminently doubtful. It is indeed difficult to see on what they can be supported. It would seem that their theoretical justification, as against an objecting country, if any is alleged at all, must be that the exclusive [p92] territorial jurisdiction of a State gives complete control over all foreigners, not protected by special immunities, while they remain on its soil. But to assert that this right of jurisdiction covers acts done before the arrival of the foreign subjects in the country is in reality to set up a claim to concurrent jurisdiction with other States as to acts done within them, and so to destroy the very principle of exclusive territorial jurisdiction to which the alleged right must appeal for support." (Hall, International Law, 8th edition (1924), paragraph 62, pp. 261, 263, citing Westlake (Peace, 261-263), Appendices (1, paragraph 147), Fauchille, paragraphs 264, 267.)

[275] It will be observed that Hall founds his disapproval of the claim mainly on its assertion by one nation of a right of concurrent jurisdiction over the territory of other nations. This claim is defended by its advocates, and has accordingly been defended before the Court, on what is called the "protective" principle; and the countries by which the claim has been espoused are said to have adopted the "system of protection".

[276] What, we may ask, is this system? In substance, it means that the citizen of one country, when he visits another country, takes with him for his "protection" the law of his own country and

subjects those with whom he comes into contact to the operation of that law. In this way an inhabitant of a great commercial city, in which foreigners congregate, may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes. This is by no means a fanciful supposition; it is merely an illustration of what is daily occurring, if the "protective" principle is admissible. It is evident that this claim is at variance not only with the principle of the exclusive jurisdiction of a State over its own territory, but also with the equally well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as his government may diplomatically intervene in case of a denial of justice, must look to that law for his protection.

[277] No one disputes the right of a State to subject its citizens abroad to the operations of its own penal laws, if it sees fit to do so. This concerns simply the citizen and his own government, and no other [p93] government can properly interfere. But the case is fundamentally different where a country claims either that its penal laws apply to other countries and to what takes place wholly within such countries or, if it does not claim this, that it may punish foreigners for alleged violations, even in their own country, of laws to which they were not subject.

[278] In the discussions of the present case, prominence has been given to the case of the editor Cutting, a citizen of the United States, whose release was demanded when he was prosecuted in Mexico, under a statute precisely similar in terms to Article 6 of the Turkish Penal Code, for a libel published in the United States to the detriment of a Mexican. It has been intimated that this case was "political", but an examination of the public record (Foreign Relations of the United States, 1887, p. 751 ; idem,1888, 11, pp. 1114, 1180) shows that it was discussed by both Governments on purely legal grounds, although in the decision an appeal, by which the prisoner was discharged from custody, his release was justified on grounds of public interest. In its representations to the Mexican Government, the Government of the United States, while maintaining that foreigners could not be "protected in the United States by their national laws", and that the Mexican courts might not, without violating international law, "try a citizen of the United States for an offence committed and consummated in his own country, merely because the person offended happened to be a Mexican", pointed out that it nowhere appeared that the alleged libel "was ever circulated in Mexico so as to constitute the crime of defamation under the Mexican law", or "that any copies were actually found .... in Mexico". The United States thus carefully limited its protest to offences "committed and consummated" within its territory ; and, in conformity with this view, it was agreed in the extradition treaty between the two countries of February 22nd, 1889, that except in the case of "embezzlement or criminal malversation of public funds committed within the jurisdiction of either Party by public officers or depositaries", neither Party would "assume jurisdiction in the punishment of crimes committed exclusively within the territory of the other". (Moore, Digest of International Law, 11, pp. 233, 242.) [p94]

[279] For the reasons which I have stated, I am of opinion that the criminal proceedings in the case now before the Court, so far as they rested on Article 6 of the Turkish Penal Code, were in conflict with the following principles of international law:

(1) that the jurisdiction of a State over the national territory is exclusive;
(2) that foreigners visiting a country are subject to the local law, and must look to the courts of that country for their judicial protection;
(3) that a State cannot rightfully assume to punish foreigners for alleged infractions of laws to which they were not, at the time of the alleged offence, in any wise subject.

(Signed)

B. Moore. [p95]

Dissenting Opinion by M. Altamira
[Translation]

[280] I regret that I am unable, to agree with the foregoing judgment. I therefore consider it my duty both to the Court and to my conscience to state the reasons which prevent me from subscribing not only to the operative part but also to several of the grounds on which it is based.

I. [Principles of International Law]

[281] It is certain that amongst the most widely recognized principles of international law are the principles that the jurisdiction of a State is territorial in character and that in respect of its nationals a State has preferential, if not sole jurisdiction. It is also certain that, arising out of the very natural combination of these two principles, persistent and well known efforts have been made to extend their field of application beyond the purely geographical conception of territorial limits, by causing them as it were to accompany, as a protecting shadow, the persons of a State's nationals on their travels, in so far as has been possible under the material conditions of international intercourse.

[282] Therefore, exceptions to these principles, in so far as they allow a foreign jurisdiction to be exercised over the citizens of a given State, have only been recognized in extreme cases where it has been absolutely necessary or inevitable. This applies for instance to the case of a general need of mankind or of a common danger (the slave trade, piracy, etc.), and also to the want of conformity with the territorial principle itself which would ensue were the jurisdiction of other States not allowed to operate in the case of foreigners who having entered the territory of such States in order to reside there for a certain period and carry on their occupations there commit acts bringing them within the arm of the law. But directly one of these fundamental reasons fails to apply, the principle of the territorial jurisdiction of the country of origin recovers its force. That is why I should have much difficulty in recognizing as well founded an attempt for instance on the part of a court, on the basis of a municipal law, to exercise jurisdiction over a foreigner, who resided [p96] on board a vessel flying the flag of his own country and did not land with the intention of remaining ashore, and that for an alleged offence committed outside the territory of the country which claimed to exercise jurisdiction over him. Such an extension of the exceptions hitherto accepted in respect of the principle of territorial and national jurisdiction appears to me to be altogether unwarranted.

[283] There can be no doubt that exceptions of this nature must necessarily be exceptions recognized by international law, that is to say, they must have their origin in relations between sovereign States, either in the form of a treaty or of international custom. It is not without interest to observe here that a custom must by its nature be positive in character and that consequently it is impossible to classify as a custom the fact that in a certain respect there is a total absence of the recurrence of more or less numerous precedents which are generally regarded as necessary to establish a custom. The rule which it is desired to discover must be positively supported by the acts which have occurred, and, of course, as regards international law these acts must also be international in character.

[284] It follows that the municipal legislation of different countries, as it does not by its nature belong to the domain of international law, is not capable of creating an international custom, still less a law. Of course it may touch and in fact does in several respects touch upon legal questions which affect or may affect other States or foreign subjects, and thus it encroaches upon a domain which is practically speaking international. But it cannot simply on this ground be held to possess a character placing it on the same plane as conventions or international customs.

[285] It may however be of considerable value in showing what in actual fact is the opinion of States as concerns certain international questions in regard to which States have not yet committed themselves by means of a convention prohibiting them from enacting a municipal law in conflict with the obligation assumed, or in regard to which no custom recognized by States has so far been built up. It is only in this way that it is legitimate to use municipal legislation and to apply it for the purposes of a question like that under consideration. It is of no value for any other purpose in connection with international law, - unless it has been duly ascertained that general agreement prevails, - because it only expresses the wish or [p97] intention of one State in the form of a municipal rule representing the opinion of a greater or smaller majority of the political community constituting a nation. For these reasons it is of particular interest to ascertain whether, - in cases where it has been sought, contrary to a general principle of international law not established by convention or custom, to impose such legislation in concrete form upon other States,- the attempt, whether simply intended or actually carried out, has encountered consent or protest on the part of the consensus of opinion in the country affected. Leaving aside all difficulties of this kind which are so general in character as to be too remote from the category of questions to which the collision case under consideration belongs and which would therefore be of little value as a basis for the solution of the particular question before us, I will begin by saying that, within the limits of the precedents considered by the Parties, what I find in general is either that there has been protest against the exercise of any jurisdiction other than that of the nation of the person alleged to be responsible or of the flag under which he sails, or else that this principle of the flag has been applied.

[286] An analysis of these precedents produces the following result:

I. Cases where governments as such have protested
1. Cutting's case. - 2. Léon XIII.
II. Cases where the protest has been made by the local courts or authorities of the State of the person convicted.
1. Ortigia- Oncle-Joseph. - 2.Hamburg.
III. Cases where a State, through either its government or a tribunal, has recognized in the particular case the prior claim of the jurisdiction of the flag of another State.
1. Costa Rica Packet. - 2. Franconia. - 3. Créole. - 4. The Bordeaux judgment. - 5. The Santiago de Chile judgment. - 6. The judgment of the Court of Appeal of Turin (1903).

[287] In spite of the differences in character which these ten cases represent from other points of view, it will be found that they all agree in that they invoke, or recognize (which is the same thing), the prior or exclusive claim of the law of the flag as regards certain acts done on board a ship. It is only for this reason that they are cited here ; and the very diversity of the questions of jurisdiction [p98] which they concern only serves to affirm the importance of the principle which unites them. There are certainly cases with a contrary tendency such as the Bruges or West-Hinder case, but of all those cited the majority are certainly in favour of the principle indicated above.

[288] It must also be admitted that there are only two cases where governments themselves have protested; but I do not see that it is necessary, for the purposes of the present question, that governments should always be the mouthpiece for the expression of a legal opinion prevailing in a country. The small number of protests by governments can in my opinion be easily explained. It is due firstly to the infrequency of the occasions on which encroachments upon jurisdiction have actually occurred, judging from the cases known and cited by the Parties. It is due above all to the frequency with which governments (and especially those of some countries) have shown themselves insensible to the injury sustained by their subjects as a result of occurrences abroad. Almost every

country has a long and unhappy experience in this connection. Either from indolence or from anxiety to avoid diplomatic complications or for other reasons, political rather than legal, governments often refrain from openly protecting their subjects and only make up their minds to do so when things have developed into a public scandal, or when the injured persons have made great and persistent efforts to attract the attention of political circles in their country. Failing such intervention by governments, sometimes municipal courts have intervened and certainly no one will refuse to recognize these as officially representing the legal opinion of their country.

[289] Again, some of the cases cited under No. III, though in a form other than that of a protest for which there was no occasion, have the same essential significance as those set out under No. I.

[290] In view of the foregoing, I have a very strong hesitation to admit, as a matter of course, and as subject to no doubt, exceptions to the territorial principle (in the application of that principle to the present case), exceptions which it is sought, simply by the will of one State, to extend beyond the limits of those hitherto expressly agreed to in conventions, or tacitly established by means of the recurrence of certain clearly defined and undisputed cases in the majority of systems of municipal law. [p99]

[291] In regard to criminal law in general, it is easy to observe that in municipal law, with the exception of that of a very small number of States, jurisdiction over foreigners for offences committed abroad has always been very limited: It has either (1) been confined to certain categories of offences ; or (2) been limited, when the scope of the exception has been wider, by special conditions under which jurisdiction must be exercised and which very much limit its effects. It is but seldom that, on this hypothesis, jurisdiction over foreigners in respect of offences committed abroad is claimed in general terms without even formal limits or with limits such as that represented b a minimum penalty, which only very remotely correspond to the question of jurisdiction arising under international law.

[292] As regards the categories of disputes contemplated by the exceptions and to which I alluded just now, it may readily be observed that for the most part these comprise offences against the State itself. Again, it seems to me that even when an exception to the territorial principle has been extended to cover offences against individuals by application of the principle of the protection of nationals (which is the principle which is most likely to come into conflict with the territorial principle), the municipal legislation in question has been visibly designed to cover offences properly so-called - i.e. those in which evil intent and perversity constitute the outstanding characteristic - and especially more serious offences constituting crimes (as regards offences of violence), as well as certain offences of a financial character in which the circumstances characteristic of the category of offences producing their effects at a distance (délits á distance) are present. I cannot believe that the legislations of which I am now speaking have ever been really intended to apply to every kind of offence, even the smallest and most unintentional.

[293] I fully realize that a limit as regards the seriousness of offences has been fixed in the case of some of the most advanced legislations, by means of stating the minimum penalty applicable to the offences contemplated. But it is very rare to find in such legislations at the same time a limit fixing the lowest penalty applicable and a complete absence of conditions of form, such as default of extradition or need for a special order from the Head of the State [p100] or other similar conditions. In other words, even in the case of the most far-reaching legislations as regards the extension of jurisdiction to foreigners for offences committed abroad, the States concerned have not ventured in most cases simply to formulate their claim without limiting its scope in any way.

[294] I have prepared a table of the municipal legislation of a number of countries which, subject to the existence of unnoticed errors, would be as follows:

I. Legislation in general terms of wide scope.

[295] 1. Italy. - 2. Turkey. - 3. China. - 4. Mexico. It is to be noticed that the terms used in these four cases are not equally stringent. Apart from other differences which might be mentioned, there are differences as regards the minimum penalty necessary to bring jurisdiction into play.

[296] To the four cases above mentioned might perhaps be added the legislation of Brazil and Uruguay, subject to certain questions of interpretation raised by the terms used, which there is no object in discussing for the moment. The German draft Of 1913, like the laws of the four countries above mentioned, employs general terms of wide scope.

II. Legislation defining the categories of offences in the case of which jurisdiction is to be exercised over foreigners for offences against individuals committed abroad.

[297] 1. Argentine, Article 25. The wording appears comprehensive, but in reality there is a very definite limitation. - 2. Belgium. - 3. Japan.

III. Legislation making the possibility of Prosecution dependent on certain conditions which limit its application.

[298] (a) The offence to be one f or which extradition may be demanded: 1. Switzerland. - 2. Sweden (draft). - 3. The Lima Proposals.

[299] (b) The prosecution of the offence in question to be ordered by the Head of the State or by law: 1. Finland. - 2. Norway. - 3. Sweden (law in force). - 4. Germany (as regards contraventions). - 3. Austria (draft). [p101]

[300] (c) Extradition to have been asked for but refused (that is to say, it must have been possible): Bulgaria (the minimum penalty under Bulgarian legislation is imprisonment).

IV. Legislation very vague in its terms.

[301] Germany (draft proposal); § 6 contains the apparently conditional phrase "may be prosecuted".

V. Legislation not conferring jurisdiction over offences against Individuals.

[302] 1. Germany (as regards crimes and offences as opposed to simple contraventions). - 2. United States. -3. Spain. - 4. France. - 5. Great Britain - 6. Netherlands. - Paraguay. - 8. Dominican Republic. – 9. Siam

[303] To these Denmark might be added, subject to the interpretation of the phrase "port of register" (port d'attache) in § 3. Also Egypt, subject to the interpretation of Rule 4. I have not included in this list the legislation of Soviet Russia or Monaco or the Polish draft proposals because the classification of these in one of the above five groups is, in my opinion, very much open to doubt and because with information available to us it would be rash to come to any conclusion concerning them.

* * *

[304] The examples considered - both those belonging to international law and those which, whilst being derived from municipal law, relate to situations concerning foreigners and acts committed abroad - tend to show the existence of a predominent conception and intention in this field of criminal law which concerns cases of an international character. This conception and intention are undoubtedly opposed to simply allowing the application of municipal law which, by claiming too wide a scope, comes in conflict with the territorial principle which protects the rights of the citizens of each State, and seeks to go much further than the exceptions held to be acceptable by the majority of States.

[305] Of course, every sovereign State may by virtue of its sovereignty legislate as it wishes within the limits of its own territory ; but [p102] it cannot, according to sound principles of law, in so doing impose its laws upon foreigners in every case and without making any distinction between the various possible circumstances as regards the place where the offence has been committed, the nature and seriousness of the offence, the special conditions under which a foreigner may happen at a given moment to be within reach of the authorities of a foreign country on the territory of which the offence of which he has been accused was not committed, and other conditions besides.

II. [Freedom to Impose Laws]

[306] But even admitting hypothetically the absence of a principle of international law express or implied, which would have been infringed by the manner in which the Turkish authorities acted as regards Lieutenant Demons, I am unable to discover any grounds for altering my view. And the following is the reason.

[307] The contention of those who held the contrary view - which we are now going to examine – may, if I am not mistaken, be summarized as follows : Since no principle exists establishing the exclusive criminal jurisdiction of the law of the flag in cases of collision upon the high seas, we are faced with two concurrent jurisdictions. Consequently, each of these jurisdictions may take effect within the limits of its natural sphere of operation - namely within its own territorial area - upon foreigners who are there and may also therefore apply to them such municipal law as each State may have adopted by virtue of that freedom which no other principle of international law prevents them from exercising in this respect.

[308] It is not irrelevant to remark in passing that all or almost all principles of international law have the common characteristic of not being invariably exclusive in character. There is no more reason for mentioning or considering this characteristic in reasoning in relation to the principle of territoriality or of the flag than in relation to the principle of protection. If one accepts, as is necessary, the exceptions to the first two, it must also be admitted that the third, like all such principles, must have exceptions and must undergo restrictions in its competition with the others. Consequently the fact that, generally speaking, a principle is not exclusive in character does not involve the consequence that it can never be so when confronted by another principle, and still less in relation to a municipal law. [p103]

[309] But, to return to the exception which has been suggested to the principle of the flag - which is only another aspect of the principle of territoriality - the question must be put whether it can come into play in the case now before the Court in the way indicated above according to the view I am discussing. I do not think so. In my, opinion, the freedom which, according to the argument put forward, every State enjoys to impose its own laws relating to jurisdiction upon foreigners is and must be subject to limitations. In the case of competing claims to jurisdiction such as those in

question (according to those who recognize the existence of such competition), this freedom is conditioned by the existence of the express or tacit consent of other States and particularly of the foreign State directly interested. As soon as these States protest, the above-mentioned freedom ceases to exist, and, subject to the result of the investigation of the dispute which has so arisen, any acts which were done in pursuance of such freedom lose the legal basis which they might otherwise have possessed. It is impossible to create an international custom, or to presume the existence of any rule in favour of the unlimited freedom of each legislation as regards foreigners, and binding on all other States, except within the same limits and subject to the same conditions as any other international rule or custom. The necessity for consent is just as much a fundamental principle of international law, which is entirely based on the will of States, as the principle of the protection of nationals or of the freedom to legislate internally. Consequently, the consent of the interested State must be requisite in every case belonging to the category I am row considering and a fortioti, its express dissent must be taken into account. If, as in the present case, the latter alternative takes place, the competition in the claims to jurisdiction cannot legitimately have the effect of favouring a claim which has been protested against and which, moreover, would not be in harmony with the preponderating opinion of most States in regard to the kind of cases contemplated according to what has been shown above. To accept the contrary view would, in my opinion, be to neglect one of the fundamental conditions of the international community and would result in opening the door to continual conflicts which might involve most undesirable consequences.

[310] Such a result being, in my opinion, inadmissible from the point of view of international law and of its essential aims which are the [p104] establishment of reciprocal good relations between States, the causes which would produce that result cannot be sanctioned. Any decision leading to the establishment of a system of unrestricted freedom in States which would lead to the consequences I have just outlined, would therefore be very serious. Even where a very circumscribed and particular case was concerned, there would, in such a conclusion, be a risk of giving rise almost inevitably to dangerous constructions and applications. In spite of all the provisoes that might be added, it would be very difficult, I think, in view of the shifting ground upon which the case rests, to prevent the decision being construed in a manner going beyond its underlying intention.

[311] For all these reasons, I am led to conclude that a State which, under the circumstances of the Lotus case, 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, in this particular case the principle of territoriality, will have acted in contravention of international law.

III. [Human Rights]

[312] Outside the particular sphere of this law, but still within the sphere of human rights (the law of Nature), I find other grounds for being unable to accept the sanctioning of the rule of absolute freedom. These grounds are derived from what, in my opinion, constitutes the basis of the whole social legal system: respect for the rights of the individual. This respect takes precedence of everything else. If it is absent, everything else falls to the ground and ceases to have any juristic foundation. Now, it is undoubtedly true that a failure to respect such rights takes place in many cases through the fact of constraint being imposed upon a man, particularly if he is not a criminal, to submit to the effects of laws which are not those of the community to which he belongs, of laws which he does not know and which are applied in his case by entirely foreign judges by whom he cannot make himself understood, except, in the most favourable conditions, through a third person, because he does not know their language, their legal mentality, the forms of procedure they employ, etc. [p105]

[313] In all periods of history, men have considered the application of their own laws and of their own national procedure and the submission of their judicial affairs to judges speaking their own language and having their own nationality, to be just as important a pledge of their rights as is in quite another respect the due appreciation of the particular circumstances surrounding the facts under consideration, which very often lead to the mitigation of the punishment prescribed in principle. Those who belong to nations in which more than one language is spoken and in which more than one legal system is recognized as valid by the courts, are well aware of the great weight which is sometimes attached to the fact that they are amenable to one court rather than to another. On many occasions this subject has been amongst the most pressing claims of the various regions and groups of the complex population of the countries to which I refer.

[314] It goes without saying that I do not mean to allude, as I have already said, to cases in which an individual has voluntarily changed his residence in order to go to a country other than his own with the intention of remaining there for a more or less protracted period, in full knowledge of the fact that this action will have the effect of subjecting a great number of his actions to a new law. Nor, again, do I refer to the cases comprised within the clearly recognized exceptions to the principle of territoriality, which are well founded upon the requirements of public order and justice. But I am unable conscientiously to accept or to lend my support to any action leading to the acceptance of a constraint of the kind described a little earlier, and in which Lieutenant Demons' case is included. And do not let us forget that the question before us is not that of the punishment of an offence which a collision might result in, but that of the competence of the Turkish tribunal to hear the case, that is to say, a question relating to jurisdiction. We have not to solve the problem of the necessity at law for a more or less severe punishment of the material results of an involuntary collision, nor the difference in this respect between the offence, considered subjectively, and its consequences as regards other persons or other things, but purely a problem of determining jurisdiction in accordance with the fundamental principles of international law.

[315] In the same order of thought but from another point of view, I find equally menacing to the rights of man the claim to apply [p106] the same rules as might be fair in the case of most true offences, to an involuntary offence even if its injurious effects went so far as to cause the death of a man. The incompatibility of such application with the rights to which I have just referred is still greater when the alleged act arises from a mistake, which, as is frequently the case in collisions, has not perhaps been committed by a single person on board one of the vessels, but by different persons on board both ships in collision. What I am unable to accept in this case is the application of jurisdictional rights which would result in the jurisdictional constraint which I have described. In my view international law in order to be real law must not be in contradiction with the fundamental principles of legal order, one of which necessarily is the rights of man taken as a whole. I am convinced that every time that a result of this nature is reached, one is faced with something wanting in regularity, which should be rejected.

IV. [Development of a Customary Rule]

[316] Before concluding, I should like to bring forward some considerations which deal with a very important matter as regards the functions of the Court. I am convinced that the problem of the exceptions to the principle of territoriality in regard to criminal jurisdiction in collision cases as it stands at present - particularly in regard to collisions with no criminal intent - offers a sufficient number of elements to enable one to conclude that to act in the manner in which the Turkish authorities have done in the Lotus case is contrary to the intention underlying the exceptions to this principle which have been agreed to, or which the majority of States would apparently be ready to agree to. But even if the question were raised of the necessity for a definitely specific custom and of

the stage of development reached by the custom which might be considered necessary in the present connection, I would point out that the conditions particular to the general process of the development of a customary rule must be borne in mind. Often in this process there are moments in time in which the rule, implicitly discernible, has not as yet taken shape in the eyes of the world, but is so forcibly suggested by precedents that it would be rendering good service to the cause of justice and law to assist its [p107] appearance in a form in which it will have all the force rightly belonging to rules of positive law appertaining to that category.

[317] Perhaps the present case offers such a moment and, at the same time, an opportunity which it would be regrettable to lose. But I do not think it is necessary to lay stress on this side of the question, in view of the conclusion at which I have arrived on the particular grounds on which the question submitted to the Court is based. I will confine myself to pointing it out as a method which in my opinion might lead by another path to the same result which has induced me to dissent from the judgment given by the Court. [p108]

Annex.

Documents Submitted to the Court by the Parties in the Course of the Proceedings.

[Annexes to the Case filed on behalf of the French Government.]

Annex
1. Special Agreement signed at Geneva on October 12th, 1926.
2. Extract from the Peace Treaty signed at Lausanne on July 24th, 1923.
3. Extract from the Convention respecting conditions of residence and business and jurisdiction, signed at Lausanne on July 24th, 1923.
4. Letter from the French Chargé d'affaires to H.E. Tewfik Rouchdy Bey, Minister for Foreign Affairs, dated August 11th, 1926.
5. Letter from the French Chargé d'affaires to H.E. Tewfik Rouchdy Bey, Minister for Foreign Affairs, dated August 18th, 1926.
6. Note from the French Minister for Foreign Affairs to the Turkish Embassy, dated August 25th, 1926.
7. Letter from the French Chargé d'affaires to H.E. Tewfik Rouchdy Bey, Minister for Foreign Affairs, dated August 28th, 1926.
8. Letter from the Turkish Under-Secretary of State for Foreign Affairs to the French Chargé d'affaires, dated September 2nd, 1926.
9. Letter from the French Chargé d'affaires to H.E. Nousret Bey, Delegate of the Ministry for Foreign Affairs, dated September 6th, 1926.
10. Note from the Turkish Embassy at Paris, dated September 14th, 1926.
11. Note from the Turkish Embassy at Paris, dated September 16th, 1926.
12. Article 6 of the Turkish Criminal Code.

Annexes to the Counter-Case filed on behalf of the French Government.

Annex
13. Letter from the Procureur général of the Court of Appeal of Algiers to M. Basdevant, Legal Adviser to the Ministry for Foreign Affairs at Paris, dated May 6th, 1927.
14. Extract from a judgment given by the Tribunal correctionnel of Bône (Algiers), May 6th, 1927.
15. Letter from the French Minister of Public Works to the Directeur de I'Inscription maritime at Marseilles, dated October 21st, 1926.

Legal Opinions referred to in the Counter-Case filed by the Government of the Turkish Republic.

Annex

1. Opinion of Prof. G. Diena, of the Royal University of Pavia, Member of the Institute of International Law, Vice-President of the League of Nations Committee of Experts for the Codification of International Law
2. Opinion of Prof. P. Fedozzi, of the Royal University of Genoa, Member of the Institute of International Law.
3. Opinion of Prof. A. Mercier, Former Dean of the Faculty of Lausanne, Member of the Institute of International Law.