

## THE CASE OF THE S.S. LOTUS

### FRANCE v. TURKEY

Permanent Court of International Justice (1927).

P.C.I.J. Ser. A No. 10.

2 Hudson, World Ct. Rep. 20.\*

A collision on the high seas between a French steamer, the *Lotus*, and a Turkish steamer, the *Boz Kourt* in 1926 resulted in the sinking of the Turkish vessel and the death of eight Turkish nationals. When the French ship reached Constantinople (Istanbul) the Turkish authorities instituted criminal proceedings against the French officer on watch-duty at the time of the collision (Lieutenant Demons). The Turkish Court overruled Demon's objection that Turkey had no jurisdiction and after a trial sentenced him to 80 days imprisonment and a fine of 22 pounds. The French Government challenged Turkey's action as violation of international law and demanded reparation. Following negotiations, the two states by special agreement submitted the question of jurisdiction to the Permanent Court of International Justice. The arguments put forward by the two parties related exclusively to whether according to principles of international law Turkey has or has not jurisdiction to prosecute the case. Both parties recognized the applicability of the Convention of Lausanne of 1923 which provided in Article 15: "Subject to the provisions of Article 16, all questions of jurisdiction as between Turkey and the other contracting parties shall be decided in accordance with the principles of international law."

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.

The latter view seems to be in conformity with the special agreement itself, No. 1 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.

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

\* Footnotes omitted.

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.

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

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.

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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.

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 15 of the Convention of Lausanne refers. Having regard to the terms of Article 15 and to the construction which 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 paralyzing 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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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.

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.

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.

Adopting, for the purposes 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.

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.

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. \* \* \*

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.

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.

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.

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 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.

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. \* \* \*

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.

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.

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.

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 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.

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

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.

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.

On the other hand, there is no lack of cases in which the 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 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.

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.

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 to two different States.

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.

[The Court then addressed itself to the third argument advanced by the French Government, that according to international law criminal proceedings arising from collision cases are within the exclusive jurisdiction of the state whose flag is flown. In offering this view, the French Agent pointed out that questions of jurisdiction in collision cases, which frequently arise before civil courts, rarely are presented to criminal courts. This fact led him to conclude that prosecutions only occur before the courts of the state whose flag is flown, which was proof of a tacit adherence by states to the rule of positive international law barring prosecutions by other states.

[The Court rejected this argument, explaining that even if the facts alleged were true, they would merely show that states had often abstained from instituting criminal proceedings, not that they felt obligated to do so. The Court observed that there were no decisions of international tribunals in the matter and that, of the four municipal court decisions cited by the parties, two supported the exclusive jurisdiction of the flag state and two supported the opposite contention. The Court pointed out 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." On the other hand, the Court stressed the fact that the French and German governments had failed to protest against the exercise of criminal jurisdiction by states whose flag was not being flown in the two cases cited by Turkey, and observed that the French and German governments would hardly have failed to protest if they "had really thought that this was a violation of international law." ]

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. \* \* \*

\* \* \* 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 of the incident as a whole. It is therefore a case of concurrent jurisdiction. \* \* \*

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 the 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.

[The six dissenting judges disagreed with the proposition that France had the burden of showing a customary law rule that prohibited Turkey's exercise of jurisdiction. They took issue with the basic premise of the judgment that "restrictions upon the freedom of states cannot be presumed" and its implicit corollary that international law permits all that it does not forbid. In their view, the question was whether international law authorized Turkey to exercise jurisdiction in the particular circumstances and they concluded that customary law did not authorize a state to exercise criminal jurisdiction over a foreigner for an act committed in a foreign country or in a vessel of another state on the high seas.]

#### Notes

1. The issue before the Court was on its face a question of burden of proof. Was it necessary for the Court to reason that international law emanates from the free will of sovereign states and therefore that restrictions on the freedom of states cannot be presumed? What alternative line of reasoning would have enabled the Court to decide the issue? If sovereignty is not itself a substantive source of law, would states have to demonstrate that their actions conform to generally accepted customary law or treaties in force? Would the United States have to show that it has