

[59] Dissenting Opinion by M. Nyholm.

[*Translation.*]

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 rule of the Law of Nations which would thus represent the positive public law applicable to the particular case.

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*.

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 [60] 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*.

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.

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[61]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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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.

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.

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. [62]

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.

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?

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.

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.

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 [63] 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.

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.

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.

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

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.

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.

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 [64] of modern legislation, to which tendency, however, an important group of nations are still opposed.

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