

CHAPTER FOUR: JURISDICTION

Pages 67-80

Reading Assignment: *International Law Anthology*, pp. 16-17, 184-89.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. Which is more territorially restricted--a state's criminal jurisdiction or a state's civil jurisdiction? Why?
2. Suppose a cable television company in the United States transmits via satellite an X-rated movie to its subscribers, and many people using a "satellite dish" in a foreign country pick up the broadcast. Can that foreign country prosecute the United States cable television company and/or its board of directors for violating its criminal laws barring the transmission of pornographic films?
3. As a check on your own understanding of the section on "Criminal Jurisdiction" (starting on p. 184), ask yourself whether what Dr. Akehurst says is consistent with each of the five propositions asserted by Professor Lowenfeld in his note entitled "Desirable Limits" at p. 187.
4. In matrimonial proceedings where the parties are in different states, should jurisdiction be based on (a) the nationality of the plaintiff? (b) the nationality of the defendant? (c) the domicile of the plaintiff? (d) the domicile of the defendant? In practice, what do courts do? Why?

The Lotus Case (France v. Turkey) Permanent Court of International Justice P.C.I.J. Series A, No. 10, at 4 (1927)

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. The Boz-Kourt, which was cut in two, sank, and eight Turkish nationals who were on board perished. After having done everything possible to succor 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.

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.

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 harbor master.

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 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.

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 13th, the bail being fixed at 6,000 Turkish pounds.

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.

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.

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

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 12, 1926, as stated above, and ratifications were deposited on December 27th, 1926.

Before approaching the consideration of the principles of international law contrary to which Turkey is alleged to have acted, 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:

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.

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 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.

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.

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.

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 outcome of the collision, and the French Government has not contended that this relation of cause and effect cannot exist.

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.

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:

Any foreigner who, apart from the cases contemplated by Article 4, commits an offense abroad to the prejudice of Turkey or of a Turkish subject, for which offense 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.

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 have disputed 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 offense in question should be regarded, by reason of its consequences, to have been actually committed on Turkish territory.

The special agreement between France and Turkey states the following questions for this Court to determine:

(1) Has Turkey 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?

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 favor of Turkey. On the other hand, the Turkish Government takes the view that it may assert 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. 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.

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 lacunas 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.

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 international law. 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.

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 offenses 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 offense 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 Court will now proceed to ascertain whether general international law contains a rule prohibiting Turkey from prosecuting Lieutenant Demons.

The arguments advanced by the French Government, are, in substance, the three following:

(1) International law does not allow a State to take proceedings with regard to offenses committed by

foreigners abroad, simply by reason of the nationality of the victim; and such is the situation in the present case because the offense 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 offense, 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 offenses 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 in to consideration the fact that the offense 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 offenses 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 offense happens to be at the time of the offense. 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 offenses, 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 offense, 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 offense 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 offense 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 denial of justice arises.

It has been sought to argue that the offense 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 offenses 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 offense

of manslaughter.

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 offense have taken place belongs, from regarding the offense 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 endeavored 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 offenses committed on board a foreign ship on the high seas, definitely come to the conclusion that such offenses 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 offenses 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 offenses 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 a State has claimed a right to prosecute for an offense, 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 offense 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 offenses. Above all it should be pointed out that the offenses 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.

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.

It only remains to examine the third argument advanced by the French Government and to ascertain whether a rule specially 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.

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.

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.

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 favor 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 *Ekatana-West-Hinder* case before the Belgian Courts have been cited in support of the opposing contention.

Lengthy discussions have taken place between the Parties as to the importance of each of these decisions as regards the details 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.

On the other hand, the Court feels called upon to 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 *Ekatana-West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, 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.

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

The offense 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 offense 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 of the incident as a whole. It is therefore a case of concurrent jurisdiction.

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 fulfillment 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 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.

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.

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 Turkey, by instituting criminal proceedings in pursuance of Turkish law against Lieutenant Demons, has not acted in conflict with the principles of international law;

(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.

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.

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 57 of the Statute, have delivered the separate opinions which follow hereafter.

Mr. Moore delivered a separate (concurring) opinion.

DISSENTING OPINION BY M. WEISS

The Turkish representatives have endeavored to localize the offense, 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 offense 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.

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 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.

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.

DISSENTING OPINION BY LORD FINLAY

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 humani generis* and might be tried in the courts of any country.

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.

SEPARATE OPINION BY MR. MOORE

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. 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.

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 today a law-governed state in the jurisprudence of which 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 offenses 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 inure 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. 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 offense may be tried and punished by any nation into whose jurisdiction he may come.

Piracy by law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offense against the law of nations; and as the scene of the pirate's operation 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.). 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 jurandi*", 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, pp. 310-311.)

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 offense, 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 principle of the territoriality of ships.

In considering the case before the Court, it should be observed that the question of the proper jurisdiction of the offense 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 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 (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.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. Article 6 of the Turkish Penal Code, quoted in the Lotus opinion, seems to set forth the "passive personality" concept of state jurisdiction. What did the Court hold with respect to this concept? Would Turkey have won the case if it had insisted on the conformity of Article 6 with international law?

2. How did the lawyers for Turkey get around the restrictive jurisdictional provisions of Article 6?

3. What role does a state's intent or motive play in international law? Can we tell the difference between the motives a government says a state has, and the motives it really has? Can we ever discern the true motives of a state? Is it sufficient if a state discloses a motive that is consistent with international law, even if that motive is not its real motive? Or is something less than that sufficient--i.e., if a lawyer for the state says that the state's motive is thus-and-so?

4. Is France the plaintiff in this case? Is Turkey? Is neither? Note the importance of the "special agreement" quoted by the Court between France and Turkey that set forth the Court's own jurisdiction in this case.

5. Did the "special agreement" favor one side over the other? (This is a critical question; re-read the special agreement and re-study the way the Court dealt with it.)

6. What, ultimately, was the rule of international law allowing Turkey to exercise jurisdiction over Lt. Demons? Is it a fiction, as Lord Finlay, in his dissenting opinion, seems to imply?

7. Did the Turkish sailors and passengers who died as the result of the collision die on board the Boz-Kourt? Note the dissenting opinion of M. Weiss. What is the significance of his dissent?

8. What use did the Court make of municipal court decisions involving questions of international law?

9. Why does the Court say, in a crucial passage defining certain necessary conditions for the ascertainment of a rule of international customary law, that the alleged fact of abstention does not allow one to infer that the abstaining states were "conscious of having a duty to abstain"?

Reading Assignment: *International Law Anthology*, pp. 303-10.

Optional Reading: *International Law Anthology*, pp. 310-12.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. Is a "countermeasure" another name for the "tit-for-a-different-tat" that we encountered in Chapter 3 of the *Anthology*? Are both examples of "retaliatory sanctions"?

2. If a "reprisal" means an act that would normally be illegal under international law, except for the fact that it is used as a lawful measure to ensure another state's compliance with international law, is a "countermeasure" a "reprisal" in this sense? Does this explain the difference between a "countermeasure" and a "tit-for-a-different-tat"?

3. What is the difference between Lori Damrosch's "expansive" view and Elisabeth Zoller's "restrictive" view

of countermeasures? Does the restrictive view more readily lead to charges of "punishment"? (Both authors based their views on the Air Services Arbitral Award; excerpts from the case directly follow this set of questions.)

4. Does a countermeasure properly redress damage to a *principle*? Or does such a countermeasure go too far and thus become a "punishment"?

5. In what sense should international law protect "principles"? Aren't "principles" simply default rules? Or are they something more?

6. Assuming that the quotation from Beale is correct (on p. 305 of the *Anthology*), why isn't the Restatement's rule of reasonableness a workable neutral principle that would solve Beale's dilemma?

7. In these days of pervasive multilateral corporations, how realistic is the simple "effects" test advocated by Professor Juenger on p. 305? Where are the effects of multilateral corporate decisions felt?

8. Is the philosophy of the Restatement's "reasonableness" test at odds with the insistence in the Barcelona Traction case of a simple and clear test for the nationality of a corporation?

9. Do you agree with Professor Abbott's criticism, on pp. 308-09, of extraterritorial export controls?

10. What are the implications if other nations begin to follow France's lead in the protection of "droit moral"?

Air Services Arbitral Award
Between France and the United States
18 U.N.R.I.A.A. 417 (1978)

Facts. This question arose under a bilateral treaty between the United States and France, the Air Services Agreement of 1946. The United States claimed that France had violated the treaty by refusing to allow a smaller Pan Am plane to be substituted for a 747 aircraft in Pan Am flights to Paris from London. France replied that the proposed change (a "change of gauge") was not authorized by the Agreement. After fruitless discussions, France compelled Pan Am to cease all flights to Paris. The U.S. protested and proposed arbitration. The United States also acted under U.S. law to suspend French flights to Los Angeles that were clearly authorized by the 1946 Agreement. The case then went to arbitration under a compromise that put two questions to the tribunal: (A) did the U.S. carrier have the right to change gauge? (B) did the U.S. have the right to suspend French traffic to Los Angeles in retaliation for the suspension of Pan Am flights to Paris? The Tribunal answered both questions affirmatively.

Arguments. With respect to the second issue, France argued, first, that retaliation was illegal because the Treaty provided for arbitration and the retaliatory measures were undertaken when the arbitral compromise was being negotiated. Second, France argued that the U.S. retaliation (the suspension of long-established Paris-Los Angeles flights of Air France) was grossly disproportionate to the French suspension of a new service from London to Paris.

Opinion of the Tribunal. If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through "countermeasures."

It is generally agreed that all countermeasures must, in the first instance, have some degree of equivalence with the alleged breach; this is a well-known rule. In the course of the present proceedings, both Parties have recognized that the rule applies to this case, and they both have invoked it. It has been observed, generally, that judging the "proportionality" of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of projected services with the losses which the French companies would have suffered as a result of the countermeasures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries.

Can it be said that the resort to such counter-measures, which are contrary to international law but justified by a violation of international law allegedly committed by the State against which they are directed, is restricted if it is found that the Parties previously accepted a duty to negotiate or an obligation to have their dispute settled through a procedure of arbitration or of judicial settlement?

It is tempting to assert that when Parties enter into negotiations, they are under a general duty not to aggravate the dispute, this general duty being a kind of emanation of the principle of good faith.

Though it is far from rejecting such an assertion, the Tribunal is of the view that, when attempting to define more precisely such a principle, several essential considerations must be examined.

Article VIII of the 1946 Agreement provides for an obligation of continuing consultation between the Parties. In the context of this general duty, the Agreement establishes a clear mandate to the Parties to make good faith

efforts to negotiate on issues of potential controversy, several other provisions of the Agreement and the Annex state requirements to consult in specific circumstances, when the possibility of a dispute might be particularly acute. Finally, Article X imposes on the Parties a special consultation requirement when, in spite of previous efforts, a dispute has arisen.

But the present problem is whether, on the basis of the above-mentioned texts, countermeasures are prohibited. The Tribunal does not consider that either general international law or the provisions of the Agreement allow it to go that far.

Indeed, it is necessary carefully to assess the meaning of countermeasures in the framework of proportionality. Their aim is to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution. In the present case, the United States of America holds that a change of gauge is permissible in third countries; that conviction defined its position before the French refusal came into play; the United States countermeasures restore in a negative way the symmetry of the initial positions.

It goes without saying that recourse to countermeasures involves the great risk of giving rise, in turn, to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Countermeasures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute. But the Arbitral Tribunal does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of countermeasures during negotiations, especially where such countermeasures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute.

However, the lawfulness of such countermeasures has to be considered still from another viewpoint. It may indeed be asked whether they are valid in general, in the case of a dispute concerning a point of law, where there is arbitral or judicial machinery which can settle the dispute. Many jurists have felt that while arbitral or judicial proceedings were in progress, recourse to countermeasures, even if limited by the proportionality rule, was prohibited. Such an assertion deserves sympathy but requires further elaboration. If the proceedings form part of an institutional framework ensuring some degree of enforcement of obligations, the justification of countermeasures will undoubtedly disappear, but owing to the existence of that framework rather than solely on account of the existence of arbitral or judicial proceedings as such.

Besides, the situation during the period in which a case is not yet before a tribunal is not the same as the situation during the period in which that case is sub judice. So long as a dispute has not been brought before the tribunal, in particular because an agreement between the Parties is needed to set the procedure in motion, the period of negotiation is not over and the rules mentioned above remain applicable. This may be a regrettable solution, as the Parties in principle did agree to resort to arbitration or judicial settlement, but it must be conceded that under present-day international law States have not renounced their right to take countermeasures in such situations. In fact, however, this solution may be preferable as it facilitates States' acceptance of arbitration or judicial settlement procedures. The situation changes once the tribunal is in a position to act. To the extent that the tribunal has the necessary means to achieve the objectives justifying the countermeasures, it must be admitted that the right of the Parties to initiate such measures disappears. In other words, the power of a tribunal to decide on interim measures of protection, regardless of whether this power is expressly mentioned or implied in its statute (at least as the power to formulate recommendations to this effect), leads to the disappearance of existing countermeasures to the extent that the tribunal so provides as an interim measure of protection. As the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the parties to initiate or maintain countermeasures, too, may not disappear completely.

As far as the action undertaken by the United States Government in the present case is concerned, the situation is quite simple. Even if arbitration under Article X of the Agreement is set in motion unilaterally, implementation may take time, and during this period countermeasures are not excluded: a State resorting to such measures, however, must do everything in its power to expedite the arbitration. This is exactly what the government of the United States has done.

The Tribunal's Reply to Question (B) consists of the above observations as a whole. These observations lead to the conclusion that, under the circumstances in question, the Government of the United States had the right to undertake the action that it undertook.

QUESTION FOR CLASSROOM DISCUSSION

Recall Question 3, above. Does the *Air Services Arbitral Award* change your response to that question? Why? Why not?