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Letting Lotus Bloom

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Letting *Lotus* Bloom

An Hertogen*

Abstract

In a world of increasing interdependence, state sovereignty is inherently limited to protect the equal sovereignty of other states. However, identifying the precise limits states are subject to is a different question. It is traditionally answered by the *Lotus* principle, which consecrates a freedom to act unless explicitly prohibited by international law. The principle has rightly come under attack because of its incompatibility with the needs of a modern international community. This is usually followed by calls to disregard the precedential value of the PCIJ's *Lotus* case on which it is based. This paper defends the *Lotus* judgment, but argues that the principle is the wrong reading of the majority opinion and that it fails to create the right conditions for inter-state co-existence and co-operation, which the majority identified as twin goals of international law. The paper then examines the meaning of 'co-existence' for contemporary international law, and weighs up the concept of 'locality' as an additional criterion that ought to be considered in the allocation of jurisdiction between different states.

Introduction

The prevailing understanding of a sovereign state in international law is as a political entity that is legally free to determine its domestic affairs independently from others. In times of increasing interdependence, however, the likelihood of states' decisions affecting other states' domestic affairs grows exponentially, putting the spotlight on the scope of state sovereignty[1] and the inherent limits on the exercise thereof.

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[1] The term 'sovereignty' is used in this paper to refer to the external dimension of sovereignty, i.e. as expressing a state's legal status at the international level and its rights and obligations towards other states and other international legal persons, rather than the inward-facing internal sovereignty that governs a state's relationship with its subjects. For the difference between both

Logic requires the existence of such limits. The very idea of state sovereignty as the ultimate authority to decide in a system of almost 200 states implies that states must be equal in their sovereignty.[2] If there were a legal hierarchy between states, only the state at the apex would have ultimate authority and be sovereign. Logic further dictates that when states are legally equal,[3] their sovereignty is by definition relative due to the need to respect other states' sovereignty.[4] But just how relative is sovereignty? What obligations, negative or positive, apply to states when exercising their sovereignty to protect state sovereignty itself? How do we identify the limits on the exercise of state sovereignty that result from states' embeddedness in an international society of equally sovereign states?

The traditional answer to these questions lies in the *Lotus* principle, named after the 1927 case between France and Turkey before the Permanent Court of International Justice (PCIJ).[5] According to the classical formulation of this principle, 'whatever is not explicitly prohibited by international law is permitted'.[6] The principle consecrates a consensual approach to international law,[7] and suggests that a state's freedom to exercise its sovereignty is only limited by prohibitive rules to which the state in question has consented. In the absence of a prohibition, a state is free to act as it sees fit without the need for a specific basis that permits its action.

Generations of international lawyers have had a love-hate relationship with the *Lotus* principle. Those representing states continue to invoke the *Lotus* principle

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concepts see Anne Peters, 'Humanity as the A and Ω of Sovereignty', 20 *European Journal of International Law* (2009) 513, at 515-18.

[2] John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (2006), at 58; Peters, *supra* n 1, at 528-29.

[3] UN Charter, article 2(1); GA Res. 2625 (XXV), 24 October 1970 (holding that states 'have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature'); Ulrich K. Preuss, 'Equality of States - Its Meaning in a Constitutionalized Global Order', 9 *Chicago Journal of International Law* (2008) 17.

[4] *Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925 between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (or Miangas)*, R.I.A.A. II (1928) Permanent Court of Arbitration, at 829; Georges Abi-Saab, 'Whither the International Community?', 9 *European Journal of International Law* (1998) 248, at 254.

[5] *The Case of the S.S. Lotus*, 1927 PCIJ Series A, No. 10.

[6] Prosper Weil, '"The Court Cannot Conclude Definitively..." *Non Liquet* Revisited', 36 *Columbia Journal of Transnational Law* (1998) 109, at 112; Pierre-Marie Dupuy, 'L'Unité de l'Ordre Juridique International: Cours Général de Droit International Public (2000)', 297 *Recueil des Cours* (2002), at 94; Brad R. Roth, 'The Enduring Significance of State Sovereignty', 56 *Florida Law Review* (2004) 1017, at 1029. See also the overview in Hugh Handeyside, 'The *Lotus* Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?', 29 *Michigan Journal of International Law* (2007-2008) 71, at 72.

[7] A. Jochen Frowein, 'Kosovo and Lotus', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest* (2011), 923, at 923.

in international disputes.[8] This is not surprising, as the voluntarism proclaimed in the principle puts them in the driver's seat when it comes to the development of restrictions. The International Court of Justice likewise applied the *Lotus* principle when it looked for a prohibition to assess the legality of the threat or use of nuclear weapons in its *Nuclear Weapons* Advisory Opinion and the legality of a unilateral declaration of independence in the *Kosovo* Advisory Opinion.[9] In contrast, lawyers who take a more constitutional or cosmopolitan approach to international law have labelled the principle's approach of looking for an express prohibition as outdated,[10] or even retrograde.[11] The *Lotus* judgment has been called the 'high water mark of laissez-faire'[12] and voluntarism in international law,[13] or, even worse to late 20th and early 21st century international lawyers,[14] a reflection of 'positivism'.[15]

This paper challenges the dominant understanding of the *Lotus* judgment as encapsulated in the *Lotus* principle, and argues that the principle is the incorrect reading of the judgment as well as the wrong policy for achieving what the majority in *Lotus* saw as key roles for international law, namely to marry states'

[8] *Arrest Warrant of 11 April 2000, (Democratic Republic of the Congo v. Belgium),* Counter Memorial of the Kingdom of Belgium, at 3.3.29; Handeyside, *supra* n 6, at 81.

[9] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* ICJ Reports (1996), 226; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion,* ICJ Reports (2010), 403. Contrary to the *Lotus* case, neither of these advisory opinions involved the exercise of jurisdiction, and the *Kosovo* opinion did not even involve an action of a state as the ICJ found in paragraph 109 of its Opinion that the elected members of the Assembly of Kosovo who adopted the declaration of independence were not acting in that capacity under the framework of the interim administration, but rather as representatives of the Kosovar people in general.

[10] Rosalyn Higgins, 'International Trade Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law', 230 *Recueil des Cours* (1991), at 114; Frowein, *supra* n 7, at 923.

[11] F. A. P. Mann, 'The Doctrine of Jurisdiction in International Law', 111 *Recueil des Cours* (1964), at 35.

[12] *Arrest Warrant of 11 April 2000,* Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ Reports (2002), 63, at 78.

[13] Theodore Christakis, 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say About Secession?', 24 *Leiden Journal of International Law* (2011) 73, at 79.

[14] Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (2004), at 249.

[15] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* Declaration of President Bedjaoui, ICJ Reports (1996) 226, at 270-271; Alex Mills, 'Rethinking Jurisdiction in International Law', *ASIL 2013 Research Forum* (2013), at 3; J. L. Brierly, 'The 'Lotus' Case', 44 *The Law Quarterly Review* (1928) 154, at 155; H. Arthur Steiner, 'Fundamental Conceptions of International Law in the Jurisprudence of the Permanent Court of International Justice', 30 *American Journal of International Law* (1936) 414, at 416. See also Alain Pellet, 'L'adaptation du Droit International aux Besoins Changeants de la Société Internationale (Conférence Inaugurale, Session De Droit International Public, 2007)', 329 *Recueil des Cours* (2007), at 27 ('la conception absolutiste [du principe de souveraineté] que s'en faisaient (et que s'en font toujours) les juristes positivistes, qui prévalait avant 1914 et qui a trouvé sa désastreuse expression dans l'affaire du Lotus', adding however that 'je ne suis pas sûr que cette interprétation s'impose avec la clarté de l'évidence.').

de iure independence with their de facto interdependence. International law needed to ensure co-existence between independent communities and to create the right environment in which these independent communities can identify and act upon common aims. To further these goals of co-existence and co-operation, the majority recognized the equal sovereignty of other states as a systemic basis for restrictions on the exercise of state sovereignty.[16] Contrary to what the *Lotus* principle suggests, the majority did not understand a state's sovereignty as limited only by international law to which the state in question had explicitly consented. Importantly, the paper will argue that the distinction between international law as a system of permissive rules or as a system of prohibitive rules was not as central to the Court's decision as it is made out to be.[17]

The paper therefore rejects calls for discarding the *Lotus* judgment as an outdated and wrongly decided precedent. Instead, an alternative reading that centres on the judgment's reference to the 'co-existence of independent communities' is proposed. In other words, it is the prevailing reading of the *Lotus* judgment expressed in the *Lotus* principle, rather than the judgment itself, that needs to be rejected as inaccurate. Even though the *Lotus* principle has dominated our view of the *Lotus* judgment since the very beginning, it is important to return to the original text of the judgment. A detailed re-examination reveals that the conventional reading is at odds with what the majority meant.

The alternative reading of the *Lotus* judgment proposed here justifies and strengthens the judgment's landmark status, as it reveals its relevance almost ninety years later, and gives limits on the exercise of state sovereignty that have developed in later years a stronger pedigree. The paper will elaborate on the alternative reading of the *Lotus* judgment by exploring the contemporary meaning of 'co-existence' in the context of the exercise of jurisdiction and the limits it entails for the exercise of state sovereignty in a world characterized by increasing interdependence.

The paper is divided in three main sections. Section 2 argues that the *Lotus* **principle** is the wrong reading of the *Lotus* **judgment**, and that a careful reading of the majority opinion reveals a far more nuanced approach to the freedoms of sovereign states than the *Lotus* principle suggests. The *Lotus* judgment saw ensuring co-existence and co-operation between independent communities as important goals of international law. As section 3 explains, the *Lotus* principle fails to further these goals — which suggests that the *Lotus* principle cannot possibly be what the PCIJ intended. Section 4 then analyses what happens if we

[16] Vaughan Lowe and Christopher Staker, 'Jurisdiction', in Malcolm D. Evans (ed), *International Law* (2010) 313, at 319-20.
[17] This point will be elaborated in section 0.0 below. Section 0 will argue that basing international law on permissive rules would be far from ideal.

let *Lotus* 'bloom'. It examines the meaning of 'co-existence' and advances a principle of locality as an additional factor in the allocation of jurisdiction when multiple states can potentially exercise jurisdiction under international law. Section 5 concludes.

The *Lotus* Principle is the Wrong Reading of the *Lotus* Judgment

Background to the Lotus Judgment

In late 1926, France and Turkey agreed to bring a case before the PCIJ asking the Court whether Turkey acted in accordance with the principles of international law when it brought criminal proceedings under Turkish law against a French national, Lt. Demons, for the involuntary manslaughter of Turkish nationals aboard the Turkish steamship Boz-Kourt that had collided on the high seas with the French steamship *Lotus* for which Lt. Demons was responsible.

The special agreement between Turkey and France asked the Court to decide whether Turkey had 'contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law — and if so, what principles — by instituting […] joint criminal proceedings in pursuance of Turkish law against M. Demons […]'. If answered in the affirmative, the Court was asked to rule if any, and if so how much, pecuniary reparation was due to Lt. Demons.[18]

It thus fell upon the recently-established Court to answer the delicate question of how to allocate territorial jurisdiction when an act and its effects are not restricted to a single territory. Should one state have exclusive jurisdiction — and if so which one — or can they exercise jurisdiction concurrently based on either the act or the effects? This involved deciding which state should have the authority to regulate, and how one state's right to regulate, based on sovereignty, can be balanced with the equal sovereignty of other states. The balance to be found involved significant rule of law questions about ensuring criminal responsibility for the loss of life. To add a layer of complexity, the Court had to answer these questions in the specific context of two ships flying different flags on the high seas. It thus had to decide whether a ship can be assimilated to the flag state's territory and whether the effects, felt on one ship, of acts committed on another ship are sufficient to establish jurisdiction. The case stirred public opinion in both states and was politically sensitive as it involved a major power and one of its

[18] Lotus, *supra* n 5, at 5.

opponents in World War I, only a few years after a peace treaty was finally concluded.[19]

In late 1927, the PCIJ rejected France's argument that Turkey needed to show that its criminal prosecution of Lt. Demons was permitted under international law.[20] The Court held that 'a ship on the high seas is assimilated to the territory of the State the flag of which it flies'[21] and that Turkey could therefore exercise territorial jurisdiction over Lt. Demons' acts on the *Lotus* seeing that they were inseparable from their effects on the Boz-Kourt.[22] Moreover, the majority rejected France's argument about the exclusivity of flag state jurisdiction by stating 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'.[23]

The assimilation of a ship to the territory of its flag state was a crucial step in the majority's reasoning. It framed the question as one of objective territorial jurisdiction where actions in one state are inseparable from its effects in the territory of another state,[24] rather than one involving the passive personality principle as France had argued.[25] The assimilation was highly controversial. It sent shockwaves through the maritime community and prompted international regulation on the issue of criminal jurisdiction over high seas collisions.[26] Nowadays, the UN Convention on the Law of the Sea takes a very different approach. Criminal jurisdiction in matters of collision on the high seas can be exercised by the state of nationality of the accused or by the flag state,[27] which otherwise exercises exclusive jurisdiction over a ship on the high seas.[28] As the state of nationality of the victims, Turkey would thus not be able to prosecute Lt. Demons were the *Lotus* and the *Boz-Kourt* to collide today.

[19] For more on the French public opinion's reaction to Turkey's exercise of jurisdiction, see Maurice Travers, 'L'Affaire du 'Lotus'', 9 *Revue de droit international et de législation comparée* (1928) 400, at 401.
[20] Lotus, *supra* n 5, at 19.
[21] *Ibid.*, at 25.
[22] *Ibid.*, at 30
[23] *Ibid.*, at 30.
[24] Michel de la Grotte, 'Les Affaires Traitées par la Cour Permanente de Justice International Pendant la Période 1926-1928', 10 *Revue de droit international et de législation comparée* (1929) 387, at 392.
[25] France's claims were directed against the prosecution. It would have made these claims anyway, even if the offence was considered committed on Turkey's territory by reason of its consequences, see Lotus, *supra* n 5, at 15, in fine.
[26] Charles de Visscher, 'Justice et Médiation Internationales (Première Partie)', 9 *Revue de droit international et de législation comparée* (1928) 73, at 82.
[27] UNCLOS, article 97.
[28] UNCLOS, article 92.

Nevertheless, the changes to these specific rules on the allocation of criminal jurisdiction over high seas collisions do not affect the rest of the *Lotus* judgment, in particular the judgment's general statements regarding the limits on states' territorial jurisdiction. As the *Lotus* principle is derived from these general statements, they will be the central focus of the following section.

Common law trained international lawyers have at times qualified the majority's general statements as obiter dicta, and hence as part of the judgment that does not need to be followed later.[29] This argument is of little practical relevance, given that international law does not recognize a doctrine of stare decisis, and even if it did, does not have a hierarchy of courts that would require lower courts to follow decisions of higher courts. The qualification of these statements as obiter does not erase in any way the impact these statements have had on international law, in particular as the source for the controversial *Lotus* principle.[30] A closer look at the general statements is thus warranted to assess whether the majority opinion supports the absolutist vision of state sovereignty embodied by the *Lotus* principle.

The Majority's Analysis in Lotus

Given the question it was asked, it is not surprising that the majority started its analysis of Turkey's exercise of jurisdiction by looking at the Convention Respecting Conditions of Residence and Business and Jurisdiction, concluded in Lausanne on 24 July 1923[31] as part of the peace treaty between Turkey and its World War I opponents. Article 15 stated that

> Subject to the provisions of Article 16,[32] all questions of jurisdiction shall, as between Turkey and the other Contracting Parties, be decided in accordance with the principles of international law.

The Court interpreted the reference to 'principles of international law' as meaning 'international law as it is applied between all nations belonging to the community of States' rather than a meaning specific to the Convention of Lausanne.[33]

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[29] Sir John F. Williams, 'L'affaire du 'Lotus'', 35 *Revue générale de droit international public* (1928) 361, at 365; Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), at 361; Mann, *supra* n 11, at 35; Higgins, *supra* n 10, at 114.

[30] Photini Pazartsis, 'Judicial Activism and Judicial Self-Restraint: The PCIJ's *Lotus* Case', in Christian J. Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (2013) 319, at 335.

[31] 18 *AJIL* (1924), Supplement: Official Documents, at 67-74.

[32] This article details the specific allocation of jurisdiction over matters of personal status of non-Muslim nationals of other Contracting Parties within Turkey. It is not relevant to the current question and can thus be ignored.

[33] Lotus, *supra* n 5, at 16.

Next, the Court identified the fundamental question of principle in the parties' written and oral arguments: should Turkey point to a title of jurisdiction in its favour, as France argued, or can Turkey, as it argued, exercise jurisdiction whenever that is not in conflict with a principle of international law?[34] The majority, supported by Judge Moore in his dissenting opinion,[35] looked for a rule or principle that the exercise of jurisdiction was contrary to. Of the remaining dissenting judges, Judges Weiss[36] and Finlay[37] argued that the question came down to finding in international law an authorization for Turkey's exercise of criminal jurisdiction. Judges Loder, Nyholm, and Altamira did not address the prohibition or permission question explicitly, but criticized the majority's opinion for being too deferential to states.[38]

The majority justified its decision to search for a prohibition on two grounds: the parties' own choice of wording in their special agreement, and 'the very nature and existing conditions of international law'.[39] It was the Court's description of international law's nature and conditions that resulted in its now famous dictum:[40]

> 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.

When this paragraph is quoted by itself, as is regularly the case in the literature,[41] it is not implausible to derive the *Lotus* principle from it. However, in the next few paragraphs of its judgment the Court went on to qualify this statement, and the added nuance that comes from reading the paragraph in its full context is

[34] *Ibid.*, at 18.
[35] *Ibid.*, Dissenting Opinion Judge Moore, at 67. Judge Moore dissented on the specific issue of whether the Court should have looked at the international validity of article 6 of the Turkish Penal Code, which provided the specific basis for Lieutenant Demons' prosecution, see *Ibid.* at 91-94. References to the dissenters in the analysis below are thus only to the opinions of Judges Loder, Finlay, Weiss, Altamira and Nyholm.
[36] *Ibid.*, Dissenting Opinion Judge Weiss, at 42 ('does international law authorize the application of Turkish law …?')
[37] *Ibid.*, Dissenting Opinion Judge Finlay, at 52 ('The question is whether the principles of international law authorize what Turkey did in this matter'). He then found (at 53) that Turkey did not have jurisdiction because jurisdiction belongs to the flag state or to the state of nationality of the offender, if different, and that (at 56) international law does not recognize the assumption of jurisdiction for 'protection'.
[38] Lotus, *supra* n 5, Dissenting Opinion Judge Loder, at 34-35; *Ibid.*, Dissenting Opinion Judge Nyholm, at 60; *Ibid.*, Dissenting Opinion Judge Altamira, at 103.
[39] *Ibid.*, at 18
[40] *Ibid.*
[41] Diane Marie Amann, 'Leviathan Below Kosovo', <http://www.intlawgrrls.com/2010/08/leviathan-below-kosovo.html> (2010); Dupuy, *supra* n 6, at 94.

indispensable for a proper understanding of the judgment. As will be shown, the judgment taken as a whole does not support the *Lotus* principle.

Crucially, the Court's statement that restrictions cannot be presumed does not imply that no restrictions exist,[42] as is also evident in the next paragraph where the Court immediately pointed to a major restriction on the exercise of jurisdiction:[43]

> 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.

The majority's requirement of a permissive rule for action is striking if one looks at the case through the lens of the *Lotus* principle. Moreover, the majority did so without pointing to any specific treaty provision or to an international custom that prohibits the exercise of power in another state's territory. Instead, it referred in general terms to the territorial nature of jurisdiction, which points to the existence of inherent limits on the exercise of territorial sovereignty to protect the territorial sovereignty of other states. The Court's requirement of a permissive rule for a state's action is a first indication that the *Lotus* principle, with its suggestion that only prohibitions to which states have explicitly consented matter in determining the scope of sovereign states' freedoms, does not correctly reflect the *Lotus* judgment.

Nevertheless, the Court did not require a permissive rule for all exercises of jurisdiction. The Court's reference to a state 'exercising its power' is understood as limited to the exercise of enforcement jurisdiction, not to prescriptive jurisdiction or to adjudicative jurisdiction.[44] In respect of these exercises of jurisdiction, the Court held that:[45]

> 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,

[42] Cf Williams, *supra* n 29, at 369 (who seems to argue that it will all lead to anarchy). But see contra, Lowe and Staker, *supra* n 16, at 319-20.
[43] Lotus, *supra* n 5, at 18-19
[44] Cedric Ryngaert, *Jurisdiction in International Law* (2008), at 23.
[45] Lotus, *supra* n 5, at 19.

> 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.

The majority thus rejected France's argument that the legality of a state's exercise of jurisdiction always depends on successfully establishing the existence of a permissive rule. Crucially for a proper understanding of the *Lotus* judgment, the Court never expressly supported Turkey's argument of *in dubio pro libertate*,[46] as the Court did not discuss what should happen if the rules were unclear. Indeed, the Court never expressed any doubt about what the rules were, but rather stated that there was a clear absence of a general prohibition to exercise legislative and adjudicative jurisdiction extraterritorially. As Spiermann puts it, the Court thus did not express a 'presumption of freedom', but only rejected a 'presumption against freedom'.[47] The Court thus took the middle way, consistent with its conception of its role to find the law itself rather than deciding between the alternatives proposed by the parties.[48] The Court's reliance on both permissive and prohibitive rules suggests that the distinction between them is not as important for determining states' freedom to act under international law as the *Lotus* principle makes it out to be. In an overlooked passage of the judgment, the majority indicated that France's argument that a permissive rule is required for the exercise of extra-territorial criminal jurisdiction hinged on prior evidence of a prohibition to act to which the permission is an exception, and therefore required an analysis of whether a prohibition exists, which was of course what Turkey had argued. the Court put it in this way:[49]

> Consequently, whichever of the two systems [i.e. permission or prohibition] 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.
>
> […]
>
> 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's decision to look for a prohibition was thus a pragmatic rather than a principled one. It started from the philosophical premise that states are sovereign,

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[46] Lauterpacht, *supra* n 29, at 359-60; Ole Spiermann, '*Lotus* and the Double Structure of International Legal Argument', in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 131, at 139-40; Spiermann, *supra* n 14, at 253.
[47] Spiermann, *supra* n 46, at 142.
[48] Lotus, *supra* n 5, at 31.
[49] *Ibid.*, 21.

which France and the dissenters did not contest, and concluded that it is necessary to explain why a sovereign state's discretion is limited in the first place. Some exercises of a state's discretion may be clearly prohibited, at which point specific permissive rules are required for this exercise to be compatible with international law, whereas in other instances the existence of a prohibition will need to be established first.

The Central Theme of the Majority Opinion: Co-existence and Co-operation

Although most of the dissenters agreed with France and required a permissive rule for any exercise of jurisdiction beyond a state's territorial limits,[50] the gap between the majority and the dissenting opinions is not as wide as it may seem at first glance. Both sides considered territorial sovereignty as the basic principle of organization for international relations.[51] Both sides also recognized international conventions and international custom as important sources for rules governing the exercise of jurisdiction, regardless of whether they are permissive or prohibitive.[52]

The real difference between the majority and the dissenters is thus not one of prohibition or permission,[53] but concerns the respective judges' understanding of the territorial limits on the exercise of prescriptive or adjudicative jurisdiction.[54] The dissenters found in territorial sovereignty a general prohibition on states against the extra-territorial application of their laws and of their courts' jurisdiction, and derived from this a prohibition on *any* exercise of extra-territorial criminal jurisdiction unless a permissive rule was available.[55] However, the dissenters did not address the deeper question of *why* the territoriality of sovereignty is so important, and how this concept can be applied when one state's

[50] *Ibid.*, Dissenting Opinion Judge Loder, at 35; *Ibid.*, Dissenting Opinion Judge Weiss, at 44.
[51] *Ibid.*, at 18-19; *Ibid.*, Dissenting Opinion Judge Nyholm, at 59 ('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') and *Ibid.*, Dissenting Opinion Judge Weiss, at 45 ('The criminal jurisdiction of a State therefore is based on *and limited by* the territorial area over which it exercises sovereignty.'). This was later confirmed by the PCIJ's successor in *Corfu Channel* where the ICJ held that 'respect for territorial sovereignty is an essential foundation of international relations', see *Corfu Channel case*, ICJ Reports (1949) 4, at 35.
[52] Lotus, *supra* n 5, at 25-26; *Ibid.*, Dissenting Opinion Judge Loder, at 35; *Ibid.*, Dissenting Opinion Judge Finlay, at 56-57.
[53] But see contra Daniel-Erasmus Khan, 'Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations', 18 *European Journal of International Law* (2007) 145, at 157, footnote 62; Jan Klabbers, 'The Sociological Jurisprudence of Max Huber: An Introduction', 43 *Austrian Journal of Public and International Law* (1992) 197, at 208.
[54] Louis Henkin, 'International Law : Politics, Values and Functions: General Course on Public International Law', 216 *Recueil des Cours* (1989), at 279.
[55] Lotus, *supra* n 5, Dissenting Opinion Judge Loder, at 35 ('[the criminal law of a state] *cannot* extend to offences committed by a foreigner in foreign territory, without infringing the sovereign rights of the foreign State concerned, since in that State the State enacting the law has no jurisdiction')

territorial sovereignty collides with that of another. As a result, they failed to assess whether strict territoriality is capable of protecting sovereignty. Stopping the analysis at territoriality does not go far enough, as it is itself in need of explanation as a source of limits on the exercise of state sovereignty.

As discussed earlier, the majority did not find a general prohibition on extraterritorial jurisdiction in territorial sovereignty. Instead, it considered territorial sovereignty itself as the basis for a state's entitlement to exercise prescriptive or adjudicative jurisdiction over persons, acts or property outside its territory.[56] All that was required from a state, the majority concluded, was '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.'[57] That states do not need a permissive rule to exercise prescriptive or adjudicative jurisdiction shows that the Court did not conceive of international law's role as micro-managing states, dictating in every possible instance what states are allowed to do. International law's role was one of filling lacunae in respect of jurisdiction or removing conflicts when the diverse rules adopted by states collide. As long as no objections or complaints from other states arose, international law did not need to limit states' discretion. This view of international law's role echoes the reference in the *Lotus* dictum to international law as being 'established in order to regulate the relations between […] co-existing independent communities with a view to the achievement of common aims.' Tellingly, and a possible explanation for the persistence of the *Lotus* principle, this crucial part of the dictum is often omitted in quotes from the *Lotus* judgment, and at times only the sentence that 'restrictions cannot be presumed' is reproduced.[58]

Support for the centrality of co-existence that leads to the 'achievement of common aims' in *Lotus* as a goal for international law can be found in a speech by Max Huber a few years after the *Lotus* judgment was issued. His views are significant not only because he was a leading figure in international law after World War I,[59] but because, as the PCIJ's President in *Lotus*, he had cast the tie-breaking vote. It is unlikely that he would have voted as he did if the opinion were opposite to his own point of view.[60] In response to criticism on the majority's opinion, he answered that states' freedom in the absence of a rule that decides

[56] de la Grotte, *supra* n 24, at 391. Michel de la Grotte was the *nom de plume* for Åke Hammarskjöld, the PCIJ's Registrar, see Spiermann, *supra* n 14, at 214.
[57] Lotus, *supra* n 5, at 19 (emphasis added)
[58] Dupuy, *supra* n 6, at 94; Ryngaert, *supra* n 44, at 25; Andreas Paulus, 'International Adjudication', in Samatha Besson and John Tasioulas (eds), *The Philosophy of International Law* (2010) 207, at 210; Klabbers, *supra* n 53, at 209.
[59] See the Symposium: The European Tradition in International Law - Max Huber in 18 *EJIL* (2007) 69.
[60] Klabbers, *supra* n 53, at 199, footnote 6 (pointing out that Huber was presumed to be closely involved in the drafting of the opinion).

their rights does not imply anarchy, because the law must provide a solution in case of a collision of sovereignty. He added that 'le droit international, comme tout droit, repose sur l'idée de la coexistence de volontés de la même valeur.'[61]

Co-existence was a recurring theme in Max Huber's arbitral work as well,[62] again showcasing an approach to international law that is incompatible with the *Lotus* principle. Of particular interest is his best known decision, the Island of Palmas arbitration between the United States and the Netherlands. He worked on the case between 1925 and 1928, thus overlapping with his work on *Lotus* at the PCIJ. In his decision in the *Palmas* case, he held that 'international law, like law in general has the object of assuring the co-existence of different interests which are worthy of legal protection.'[63]

In his academic work, Max Huber was far from a positivist, but rather adopted a sociological approach to the law.[64] Importantly, contrary to the *Lotus* principle, Max Huber rejected the consent of states as the source of international law's binding force.[65] This further undermines the traditional, highly positivist reading of the *Lotus* judgment embodied in the *Lotus* principle.

The centrality of co-existence in the *Lotus* opinion was taken up again more recently in Judge Shahabuddeen's dissent in the *Nuclear Weapons* advisory opinion. He suggests that the majority in *Lotus* never intended to proclaim a principle as wide and as hard-core voluntarist as the *Lotus* principle, because the PCIJ was aware of the need to ensure co-existence between states. Judge Shahabuddeen argued that:[66]

> The existence of a number of sovereignties side by side places limits on the freedom of each State to act as if the others did not exist. These limits define an objective structural framework within which sovereignty must necessarily exist; the framework, and its defining limits, are implicit in the reference in *'Lotus'* to 'co-existing independent communities' […]. Thus, however far-reaching may be the rights conferred by sovereignty, those rights cannot extend beyond the framework within which sovereignty itself exists; in

[61] As quoted in Spiermann, *supra* n 46, at 131. Author's translation: 'international law, like all law, rests on the idea of the coexistence of wills of the same value'.
[62] For more on Huber's arbitrations, see Khan, *supra* n 53.
[63] Island of Palmas, *supra* n 4, at 870. In 1925, he had expressed a similar thought in the British Claims Award where he held that 'Il est acquis que tout droit a pour but d'assurer la coexistence d'intérêts dignes de protection légale. Cela est sans doute vrai aussi en ce qui concerne le droit international. », see *Affaire des Biens Britanniques en Maroc Espagnol Part XIV* (1 May 1925), Reports of International Arbitral Awards vol. II, iii – 744, 640.
[64] Max Huber, *Die Soziologischen Grundlagen Des Völkerrechts* (1928); Daniel Thürer, 'Max Huber: A Portrait in Outline', 18 *European Journal of International Law* (2007) 69, at 98; Oliver Diggelmann, 'The Aaland Case and the Sociological Approach to International Law', 18 *European Journal of International Law* (2007) 135, at 136.
[65] Diggelmann, *supra* n 64, at 142.
[66] Nuclear Weapons, *supra* n 9, Dissenting Opinion Judge Shahabuddeen, at 393-394 (citations omitted).

> particular, they cannot violate the framework. […] It is difficult for the Court to uphold a proposition that, absent a prohibition, a State has a right in law to act in ways which could deprive the sovereignty of all other States of meaning.

As Judge Shahabuddeen suggests, international law provides a structural framework for the exercise of state sovereignty. It provides a residual rule that applies when no clear rule either prohibits or permits an action, and explains why sovereignty is important. This residual rule is not freedom to act,[67] but rather the idea that territorial sovereignty deserves protection to ensure the co-existence of independent communities and facilitate the achievement of common aims. Only if an action that is not expressly prohibited or permitted does not jeopardize these goals will states be free to act and will their actions be legal under international law. Otherwise, their freedom ought to be limited and their actions will be illegal unless an exception is available in the form of a permissive rule.

To conclude, a careful rereading of the *Lotus* majority opinion reveals that the Court did not intend to express the position embodied in the *Lotus* principle.[68] How then did the *Lotus* principle come to dominate the debate? A first reason is that the majority opinion itself is far from a beacon of clarity. Its lengthy analysis wraps up the central question of the scope of territorial jurisdiction in an abstract cloak that can leave a reader puzzled. A second reason can be found in the dissents, particularly in former President Loder's opinion, where our reader encounters a more easily digestible sound bite summing up the majority opinion as 'under international law everything which is not prohibited is permitted.'[69] This sound bite gave rise to the *Lotus* principle, but is a straw man[70] version of the majority's more nuanced conclusions.

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[67] Sir Hersch Lauterpacht has argued that in *Lotus* the PCIJ seems to treat 'the principle of freedom and the independence of States as a direct source of law and as a vehicle of judicial reasoning'. However, he adds that '[a]ny criticism of this view of the Court ought to be mitigated by the fact that it was not the only consideration on which the Court based its judgment', Hersch Lauterpacht, *The Function of Law in the International Community* (2011), at 102-103.

[68] Alain Pellet, '*Lotus* Que de Sottises On Profère en Ton Nom?', in Edwige Belliard (ed), *L'Etat Souverain dans le Monde d'Aujourd'hui: Mélanges en l'Honneur De Jean-Pierre Puissochet* (2008) 215, at 217; Lauterpacht, *supra* n 29, at 360 ('On closer investigation however, the principle enunciated by the Court is less dogmatic and more flexible than a first reading makes it appear' […] the Court qualified considerably the observation that rules emanate from the free will of states').

[69] Lotus, *supra* n 5, Dissenting Opinion Judge Loder, at 33. See also *Ibid.*, Dissenting Opinion Judge Nyholm, at 60 ('[t]he 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.')

[70] Sir Gerald Fitzmaurice, 'The Problem of Non-Liquet: Prolegomena to a Restatement', in Charles Rousseau (ed) *Mélanges Offerts à Charles Rousseau : La Communauté Internationale* (1974) 89, at 109; Handeyside, *supra* n 6, at 76.

The real issue facing the Court was the extent to which the territorial nature of sovereignty restricts a state's exercise of its sovereignty, particularly in criminal matters.[71] The Court indicated that sovereignty was the basis for a state's title to exercise jurisdiction. But sovereignty in international law is not just unbridled discretion; it is subject to inherent limits because of the equal sovereignty of other states. Thus, sovereignty is the source of limitations, which need a permissive rule to overcome it, as well as of freedom, which can be exercised unless there is a prohibition. The precise delimitation of sovereignty when effects are felt in another state or by nationals of another state is a question at the core of international law. In the *Lotus* case, the majority held that effects felt in a state are sufficient for that state to exercise prescriptive or adjudicative jurisdiction, whereas the minority focused on the location of the acts and ignored the effects. Importantly, the majority emphasized international law's role in ensuring co-existence and co-operation between independent communities. The next section argues that adopting the *Lotus* principle is the wrong policy for ensuring these twin goals.

The *Lotus* Principle is the Wrong Policy for Ensuring Co-Existence and Co-Operation

Not only is the *Lotus* principle not supported by the text of the *Lotus* judgment, the principle is also incompatible with the majority's understanding of international law's role as ensuring co-existence between independent communities and the achievement of common aims.

The main charge levelled against the *Lotus* principle in the literature is that its position that all states' decisions are legal unless expressly prohibited is no longer suited to meet the modern day demands of the international community.[72] As will be explained further below, this critique is valid. Where the critics go wrong, however, is in their extension of this critique to the *Lotus* judgment itself. In doing so, they ignore the emphasis put by the majority on co-existence and co-operation, even though it can provide answers to questions that the critics leave open.

Two elements of the *Lotus* principle are said to be incompatible with the needs of the international community of states: the voluntarism it preaches in the requirement that states consent to the limits to which they are subject; and the requirement of express prohibitions on action instead of permissions.

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[71] See Mann, *supra* n 11, at 35-36 (noting that 'Perhaps it is the true explanation of the Court's statements that it intended, not to deny the existence of restraints upon a State's jurisdiction, but to reject the test of the strict territoriality of criminal jurisdiction […]', and adding that this approach 'would not be inconsistent with the requirements of modern life'.).

[72] Nuclear Weapons, *supra* n 9, Declaration of President Bedjaoui, at 270-271.

The *Lotus* principle's idea of absolute freedom for states restricted only by their consent is indeed difficult to reconcile with the need for a relative conception of state sovereignty in situations of increasing interdependence. The *Lotus* principle gives states *carte blanche* to remain blissfully ignorant about and unaccountable for the negative externalities of their decisions, unless they have consented to a rule that would prohibit their behaviour and trigger their responsibility in case of violation. Requiring states' express consent grants them a de facto veto right over any rule that would force them to internalize the externalities of their decisions. The *Lotus* principle therefore casts, as Judge Weeramantry put it in his dissent to the ICJ's *Nuclear Weapons* Advisory Opinion,[73] 'a baneful spell on the progressive development of international law.'

As will be argued below, the problem is not with voluntarism itself, which is to a degree inevitable in a decentralized system such as international law. Nevertheless, the 'baneful spell' is exacerbated by the *Lotus* principle's emphasis on express prohibitions that grants states quasi-absolute sovereignty.

In their Declarations attached to, respectively, the ICJ's *Nuclear Weapons* Advisory Opinion and the *Kosovo* Advisory Opinion, President Bedjaoui and Judge Simma strongly disagreed with the *Lotus* principle's application to contemporary questions of international law. In both Opinions, the ICJ applied the *Lotus* principle's approach, even though the opinions involved policy decisions rather than the legality of the exercise of jurisdiction over criminal matters as in the *Lotus* judgment. In its *Nuclear Weapons* Advisory Opinion, the Court looked for a prohibition on the threat or use of nuclear weapons, despite having been asked whether the threat or use of nuclear weapons was permitted under international law.[74] President Bedjaoui, who nevertheless agreed with the majority opinion in general, criticized the adoption of the *Lotus* principle's approach. Since *Lotus*, he argued, international law had evolved towards addressing the needs of states as a community, and added that although the ICJ had found uncertainties about the law governing the threat or use of nuclear weapons,[75]

> it does not infer any freedom to take a position. Nor does it suggest that such licence could in any way whatever be deduced therefrom. Whereas the Permanent Court gave the green light of authorization, having found in international law no reason for giving the red light of prohibition, the present Court does not feel able to give a signal either way.

President Bedjaoui added that the ICJ's controversial decision not to reach a definitive conclusion on the legality of the threat or use of nuclear weapons 'in an

[73] Nuclear Weapons, *supra* n 9, Dissenting Opinion of Judge Weeramantry, at 495.
[74] Christopher Greenwood, 'The Advisory Opinion on Nuclear Weapons and the Contribution of the International Court to International Humanitarian Law', 37 *International Review of the Red Cross* (1997) 65, at 68.
[75] Nuclear Weapons, *supra* n 9, Declaration of President Bedjaoui, at 271-272.

extreme circumstance of self-defence, in which the very survival of a state would be at stake'[76] should not be seen by states as an authorization 'to act as they please' because 'the Court […] is far more circumspect than its predecessor in the '*Lotus*' case in asserting today that what is not expressly prohibited by international law is not therefore authorized'.[77] President Bedjaoui thus rejected *in dubio pro libertate;* but as discussed in section 0, a close reading of the *Lotus* judgment indicates that the PCIJ did not adopt this part of Turkey's argument when it rejected France's.

The possibility that acts that are not expressly prohibited may nevertheless still be contrary to international law, envisaged in President Bedjaoui's Declaration, is echoed in Judge Simma's Declaration attached to the *Kosovo* Advisory Opinion. Mirroring its approach in the *Nuclear Weapons* Opinion, the ICJ had looked for a rule prohibiting Kosovo's unilateral declaration of independence rather than one permitting it.[78] Judge Simma criticized the ICJ's focus on whether international law prohibited Kosovo's declaration as upholding the *Lotus* principle, arguing that[79]

> The Court could have considered the scope of the question from an approach which does not, in a formalistic fashion, equate the absence of a prohibition with the existence of a permissive rule; […]
>
> The Court's reading of the General Assembly's question and its reasoning, leaping as it does straight from the lack of a prohibition to permissibility, is a straightforward application of the so-called *Lotus* principle. By reverting to it, the Court answers the question in a manner redolent of nineteenth-century positivism, with its excessively deferential approach to State consent. Under this approach, everything which is not expressly prohibited carries with it the same colour of legality; […]
>
> […] by moving away from 'Lotus', the Court could have explored whether international law can be deliberately neutral or silent on a certain issue, and whether it allows for the concept of toleration, something which breaks from the binary understanding of permission/prohibition and which allows for a range of non-prohibited options. That an act might be 'tolerated' would not necessarily mean that it is 'legal', but rather that it is 'not illegal'.

President Bedjaoui's and Judge Simma's criticism that the *Lotus* principle undesirably deferential to states in an interdependent world is correct. However, the PCIJ's emphasis on co-existence and co-operation limits the deference it was willing to give to states. If this part of the *Lotus* judgment had been read in its full

[76] *Ibid.*, at 266.
[77] *Ibid.*, at 271-272. Arguably, Lotus does not provide an answer either to this extreme situation: when the existence itself of a state is at stake, the prospect of 'co-existence' is all but illusory.
[78] Kosovo, *supra* n 9, at para. 56 (emphasis added).
[79] *Ibid.*, at paras 3, 8-9. In Bruno Simma and Andreas L. Paulus, 'The 'International Community': Facing the Challenge of Globalization', 9 *European Journal of International Law* (1998) 266, at 277, President Bedjaoui's declaration is quoted with approval.

context, there would not be a need either to examine whether international law can be deliberately silent, which is far from a satisfactory approach either.

Concepts such as 'deliberate silence' are, as Peters points out,[80] difficult to apply in a decentralized system of international law where it is rarely clear if silence is deliberate or results from 'unwanted or unconscious non-regulation'. Moreover, the practical effect of introducing the concept of 'toleration' of behaviour that is 'not illegal' is the same as that dictated by the *Lotus* principle; it confers a freedom to act, unless a residual rule restricts a specific decision.

Even less workable than the concept of a 'deliberate silence' are suggestions that states should find permission for their actions in international law, as argued by France and the dissenters. Such a requirement would be undesirable, unrealistic and politically unacceptable to sovereign states.

First, a system that requires permission before states can act is undesirable, because it fails to remove the 'baneful spell' of consent that hinders the progressive development of international law. The problem with a requirement of permission is not that the acting state will have a de facto veto right over a rule that prohibits its actions, as is the problem under the *Lotus* principle, but that it will have a de facto veto right over the creation of any rule that permits an affected state to respond. The end result for the development of international law thus remains the same, regardless of whether international law prohibits or permits states' actions.

Second, a system based on permissions is unrealistic as it 'assumes a complete and perfected body of international law, adequate to meet and settle all conceivable international disputes'.[81] Despite the undeniable growth of the corpus of international rules as compared to the 1920s when *Lotus* was decided, international law does not contain explicit permissions for every act a state could potentially undertake. When a previously unknown problem arises, states would face the unenviable choice between inaction[82] or violation of international law until a specific legal basis permitting action has been created to respond to this problem. International courts would be of little help, as they would find themselves forced to issue *non liquet* decisions.

Third, even if it would be feasible to have a comprehensive regime governing states' actions in place, it is unlikely that states would accept an international legal

[80] Anne Peters, 'Does Kosovo Lie in the Lotus-Land of Freedom?', 24 *Leiden Journal of International Law* (2011) 95, at 99.
[81] George Wendell Berge, 'The Case of the S.S. "Lotus"', 26 *Michigan Law Review* (1927-1928) 361, at 375.
[82] *The Case of the S.S. Lotus*, 1927 PCIJ Series C, No. 13/2, Part II – Speeches Made and Documents Read in Court, at 112.

system that restricts their freedom to act to those instances where permission is available. This simply is not an accurate reflection of the political reality now or then, when a ruling to this effect in the *Lotus* case would have amounted to political suicide for the young PCIJ.

To avoid these pitfalls, and to make a system that requires permissions before action can take place workable in practice, the only solution is to give states a broad freedom to act as a residual rule when international law is silent. But this will effectively turn international law into a system of prohibitions, since there is no need to expressly permit state actions if permission is already the default.

The difference between permission and prohibition therefore arguably becomes one of semantics, with both concepts two sides of the same coin. A permission is after all the reverse of an obligation or a prohibition.[83] Moreover, if a permission to act grants exclusivity to one state, it in effect amounts to a prohibition on other states. For example, under art 97(1) UNCLOS, jurisdiction over collisions on the high seas belongs to the flag state or state of nationality of the alleged offender. This can be read as a permissive rule for the flag state or the state of nationality, or as a prohibitive rule for states that do not fall in either category, such as the state of nationality of the victim.

At times, concerns have been raised about the implications of the choice between systems based on prohibitions and those based on permissions for the burden of proof. However, such concerns are unwarranted. As France correctly pointed out in its reply to Turkey during the oral arguments in *Lotus*, the burden of proving the existence of a specific legal rule does not rest with one party or the other, but is the responsibility of all sides and the Court itself under the principle of *iura novit curia*. This was confirmed by the PCIJ in the *Lotus* case,[84] as well as by its successor in the *Fisheries Jurisdiction* case[85] and the *Nicaragua* case.[86] Thus, whether the exercise of state sovereignty in international law requires a permission or the absence of a prohibition makes no difference for the allocation of the burden of proof.[87]

It is thus nigh impossible to cast international law in categorical terms as a system based on prohibitive or permissive rules, and there is little to gain from attempts to do so. Ultimately, the legality of a state's action depends on the residual rule

[83] A prohibition is an obligation expressed in negative terms. Where an obligation tells an actor to do something, a prohibition tells an actor not to do something. In other words, a prohibition can be formulated as 'do not do X' and an obligation as 'do not not do X'.
[84] Lotus, *supra* n 5, at 31.
[85] *Fisheries Jurisdiction (United Kingdom v. Iceland)(Merits)*, ICJ Reports (1974), 3, at 9.
[86] *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*, ICJ Reports (1986), 14, at 24-25.
[87] See also Lauterpacht, *supra* n 29, at 365.

that applies if no express rules exist. This residual rule is not necessarily included in an international agreement, but can be found in custom or in general principles of international law. The residual rule determines whether international law consists mainly of prohibitions or permissions on states' actions. If the residual rule leaves a broad discretion to states, international rules will mostly take the form of prohibitions, formulated as 'do not do X' or 'do not not do X'.[88] In contrast, a prohibitive residual rule will be complemented by permissive international rules, formulated as 'you may do X'.

In the example of Kosovo's declaration of independence, the residual rule could be either the stability of the existing state or the self-determination of the inhabitants of the newly independent state.[89] If stability of the state is the residual rule, a declaration of independence would be illegal. With self-determination as the residual rule, a declaration of independence would be legal.[90] In his declaration, Judge Simma pointed to the principle of self-determination as a possible residual rule, but did not 'consider it an appropriate exercise of [his] judicial role to examine these arguments *in extenso*'.[91]

In the *Lotus* case, the residual rule that governed the exercise of territorial sovereignty was to ensure co-existence and co-operation between independent states whose sovereignty was defined by their territorial borders. Due to the discretion inherent in the idea of sovereignty, the majority concluded that in most instances, international law would take the form of prohibitions. Nevertheless, the majority also concluded that territorial sovereignty in itself implied a restriction on the extra-territorial exercise of enforcement jurisdiction that could only be overcome if a permissive rule existed. As argued in section 0, this nuanced position indicates that the majority did not intend to adopt the *Lotus* principle as its vision of international law. The goal for the next section is to analyse the *Lotus* judgment's continued relevance in today's interdependent world and to consider the limits it entails for the exercise of state sovereignty, and, in particular, the exercise of legislative or adjudicative jurisdiction.

[88] Or, more simply, 'do X'.
[89] Peters, *supra* n 80, at 99.
[90] It should be noted that the ICJ in the *Kosovo* Opinion considered the question about the legality of a unilateral declaration to be separate from the issue of whether the right of self-determination implies a right to separate from another state. In the *Québec* case, the Canadian Supreme Court found such a right to be non-existent under international law which only allows for internal self-determination except in the case of colonial or oppressed people, see Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada, Canada Supreme Court, 20 August 1998, 115 ILR 536, at 584 and 586.
[91] Kosovo, *supra* n 9, Declaration Judge Simma, at para 7.

Lotus in Full Bloom

The previous two sections have argued that the *Lotus* principle, according to which 'whatever is not explicitly prohibited by international law is permitted', is a reductionist interpretation of the majority opinion in the *Lotus* judgment. Moreover, the *Lotus* principle is incompatible with the goals of co-existence and co-operation between independent states that the PCIJ found to be central to international law.

Even though the *Lotus* principle is based on an incorrect reading of the decision and has undesirable policy implications, the *Lotus* judgment's core, like the seeds of its namesake flower,[92] remains viable still. This core of the judgment suggests that, when assessing the compatibility of a state's actions with international law, one should examine whether international law limits the action. Contrary to what the *Lotus* principle suggests, there are multiple ways of establishing the existence of limits. A limit is clearly available when a treaty or custom prohibits the action, just like a limit is clearly absent when a conventional or customary rule expressly permits the action. When there is no clear positive rule either prohibiting or permitting the action, the residual rule comes into play. As discussed above, the residual rule identified by the majority in the *Lotus* case is not *in dubio pro libertate*, but rather that territorial sovereignty should be exercised so as to ensure co-existence and co-operation between independent states whose sovereignty is defined by their territorial borders.

Ensuring co-existence is an important purpose of international law in a pluralistic society of states.[93] Rules created through co-operation supplement rules that govern states' co-existence.[94] Central to the international law of co-existence is the protection of territorial sovereignty, but also the recognition that this sovereignty is relative and subject to limitations when it affects others.[95] Co-existence thus provides the conceptual foundation for systemic limitations on states' territorial sovereignty in international law. The purpose of this section is to analyse and identify the inherent limits in international law on states' exercise of their jurisdiction that are part of what Judge Shahabuddeen called the 'objective structural framework within which sovereignty must necessarily exist'.[96] Before identifying these limits it is useful to gain an understanding of what co-existence means.

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[92] J. Shen-Miller et al., 'Exceptional Seed Longevity and Robust Growth: Ancient Sacred Lotus from China', 82 *American Journal of Botany* (1995) 1367.
[93] Pellet, *supra* n 68, at 221; Spiermann, *supra* n 14, at 54.
[94] Spiermann, *supra* n 14, at 54; Wolfgang Friedmann, *The Changing Structure of International Law* (1964), at 66.
[95] These others include other states as well as their citizens.
[96] Nuclear Weapons, *supra* n 9, Dissenting Opinion Judge Shahabuddeen, at 393.

A. 'Co-Existence'

When analysing co-existence, it is difficult to escape the multiple attempts to codify principles of 'peaceful co-existence' in the 1950s and 1960s. A first is the 1954 Pancha Shila Agreement between China and India[97] where both states proclaimed the five principles of peaceful co-existence: (1) mutual respect for each other's territorial integrity and sovereignty; (2) mutual non-aggression; (3) mutual non-interference in internal affairs; (4) equality; and (5) peaceful co-existence. In the early 1960s, the USSR adopted peaceful co-existence as a key element of its foreign policy,[98] using the term to refer to the side-by-side existence of communist and capitalist states through repudiation of war and any other form of interference as a tool in the ideological competition between them.[99]

Although these principles of 'peaceful co-existence' could already be found in the UN Charter,[100] specific codification attempts at the International Law Association failed to come to fruition because acceptance of a fundamental concept of communist states' foreign policy, which often only paid lip-service to these principles, proved politically unpalatable to Western scholars.[101] They did not, however, consider 'peaceful co-existence' to have the same meaning as 'co-

[97] Agreement Between the Republic of India and the People's Republic of China on Trade and Intercourse between Tibet Region of China and India, 29 April 1954, 1958 UNTS 4307, preamble. See also, Carlo Panara, 'Peaceful Coexistence ' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International law* (2010). For commentary at the occasion of the Agreement's 50th anniversary, see Boutros Boutros-Ghali, 'The Five Principles', 3 *Chinese Journal of International Law* (2004) 373; Edward McWhinney, 'The Renewed Vitality of the International Law Principles of Peaceful Coexistence in the Post-Iraq Invasion Era: The 50th Anniversary of the China/India Pancba Shila Agreement of 1954', 3 *Chinese Journal of International Law* (2004) 379; K.R. Narayanan, 'The 50th Anniversary of Panchsheel', 3 *Chinese Journal of International Law* (2004) 369; Wen Jiabao, 'Carrying Forward the Five Principles of Peaceful Coexistence in the Promotion of Peace and Development', 3 *Chinese Journal of International Law* (2004) 363.

[98] Panara, *supra* n 97; Edward McWhinney, 'International Law Making in Times of Competing Ideologies or Clashing Civilizations: Peaceful Coexistence and Soviet-Western Legal Dialogue in the Cold War Era', 44 *Canadian Yearbook of International Law* (2006).

[99] Nikita S. Khrushchev, 'On Peaceful Coexistence', 38 *Foreign Affairs* (1959) 1, at 3. As mentioned by Lerner, the element of competition however remained, as the doctrine only excluded force and interference from the methods of competition. The usage of the term 'co-existence' was cynical because the policy did not apply to relations between states that shared the same ideology, see Warren Lerner, 'The Historical Origins of the Soviet Doctrine of Peaceful Coexistence', in Hans W. Baade (ed), *The Soviet Impact on International Law* (1965)21, at 21, 34.

[100] Panara, *supra* n 97.

[101] For the stalled codification efforts at the International Law Association, see ILA, 'Report of the Committee on Peaceful Coexistence', *Proceedings of the American Branch of the Law Association* (1963-1964) 83, at 83.

existence' in *Lotus*,[102] and preferred to refer to 'friendly relations' instead, as used a decade later in the UN General Assembly's Friendly Relations Declaration.[103]

A more politically neutral definition of co-existence is of 'existing together or in conjunction'.[104] The dimension of 'together or in conjunction' is reflected in Friedmann's seminal work, 'The Changing Structure of International Law' in which he distinguished between the 'international law of co-existence' and the newer 'international law of co-operation'.[105] In his taxonomy, the 'international law of co-existence' covers the rules and principles guaranteeing mutual respect for each state's territorial sovereignty regardless of social or economic structure.[106]

The body of obligations that states are under to ensure their co-existence still forms the core of international law[107] despite the additional layer of the 'international law of co-operation' — the body of obligations developed in treaties to respond to specific instances of increasing interdependence. The goal of this section is not to list all the obligations exhaustively, but rather to analyse what co-existence implies for the exercise of jurisdiction — the central point of debate in the *Lotus* case. This paper argues for the addition of 'locality' as a relevant factor in the allocation of jurisdiction, subject to limitations to ensure that an exercise of jurisdiction does not unduly restrict another state's equal sovereignty.

'Locality'

Like sovereignty, of which it is an expression, the scope of a state's jurisdiction is traditionally defined by its territorial boundaries.[108] This approach has numerous advantages. Containing enforcement jurisdiction to strict territorial boundaries ensures that states cannot arrest persons or seize property in another state's territory without the latter's consent. This can be seen as an expression of the principle of non-intervention that is arguably more important than sovereignty itself for the existence of an international legal order.[109] Allocating prescriptive

[102] John N. Hazard, 'Codifying Peaceful Co-Existence', 55 *American Journal of International Law* (1961) 109, at 110, footnote 9.
[103] ILA, *supra* n 101, at 84-85.
[104] 'Coexistence', in *Oxford English Dictionary* 2nd ed. (1989).
[105] Friedmann, *supra* n 94, at 60-61.
[106] *Ibid.*, at 60-61. Jackson likewise uses 'co-existence' to mean 'mutual regard of separate states as, *prima facie*, worthy of recognition and respect', see Robert Jackson, 'Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape', 47 *Political Studies* (1999) 431, at 455.
[107] Spiermann, *supra* n 14, at 54.
[108] International law provides other grounds on which the exercise of jurisdiction is presumed legal, such as the nationality principle or the protective principle. Nevertheless, the main basis for the exercise of jurisdiction is still the territoriality principle. For more on the exercise of jurisdiction see Menno T. Kamminga, 'Extraterritoriality', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (2008) and Ryngaert, *supra* n 44.
[109] Peters, *supra* n 1, at 533.

jurisdiction along territorial boundaries provides each state its own 'space' in which it can regulate as appropriate to its specific characteristics in terms of size, population and development. It also ensures that the international validity of laws can be easily ascertained. The territorial allocation of jurisdiction provides certainty to individuals, who do not need to ascertain the nationality of those they interact with to determine which legal system governs their interaction.

However, prescriptive jurisdiction based on territoriality cannot guarantee co-existence between states because an act and its effects are not necessarily restricted to the same territory. The strict territoriality of the *Lotus* dissenters, in which only the location of the act or the actor counts, creates a situation in which states are unable to respond to negative effects felt within their territory simply because the causes of such effects are located abroad, leaving them unable to fulfil the essential task of protecting their inhabitants. Likewise, strict territoriality relies on governments to regulate to avoid negative effects in other states. It is unlikely that they will do so given that those affected cannot hold them politically accountable.

This does not mean that territorial sovereignty and the central role of territoriality in determining the legality of an exercise of jurisdiction have become irrelevant. Territoriality certainly remains central to the exercise of enforcement jurisdiction — a point on which the majority and the dissenting opinions in *Lotus* agreed. However, the territoriality of the acts was too crude an instrument to allocate prescriptive and adjudicative jurisdiction in the eyes of the *Lotus* majority, and has only become more so in our world of increasing interdependence. Therefore, we need something else to identify the extent to which prescriptive jurisdiction can be exercised even when this has effects abroad, and the limits that need to apply to safeguard co-existence.

This something else is locality. Locality is not another basis for the exercise of jurisdiction, such as territoriality or nationality, but rather a criterion to weigh up the interests of different states that can claim jurisdiction based on territoriality or another recognized basis for jurisdiction. Unlike private international law, public international law has not developed criteria to identify which state is, or which states are, the most appropriate to exercise jurisdiction over an act or event that spans multiple states. Locality aims to fill this gap. The idea behind locality is that states should be allowed to act when their domestic affairs are adversely affected, and conversely that limits on the exercise of jurisdiction are possible if the effects are wholly or partly localized outside a state's territory. It should thus not be confused with the protective principle or the effects doctrine. These only provide a basis for the exercise of jurisdiction, but do not impose limits on what would otherwise be a legitimate exercise of jurisdiction.

Leaving the political decision to the state or states that feel the brunt of the effects is preferable for several reasons. First, states are responsible towards their inhabitants for the protection of the environment, health, economic stability and other values.[110] If the decision on how to regulate activities that have an impact on these matters is left to states where the activity takes place rather than the state where the impact is felt, the affected state will not be able to discharge its responsibility towards its inhabitants. Second, if the negative externalities of a state's actions or its failure to regulate private actors whose activities trigger such externalities are not internalized by that state, it will be able to affect people to whom it is not politically accountable. The consequences of a lack of incentives are clearly illustrated by the free riding that is prevalent in relation to climate change mitigation efforts. Third, by shifting the centre of gravity away from the action itself towards the effects of the action, locality can provide better protection for states' sovereignty, because it enables states to take decisions regarding actions that affect them.

As a principle that identifies the appropriate locus for political decision-making, locality is a close relative of subsidiarity. Subsidiarity is applied when multiple levels of governance exist, for example in federal states or between states and supranational institutions, to express a preference for the exercise of authority at the lowest possible level of government,[111] depending on the scale and the effects of the action. If there is a collective interest in regulation, the matter should be dealt with at the federal or supranational level. If there is no such interest, the matter should be left to the individual states.[112] Locality performs a similar function, albeit in the horizontal relationships between equally sovereign states, by allowing the political decision to be made by the state that is closest to the negative effects that need to be addressed.[113] Depending on how widespread the negative effects are, application of the locality principle may result in multiple states exercising jurisdiction.

Locality can thus help to clarify limits on the exercise of states' sovereignty when an act and its effects are not contained within the same territory or when a state's actions trigger negative externalities elsewhere. But it is in the context of the allocation of prescriptive jurisdiction over multi-territorial activities, such as

[110] Karen J. Alter, 'Resolving or Exacerbating Disputes? The WTO's New Dispute Resolution System', 79 *International Affairs* (2003) 783, at 797.
[111] Isabel Feichtner, 'Subsidiarity', in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2007), at 1, 3.
[112] Dupuy, *supra* n 6, at 77.
[113] Ryngaert, *supra* n 44, at 214 (calling this a 'transversal application of the subsidiarity principle'); Alex Mills, *The Confluence of Public and Private International Law* (2009), at 106 (arguing that although subsidiarity is traditionally applied vertically, it also has a horizontal dimension).

international aviation, and over multi-national actors that locality really comes into its own.

Under the principle of locality, the effects of an act or actor within a territory are a necessary condition for the exercise of prescriptive jurisdiction over that act or actor. However, for reasons that are explained below, the locality of effects is not a sufficient condition for the exercise of prescriptive jurisdiction. Other norms will inform whether a particular exercise of prescriptive jurisdiction over acts or actors having an impact within the regulating state's territory is compatible with locality, and ultimately with the need to ensure co-existence between states.

Conversely, under the principle of locality the physical presence of an act or an actor in the regulating state's territory is not a necessary condition for the exercise of prescriptive jurisdiction either. It is important here to distinguish between prescriptive and enforcement jurisdiction. While the latter is strongly linked to territory,[114] it will be up to the regulating state to decide whether it wants to regulate, even if it may not be able to enforce its regulation effectively and may have to wait until the regulated actors are within its territory before it can enforce its regulation. This is however a matter of practical, rather than legal, limits on prescriptive jurisdiction, which can be exercised even if enforcement jurisdiction is not possible.[115] Or, as Akehurst put it, 'ineffectiveness is not the same as illegality'.[116]

Not only is an act or actor's presence within a state's territory not a necessary condition for the exercise of prescriptive jurisdiction in our era of increasing interdependence between states, it is not a sufficient condition either. Not every act or actor within a state's territory is by virtue of such presence also within the scope of the state's domestic affairs, particularly when this act or actor reduces another state's capacity to decide. Thus, a state should not object when another state's regulation affects actors or actions within its territory simply because these actors or actions happen to be within its territory. Under the principle of locality, the locus of the actors or actions does not automatically prevail over the locus of the effects.

[114] Lotus, *supra* n 5, at 18-19 ('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.').
[115] D. W. Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources', 53 *British Yearbook of International Law* (1983) 1, at 1.
[116] Michael Akehurst, 'Jurisdiction in International Law', 46 *British Yearbook of International Law* (1972-1973) 145, at 181.

Limits on Locality

Locality does not, however, eliminate collisions of state sovereignty, as an act can produce effects in multiple states. Moreover, even if the state should be able to regulate a specific act because it feels the impact thereof, its discretion may need to be limited to avoid in turn causing a negative impact on other states. Therefore, locality of effects is not a sufficient condition for the exercise of prescriptive jurisdiction.

A first limit on locality arises from the type of effects on the domestic affairs of the state that wishes to exercise jurisdiction. Not all effects should sway the balance of interests for the allocation of jurisdiction in favour of the state feeling the effects of an act, and away from the state where the act, or part thereof, takes place. The benchmark is again the need to ensure co-existence between states. The literature on negative externalities typically distinguishes between three types of externalities: physical, pecuniary and psychological.[117] While the first types are self-explanatory, the third is not. Psychological externalities refer to the negative psychological effects that occur when an action causes offence in another state, for example when a state is offended by the lack of respect for animal rights in another state, or by the lack of protection of cultural heritage. When it comes to assessing states' exercise of prescriptive jurisdiction over effects in their territory, states should be able to respond when the physical or pecuniary negative effects of another state's actions or omissions are felt within their territory, but not necessarily if the effects are only psychological. The justification for excluding psychological externalities from the scope of the locality is not that these are less important than the other types of externalities, but that psychological externalities reflect a clash of fundamental values.[118] It is the essence of sovereignty that a state should decide independently on these fundamental values. If a state's choice offends other states, the latter will need to accept this as part of the pluralistic society in which independent communities co-exist. A major exception is when an international agreement declares a particular value to be shared, as is for example the case for the protection of fundamental human rights or of cultural heritage. Only if this expression of shared nature has happened[119] is there ground for action in response to a psychological externality.

Although the quality of the effects is a limit on 'locality', the quantity of the effects should not be a limit on the exercise of jurisdiction. There should, in other words, not be a *de minimis* exception. In the end, sovereign states should be able

[117] Jeffrey L. Dunoff, 'Levels of Environmental Governance', in Daniel Bodansky *et al.* (eds), *The Oxford Handbook of International Environmental Law* (2007) 85, at 104-105.
[118] *Ibid.*, at 104-105.
[119] Of course the scope of this expression will often be debated, but that is not a question that should concern us here.

to decide whether the effects they are exposed to, however small, warrant a response. Yet, in today's interdependent world, transboundary effects are inevitable, and a state may have to tolerate some effects of other states' actions. Useful norms to assess whether effects need to be tolerated — and from the perspective of the state causing the effects, which effects are permitted — are good neighbourliness[120] and reasonableness.[121] Both norms would benefit from additional research, that the author hopes to undertake in the future, to reveal the breadth of limits they can justify on the exercise of jurisdiction and sovereignty, informed by locality, with a view to ensuring co-existence in increasing interdependence.

Conclusion

Max Huber famously compared the PCIJ's decisions 'to ships which are intended to be launched on the high seas of international criticism'.[122] By all accounts, it has been rough sailing for the *Lotus* judgment that has been pushed by prevailing winds toward the *Lotus* principle. This paper has challenged this dominant reading of the *Lotus* judgment. A detailed analysis of the majority opinion has shown that rather than settling the conceptual divide between both parties as to whether international law is a system of prohibitive or permissive rules, the Court identified the scope of territorial jurisdiction over acts or events that involve multiple territories as the central issue at stake.

Despite criticism of the majority's opinion as retrograde, the majority arguably demonstrated a more progressive outlook than the dissenters in that it was more sensitive to the complexity of states' interdependence.[123] It acknowledged that a state's territorial sovereignty can at times be affected by acts or actors outside its territory, and that it may be desirable for this state to exercise prescriptive or adjudicative jurisdiction over these acts or actors, even when they are outside its territory. States can change this default situation by agreeing on a different allocation of jurisdiction over these acts or actors. Until they have agreed on an alternative allocation, the strict territorial restriction on enforcement jurisdiction takes the sting out of any excessive exercise of prescriptive or adjudicative jurisdiction as the prescribing state or the court will only be able to enforce its

[120] Laurence Boisson de Chazournes and Danio Campanelli, 'Neighbour States', in Rüdiger Wolfrum (ed), *Mac Planck Encyclopedia of Public International Law* (2006); Jutta Brunnée, 'Sic Utere Tuo Ut Alienum Non Laedes', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (2010).
[121] Olivier Corten, 'Reasonableness in International Law', *Max Planck Encyclopedia of Public International Law* (2006); Andreas F. Lowenfeld, 'International Litigation and the Quest for Reasonableness: General Course on Private International Law', 245 *Recueil des Cours* (1994).
[122] Spiermann, *supra* n 14, at v.
[123] Ole Spiermann, 'Judge Max Huber at the Permanent Court of International Justice', 18 *European Journal of International Law* (2007) 115, at 132.

legislation or its judgments over acts, actors or goods outside its territory with the consent of the territorial state.

More so than the dissenters, the majority was aware that there were two potentially conflicting exercises of territorial jurisdiction at play here, and that granting exclusivity of jurisdiction to the state on which territory the act was committed was not necessarily the best outcome for ensuring justice in the particular case[124] or international law's goals of co-existence and co-operation.[125] Whereas the dissenters rejected Turkey's exercise of criminal jurisdiction as an infringement on France's sovereign rights, the majority at least implicitly recognized that leaving the prosecution to France would have infringed on Turkey's equal sovereign rights, because Turkey would not have been able to address the effects of an act on its 'territory'. This is preferable to the dissenters' approach that leaves a state feeling the effects of actions in another state dependent upon the latter either exercising its jurisdiction to stop these effects or consenting to a rule that permits the affected state to act. What the dissenters failed to see is that when it comes to protecting state sovereignty in situations of increasing interdependence their approach suffers from the same defects as the *Lotus* principle: it hollows out the idea of sovereignty as independence that is central to international law,[126] threatens co-existence, and undermines the progressive development of international law.

The Court did not shy away from allowing concurrent exercises of jurisdiction. As a commentator at the time recognized,[127] by allowing concurrent jurisdiction rather than determining that jurisdiction belonged exclusively to either state, the Court — somewhat counterintuitively perhaps — limited the possibility of conflict between the different states involved. Concurrent jurisdiction is not something to be feared; it serves an important signalling function in international law as competing exercises of jurisdiction reveal that the interests of multiple states are involved. It is only by becoming aware of these tensions that incentives emerge for states to develop a solution through treaty or custom. The Court explicitly

[124] As is clear from its statement at the end of the opinion where it held that:

> '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.'

See Lotus, *supra* n 5, at 30-31. France had prosecuted Lt. Demons after his return to Marseille, but had found that he was not to blame for the incident, see Lotus, *supra* n 82, at 31.

[125] These goals were also recognized by the ICJ in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Judgment)*, ICJ Reports (1984) 246, at 299. See Spiermann, *supra* n 14, at 56.

[126] Pellet, *supra* n 68, at 217.

[127] Travers, *supra* n 19, at 407.

mentioned such tensions resulting from states' discretion as a driver for growth in international law:[128]

> 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 […] 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 lacunae in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States.

The Court's decision in *Lotus* indeed prompted negotiations on an alternative allocation of jurisdiction over collisions on the high seas, and this may have been exactly what the Court intended.[129] In a decentralized system of states, creating an environment that stimulates states to solve a tension between their competing exercises of sovereignty is preferable to the Court legislating for states through its dispute settlement. It is also preferable from the perspective of a Court that lacks compulsory jurisdiction, as states will be less inclined to have recourse to a Court that asserts its powers too readily. Given that the PCIJ was newly established, and the first ever court of its kind, it is hardly surprising that it took this stance.

With its emphasis on co-existence and co-operation between independent communities, the *Lotus* judgment still has a lot to offer to international law, even after some 90 years. The paper concluded with an analysis of how *Lotus* can be allowed to bloom, by regenerating the age old idea of co-existence and by suggesting locality, and possible limits thereon, as an additional factor in the process of allocating jurisdiction between states to ensure states' co-existence and ultimately their co-operation.

[128] Lotus, *supra* n 5, at 19.
[129] Robert Ruzé, 'L'Affaire Du Lotus', 9 *Revue de droit international et de législation comparée* (1928) 124, at 155.