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## Letting *Lotus* Bloom

### *Abstract*

In an increasingly interdependent world, state sovereignty is inherently limited in order to protect the equal sovereignty of other states. However, identifying the precise constraints on states is a different and far more difficult question. The traditional answer is found in 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 Permanent Court of International Justice's *Lotus* judgment on which it is based. This article 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, the twin goals of international law identified by the majority. The article then examines the meaning of 'co-existence' for contemporary international law, and weighs up the principle of 'locality' as an additional criterion that ought to be considered when resolving conflicting claims of jurisdiction.

### 1. 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<sup>1</sup> and the inherent limits on its exercise.

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.<sup>2</sup> If there were a legal hierarchy between states, only the state at the apex would

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<sup>1</sup> 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 concepts see Anne Peters, 'Humanity as the A and Ω of Sovereignty', 20 *European Journal of International Law* (2009) 513, at 515–18.

<sup>2</sup> John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (2006), at 58; Peters, *supra* n 1, at 528–29.

have ultimate authority and be sovereign. Logic further dictates that when states are legally equal,<sup>3</sup> their sovereignty is by definition relative due to the need to respect other states' sovereignty.<sup>4</sup> 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).<sup>5</sup> According to the classical formulation of this principle, 'whatever is not explicitly prohibited by international law is permitted'.<sup>6</sup> The principle consecrates a consensual approach to international law,<sup>7</sup> 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 in international disputes.<sup>8</sup> 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

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<sup>3</sup> 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'); Ulrich K. Preuss, 'Equality of States — Its Meaning in a Constitutionalized Global Order', 9 *Chicago Journal of International Law* (2008) 17.

<sup>4</sup> *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.

<sup>5</sup> *The Case of the S.S. Lotus*, 1927 PCIJ Series A, No. 10.

<sup>6</sup> 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.

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

<sup>8</sup> *Arrest Warrant of 11 April 2000, (Democratic Republic of the Congo v. Belgium)*, Counter Memorial of the Kingdom of Belgium, at 3.3.29.

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.<sup>9</sup> 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,<sup>10</sup> or even retrograde.<sup>11</sup> The *Lotus* judgment has been called the 'high water mark of laissez-faire'<sup>12</sup> and voluntarism in international law,<sup>13</sup> or, even worse to late 20<sup>th</sup> and early 21<sup>st</sup> century international lawyers,<sup>14</sup> a reflection of 'positivism'.<sup>15</sup>

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. A detailed re-examination reveals that the dominant understanding of the *Lotus* judgment as encapsulated in the *Lotus* principle is based on an incomplete reading of the majority opinion and is at odds with the majority's expressed normative goals for international law. These goals are to ensure co-existence between independent communities and to create an 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

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<sup>9</sup> *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.

<sup>10</sup> 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.

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

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

<sup>13</sup> 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.

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

<sup>15</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, Declaration of President Bedjaoui, ICJ Reports (1996) 226, at 270–271; 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.').

basis for restrictions on the exercise of state sovereignty.<sup>16</sup> 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 article 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.

The article therefore rejects calls for discarding the *Lotus* judgment as an outdated and wrongly decided precedent. 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 discarded as inaccurate. Instead, an alternative reading that centres on the judgment's reference to the 'co-existence of independent communities' is proposed. The article will explore the meaning of 'co-existence' in the context of the exercise of jurisdiction, and advance a principle of 'locality' as an additional factor in the allocation of jurisdiction when multiple states can potentially exercise jurisdiction under international law. The article will elaborate on this principle of locality and on the limits it entails for the exercise of state sovereignty in a world characterized by increasing interdependence.

The article is divided in three main sections. Section 2 argues that the *Lotus* principle is based on a selective, incomplete 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. As section 3 explains, the *Lotus* principle fails to promote these goals, which further suggests that the *Lotus* principle cannot possibly be what the PCIJ intended. Section 4 then analyses what happens if we let *Lotus* 'bloom'. It examines the meaning of 'co-existence' and advances the principle of locality as a way of conceptualizing when states can exercise jurisdiction with a view of ensuring co-existence between states in an increasingly interdependent world. Section 5 concludes.

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<sup>16</sup> *Lotus*, *supra* n 5, at 18. See also Vaughan Lowe and Christopher Staker, 'Jurisdiction', in Malcolm D. Evans (ed), *International Law* (2010) 313, at 319–20.

## 2. The *Lotus* Principle is based on an Incomplete Reading of the *Lotus* Judgment

### A. 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 case stirred public opinion in both states and was politically sensitive as it arose only three years after a peace treaty — the Convention of Lausanne<sup>18</sup> — was concluded between France and one of its World War I opponents.<sup>19</sup>

According to the special agreement between Turkey and France, the main question put to the Court was whether Turkey had ‘contrary to Article 15 of the Convention of Lausanne of July 24<sup>th</sup>, 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 [...]’.<sup>20</sup>

It thus fell upon the recently-established Court to answer the delicate question of how to allocate 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 the states exercise jurisdiction concurrently based on either the act or its effects? This involved deciding which state should have the authority to regulate, and how one state’s sovereign right to regulate can be balanced with the equal sovereignty of other states. The balance to be found entailed 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 of acts committed on one ship, but felt on another ship, are sufficient to establish jurisdiction.

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<sup>18</sup> Treaty of Peace with Turkey, signed at Lausanne, 24 July 1923, 18 *AJIL* (1924), Supplement: Official Documents, at 67–74.

<sup>19</sup> 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.

<sup>20</sup> *Lotus*, *supra* n 5, at 5.

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.<sup>22</sup> The Court held that 'a ship on the high seas is assimilated to the territory of the State the flag of which it flies',<sup>23</sup> and that Turkey could therefore exercise territorial jurisdiction over *Lt. Demons'* acts on the *Lotus* because they were inseparable from their effects on the *Boz-Kourt*.<sup>24</sup> 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'.<sup>25</sup>

The assimilation of a ship to the territory of its flag state 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,<sup>26</sup> rather than one involving the passive personality principle or the protective principle.<sup>27</sup> It was a crucial and highly controversial step in the majority's reasoning that sent shockwaves through the maritime community and prompted international regulation on the issue of criminal jurisdiction over high seas collisions.<sup>28</sup> If the *Lotus* and the *Boz-Kourt* were to collide today, France would have jurisdiction as the flag state of the *Lotus* and as the state of *Lt. Demons'* nationality.<sup>29</sup> As the state of nationality of the victims, Turkey would not be able to assert jurisdiction.

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<sup>22</sup> *Lotus*, *supra* n 5, at 19.

<sup>23</sup> *Ibid.*, at 25.

<sup>24</sup> *Ibid.*, at 30.

<sup>25</sup> *Ibid.*, at 30.

<sup>26</sup> 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. Michel de la Grotte was the *nom de plume* for Åke Hammarskjöld, the PCIJ's Registrar, see Spiermann, *supra* n 14, at 214.

<sup>27</sup> The precise legal basis for the prosecution was not mentioned in the Special Agreement, but France argued, and Turkey did not deny, that it was based on article 6 of the Turkish Penal Code. This article provides for criminal jurisdiction when an offence is committed outside Turkey against it or its citizens. As France's claims were directed against the prosecution itself, the precise legal basis for Turkey's prosecution did not matter. Turkey's jurisdiction would have been disputed regardless of its specific basis, and even if the offence was considered committed on Turkey's territory by reason of its consequences, see *Lotus*, *supra* n 5, at 15.

<sup>28</sup> Charles de Visscher, 'Justice et Médiation Internationales (Première Partie)', 9 *Revue de droit international et de législation comparée* (1928) 73, at 82.

<sup>29</sup> UNCLOS, article 97. Before UNCLOS, the same allocation of jurisdiction was included in the 1952 International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matter of Collision or other Incidents of Navigation, articles 1-3 and in the 1958 Convention on the High Seas, article 11.

The changes to these specific rules on the allocation of criminal jurisdiction over high seas collisions do not affect the continued relevance of the *Lotus* judgment's general statements regarding the limits on states' territorial jurisdiction from which the *Lotus* principle is derived. These statements are the central focus of the following section, in which the majority opinion is analyzed for its support of the absolutist vision of state sovereignty embodied by the *Lotus* principle.

### **B. The Majority's Analysis in Lotus**

The majority started its analysis of Turkey's exercise of jurisdiction by looking at article 15 of the Convention of Lausanne which stated:

Subject to the provisions of Article 16,<sup>34</sup> all questions of jurisdiction shall, as between Turkey and the other Contracting Parties, be decided in accordance with the principles of international law.

After interpreting 'principles of international law' as meaning 'international law as it is applied between all nations belonging to the community of States' rather than having a meaning specific to the Convention of Lausanne,<sup>35</sup> the majority 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 could Turkey, as it argued, exercise jurisdiction provided that this did not conflict with a principle of international law?<sup>36</sup> The majority and also Judge Moore, who dissented on a different point,<sup>37</sup> looked for a rule or principle prohibiting Turkey's exercise of jurisdiction. Of the remaining dissenting judges, Judges Weiss<sup>38</sup> and Finlay<sup>39</sup> argued that the question came down to finding in international

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<sup>34</sup> Article 16 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.

<sup>35</sup> *Lotus*, *supra* n 5, at 16.

<sup>36</sup> *Ibid.*, at 18.

<sup>37</sup> *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.

<sup>38</sup> *Ibid.*, Dissenting Opinion Judge Weiss, at 42.

<sup>39</sup> *Ibid.*, Dissenting Opinion Judge Finlay, at 52. 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'.

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.<sup>40</sup>

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'.<sup>41</sup> It was the majority's description of international law's nature and conditions that resulted in its now famous dictum:<sup>42</sup>

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 in isolation, as is regularly the case in the literature,<sup>43</sup> it is not implausible to derive the *Lotus* principle from it. However, the majority qualified this statement in the next few paragraphs of its judgment. The added nuance that comes from reading the paragraph in its full context is 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 majority's statement that restrictions cannot be presumed does not imply that no restrictions exist,<sup>44</sup> as is also evident in the next paragraph where the majority immediately pointed to a significant restriction on the exercise of jurisdiction:<sup>45</sup>

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<sup>40</sup> *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.

<sup>41</sup> *Ibid.*, at 18

<sup>42</sup> *Ibid.*

<sup>43</sup> See, for example, Diane Marie Amann, 'Leviathan Below Kosovo', <<http://www.intlawgrls.com/2010/08/leviathan-below-kosovo.html>> (2010); Dupuy, *supra* n 6, at 94.

<sup>44</sup> Cf *Lowe and Staker*, *supra* n 16, at 319–20. But see contra, Sir John F. Williams, 'L'affaire du 'Lotus'', 35 *Revue générale de droit international public* (1928) 361, at 369.

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 not point 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 as the source of this restriction, which points to the existence of inherent limits on the exercise of territorial sovereignty to protect the sovereignty of other states. The majority's requirement of a permissive rule for certain state actions indicates that the *Lotus* principle, with its suggestion that only prohibitions to which states have explicitly consented matter can restrict sovereign states' freedoms, does not correctly reflect the *Lotus* judgment.

Nevertheless, the majority did not require a permissive rule for all exercises of jurisdiction. The reference to a state 'exercising its power' is understood as limited to the exercise of enforcement jurisdiction, not of prescriptive jurisdiction or of adjudicative jurisdiction.<sup>46</sup> In respect of these exercises of jurisdiction, the majority held:<sup>47</sup>

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

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<sup>45</sup> *Lotus*, *supra* n 5, at 18–19.

<sup>46</sup> Cedric Ryngaert, *Jurisdiction in International Law* (2008), at 23.

<sup>47</sup> *Lotus*, *supra* n 5, at 19.

territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.

The conclusion upon reading these three paragraphs is that the majority 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, the majority never expressly supported Turkey's argument that in case of doubt, the state should be free to act (*'in dubio pro libertate'*) either,<sup>48</sup> as the majority was silent on what should happen if the rules are unclear. Indeed, the majority never expressed any doubt about what the rules were, but rather stated that there was a clear absence of a general prohibition to exercise prescriptive and adjudicative jurisdiction extraterritorially. As Spiermann puts it, the majority thus did not express a 'presumption of freedom', but only rejected a 'presumption against freedom'.<sup>49</sup> Consistent with its conception of its role to find the law rather than deciding between the alternatives proposed by the parties,<sup>50</sup> the majority thus took the middle way foreseeing the existence of limits on the exercise of state sovereignty even when not embodied in an express rule.

### ***C. The Essence of the Majority Opinion: Co-existence and Co-operation as Limits on Territorial Sovereignty Rather than the Prohibition-Permission Dichotomy***

The majority'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 suggests. In an overlooked passage of the judgment, the majority

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<sup>48</sup> Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), 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.

<sup>49</sup> Spiermann, *supra* n 48, at 142.

<sup>50</sup> *Lotus*, *supra* n 5, at 31.

indicated that France's argument that a permissive rule was required for the exercise of extra-territorial criminal jurisdiction hinged on prior evidence of a prohibition against acting to which the permission was an exception, and therefore required an analysis of whether a prohibition existed. This shifted the focus to the question of a prohibition, which was also what Turkey had argued. The majority put it in this way:<sup>51</sup>

Consequently, whichever of the two systems [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.

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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 majority'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, which France and the dissenters did not contest, and concluded that it was necessary to explain why a sovereign state's discretion was 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.

An undercurrent in the majority's reasoning is its recognition that leaving the prosecution of Lt. Demons 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' and ensure

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<sup>51</sup> *Ibid.*, 21.

justice to the citizens that had perished on the *Boz-Kourt*.<sup>52</sup> At the end of its opinion, the majority declared that the case was one of concurrent jurisdiction, because:<sup>53</sup>

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.

As a commentator at the time recognized,<sup>54</sup> 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 conflicting 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 mentioned such tensions resulting from states' discretion as a driver for growth in international law:<sup>55</sup>

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

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<sup>52</sup> Of note in this respect is that France had prosecuted Lt. Demons after his return to Marseille, but had found that he was not to blame for the incident, see *The Case of the S.S. Lotus*, 1927 PCIJ Series C, No. 13/2, Part II – Speeches Made and Documents Read in Court, at 31.

<sup>53</sup> *Lotus*, *supra* n 5, at 30–31.

<sup>54</sup> Travers, *supra* n 21, at 407.

<sup>55</sup> *Lotus*, *supra* n 5, at 19.

respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States.

Despite most of the dissenters agreeing with France that a permissive rule is required for any exercise of jurisdiction beyond a state's territorial limits,<sup>56</sup> the gap between the majority and the dissenters is not as wide as it may seem. There was no dispute about territorial sovereignty as the basic principle of organization for international relations.<sup>57</sup> Likewise, the majority and the dissenters also recognized international conventions and international custom as important sources for rules governing the exercise of jurisdiction, regardless of whether these rules are permissive or prohibitive.<sup>58</sup> The real difference between the majority and the dissents is thus not one of prohibition or permission,<sup>59</sup> but rather the respective judges' understanding of the limits on the exercise of prescriptive or adjudicative jurisdiction that follow from the concept of territorial sovereignty.<sup>60</sup>

The dissenters found in territorial sovereignty a general prohibition on states against the application of their laws and of their courts' jurisdiction to acts or actors outside of their territory. From this, the dissenters derived a prohibition on *any* exercise of extra-territorial jurisdiction unless a permissive rule was available.<sup>61</sup> The dissenters therefore rejected Turkey's exercise of criminal jurisdiction over Lt. Demons as an infringement on France's sovereignty.

In contrast, 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, including over

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<sup>56</sup> *Ibid.*, Dissenting Opinion Judge Loder, at 35; *Ibid.*, Dissenting Opinion Judge Weiss, at 44.

<sup>57</sup> *Ibid.*, at 18–19; *Ibid.*, Dissenting Opinion Judge Nyholm, at 59, *Ibid.*, Dissenting Opinion Judge Weiss, at 45 and *Ibid.*, Dissenting Opinion Judge Altamira, at 95. 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.

<sup>58</sup> *Lotus*, *supra* n 5, at 25–26; *Ibid.*, Dissenting Opinion Judge Loder, at 35; *Ibid.*, Dissenting Opinion Judge Finlay, at 56–57; *Ibid.*, Dissenting Opinion Judge Altamira, at 96.

<sup>59</sup> 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.

<sup>60</sup> Louis Henkin, 'International Law : Politics, Values and Functions: General Course on Public International Law', 216 *Recueil des Cours* (1989), at 279.

<sup>61</sup> *Lotus*, *supra* n 5, Dissenting Opinion Judge Loder, at 35.

persons, acts or property outside its territory.<sup>62</sup> 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.’<sup>63</sup> As there were no limits on Turkey’s exercise of jurisdiction, it could do so on the basis of its territorial sovereignty over the *Boz-Kourt*, which the majority — as explained above — assimilated to Turkey’s territory.

The majority’s conclusion that there is no general prohibition on extraterritorial jurisdiction and thus that states do not need a permissive rule to exercise prescriptive or adjudicative jurisdiction shows that the majority did not conceive of international law’s role as micro-managing states, dictating in every possible instance what states are allowed to do. Rather, international law fills lacunae in respect of jurisdiction or removes conflicts when the diverse rules adopted by states collide. As long as no objections or complaints from other states arise, international law does not, in the majority’s opinion, 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.’ 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.<sup>65</sup>

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. Responding to criticism on the majority’s opinion, Huber argued that recognizing states’ freedom in the absence of a rule that decides 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.’<sup>68</sup>

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<sup>62</sup> *Lotus*, *supra* n 5, at 19; de la Grotte, *supra* n 26, at 391.

<sup>63</sup> *Lotus*, *supra* n 5, at 19 (emphasis added)

<sup>65</sup> Dupuy, *supra* n 6, at 94; Ryngaert, *supra* n 46, at 25; Andreas Paulus, ‘International Adjudication’, in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (2010) 207, at 210; Klabbers, *supra* n 59, at 209.

<sup>68</sup> *Annuaire de l’Institut de Droit International*, 36-I (1931), at 79. Author’s translation: ‘international law, like all law, rests on the idea of the co-existence of wills of the same value’.

Huber's views are significant not only because he was a leading figure in international law after World War I,<sup>69</sup> but also because he had, as the PCIJ's President, cast the tie-breaking vote in the *Lotus* judgment. It is unlikely that he would have voted with what became the majority if the opinion did not represent his own point of view.<sup>70</sup> His academic work, which adopted a sociological approach to the law<sup>71</sup> and rejected the consent of states as the source of international law's binding force,<sup>72</sup> indicates that he would not have voted for the *Lotus* Principle and thus lends power to the argument that the *Lotus* Principle is inconsistent with the correct reading of the *Lotus* judgment.

Co-existence was also a recurring theme in Huber's arbitral work,<sup>73</sup> again showcasing an approach to international law that is incompatible with the *Lotus* principle. In the Island of Palmas arbitration between the United States and the Netherlands — his best known decision on which he worked between 1925 and 1928 while the PCIJ heard the *Lotus* 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.'<sup>74</sup>

The centrality of co-existence in the *Lotus* majority 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:<sup>77</sup>

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

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<sup>69</sup> See the Symposium: The European Tradition in International Law – Max Huber in 18 *EJIL* (2007) 69.

<sup>70</sup> Klabbers, *supra* n 59, at 199, footnote 6 (pointing out that Huber was presumed to be closely involved in the drafting of the opinion).

<sup>71</sup> Max Huber, *Die Soziologischen Grundlagen Des Völkerrechts* (1928). For a discussion, see 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.

<sup>72</sup> As discussed in Diggelmann, *supra* n 71, at 142.

<sup>73</sup> For more on Huber's arbitrations, see Khan, *supra* n 59.

<sup>74</sup> 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.

<sup>77</sup> *Nuclear Weapons*, *supra* n 9, Dissenting Opinion Judge Shahabuddeen, at 393–394 (citations omitted).

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 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,<sup>78</sup> 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 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 express the position embodied in the *Lotus* principle. How then did the *Lotus* principle come to dominate our understanding of the *Lotus* judgment? A first reason is that the majority opinion itself is far from a beacon of clarity. Its lengthy analysis obscures the central question of the scope of territorial jurisdiction. A second reason can be found in former President Loder’s opinion with its summation of the majority opinion as ‘under international law

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<sup>78</sup> 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. 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 Puissechet* (2008) 215, at 217; Lauterpacht, *supra* n 48, 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’).

everything which is not prohibited is permitted.’<sup>80</sup> This sound bite gave rise to the *Lotus* principle, but is a straw man<sup>81</sup> version of the majority’s more nuanced conclusions.

The real issue facing the Court was the extent to which the territorial nature of sovereignty restricts a state’s exercise of its sovereignty. The Court decided this in the factual context of *Lotus*, which involved the exercise of criminal jurisdiction. But there is no indication that its conclusion was intended to be limited to criminal jurisdiction only, as some have suggested.<sup>82</sup> Moreover, even if the Court had only rejected strict territoriality for the exercise of criminal jurisdiction and maintained it in non-criminal matters, the practical implications of such a ruling for the exercise of state sovereignty would be limited. Given that international law does not determine what states can criminalize, states could always avoid strict territoriality by bringing the object of regulation within the scope of their criminal laws.

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 to be overcome with a permissive rule, as well as 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 the *Lotus* principle is the wrong policy for ensuring these twin goals.

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<sup>80</sup> *Lotus*, *supra* n 5, Dissenting Opinion Judge Loder, at 33. See also *Ibid.*, Dissenting Opinion Judge Nyholm, at 60.

<sup>81</sup> 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.

<sup>82</sup> 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’).

### 3. The *Lotus* Principle Fails to Ensure 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. This further strengthens the argument that the majority could not have intended to express anything like the *Lotus* principle in their opinion.

The *Lotus* principle's idea of absolute freedom for states restricted only by their consent is no longer suited to meet the modern day demands of the international community,<sup>84</sup> as it is 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 of and unaccountable for the negative externalities of their decisions, unless they have consented to a rule prohibiting their behaviour and triggering 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 negative 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,<sup>85</sup> 'a baneful spell on the progressive development of international law.'

The most common response to the unwanted implications of the *Lotus* principle is to discard the *Lotus* judgment as a precedent. In his Declaration attached to the ICJ's *Nuclear Weapons* Advisory Opinion, President Bedjaoui clarified that the ICJ's controversial decision not to reach a definitive conclusion on the legality of the threat or use of nuclear weapons when the survival of a state is at stake<sup>89</sup> 'does not infer any freedom to take a position'.<sup>90</sup> Where the PCIJ had given 'the green light of authorization, having found in international law no reason

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<sup>84</sup> *Nuclear Weapons*, *supra* n 9, Declaration of President Bedjaoui, at 270–271.

<sup>85</sup> *Nuclear Weapons*, *supra* n 9, Dissenting Opinion of Judge Weeramantry, at 495.

<sup>89</sup> *Ibid.*, at 266.

<sup>90</sup> *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.

for giving the red light of prohibition’, President Bedjaoui added that ‘the present Court does not feel able to give a signal either way’.<sup>91</sup>

President Bedjaoui’s suggestion that acts that are not expressly prohibited may nevertheless still be contrary to international law 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.<sup>92</sup> Judge Simma criticized the ICJ’s focus on whether international law prohibited Kosovo’s declaration as upholding the *Lotus* principle, arguing that<sup>93</sup>

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’.

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<sup>91</sup> *Ibid.*

<sup>92</sup> *Kosovo*, *supra* n 9, at para. 56.

<sup>93</sup> *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.

President Bedjaoui and Judge Simma are correct in their criticism of the *Lotus* principle as undesirably deferential to states in an interdependent world. However, the PCIJ's emphasis in the judgment on co-existence and co-operation limits the deference given to states. When that aspect of the judgment is given full recognition, there is no need to disregard it or to examine the alternative proposed by Judge Simma that international law can be deliberately silent.

The alternative approach of a 'deliberative silence' about the legality of states' actions is far from satisfactory either. As Peters points out,<sup>94</sup> concepts such as 'deliberate silence' are 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 rule prohibits this act.

Even less workable than the concept of a 'deliberate silence' are suggestions that the legality of states' actions depends on finding a permission in international law, as argued by France and the dissenters in the *Lotus* case. Such a requirement is not feasible for three reasons.

First, a system that requires permission before states can act is undesirable. It fails to remove the 'baneful spell' of consent that hinders the progressive development of international law. Contrary to the *Lotus* principle, a requirement of permission is problematic not because the acting state will have a de facto veto right over a rule that prohibits its actions, but because the state 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. It 'assumes a complete and perfected body of international law, adequate to meet and settle all conceivable international disputes'.<sup>96</sup> 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. Whenever a previously unknown problem

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<sup>94</sup> Anne Peters, 'Does Kosovo Lie in the Lotus-Land of Freedom?', 24 *Leiden Journal of International Law* (2011) 95, at 99.

<sup>96</sup> George Wendell Berge, 'The Case of the S.S. "Lotus"', 26 *Michigan Law Review* (1927-1928) 361, at 375.

arises under a system based on permissions, states would face the unenviable choice between inaction<sup>97</sup> or violation of international law until a specific legal basis permitting action has been created to respond to this problem.

Third, even if it were feasible to have a comprehensive regime permitting all possible states' actions, it is unlikely that states would accept an international legal 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 in 1927, when a ruling to this effect in the *Lotus* case would have amounted to political suicide for the young PCIJ. In a case involving questions of criminal justice, as the *Lotus* case, states would then only be able to protect the interests of their citizens within their territory against the negative effects of an action in another state when they can point to a specific permission.

The only solution to avoid these pitfalls and to make a system that requires *ex ante* permissions workable in practice, is to give states a broad freedom to act as a residual rule when international law is silent. But this effectively turns 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 converse of an obligation or a prohibition.<sup>98</sup> 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 for the burden of proof of the choice between systems based on prohibitions and those based on permissions. However,

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<sup>97</sup> As Turkey pointed out in its oral pleadings before the Court, see *Lotus*, *supra* n 52, at 112.

<sup>98</sup> 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'.

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,<sup>99</sup> as well as by its successor in the *Fisheries Jurisdiction* case<sup>100</sup> and the *Nicaragua* case.<sup>101</sup> 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.<sup>102</sup>

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. As a result, a system based on permissions rather than prohibitions is not a suitable alternative to the *Lotus* principle either.

Ultimately, the legality of a state's action depends on the residual rule 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 is permissive, meaning that it leaves a broad discretion to states, as the *Lotus* Principle does, international rules will mostly take the form of prohibitions, formulated as 'do not do X' or 'do not not do Y'.<sup>103</sup> In contrast, a prohibitive residual rule will be complemented by permissive international rules, formulated as 'you may do Z'.

In the *Lotus* case, the residual rule that governed the exercise of territorial sovereignty is not the *Lotus* principle, but rather that territorial sovereignty needs to be exercised so as to ensure co-existence and co-operation between independent states whose sovereignty is 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.

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<sup>99</sup> *Lotus*, *supra* n 5, at 31.

<sup>100</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)(Merits)*, ICJ Reports (1974), 3, at 9.

<sup>101</sup> *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America)(Merits)*, ICJ Reports (1986), 14, at 24–25.

<sup>102</sup> See also Lauterpacht, *supra* n 48, at 365.

<sup>103</sup> Or, more simply, 'do Y'.

Nevertheless, the majority also found 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 2, this nuanced position indicates that the majority did not intend to adopt the *Lotus* principle as its vision of international law.

Given that the *Lotus* principle is not the correct reading of the *Lotus* judgment and fails to promote the goals the PCIJ expressed for international law, there is no reason to reject the *Lotus* judgment because of the *Lotus* principle. Once the link between the judgment and the principle is severed, we can analyze the judgment's continued relevance in today's interdependent world and consider the limits it entails for the exercise of state sovereignty, particularly regarding the exercise of prescriptive or adjudicative jurisdiction.

#### **4. *Lotus* in Full Bloom**

The previous two sections have argued that the *Lotus* principle 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 majority found to be central to international law.

However, the *Lotus* judgment's core, like the seeds of its namesake flower,<sup>107</sup> remains viable still. The 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 clearly exists when a treaty or custom prohibits the action, just as 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 sovereignty should be exercised so as to ensure co-existence and co-operation between independent states. The exercise of sovereignty can therefore be limited when it threatens co-existence and co-operation between states.

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<sup>107</sup> J. Shen-Miller et al., 'Exceptional Seed Longevity and Robust Growth: Ancient Sacred Lotus from China', 82 *American Journal of Botany* (1995) 1367.

Of the two goals for international law, ensuring co-existence is the most important one in a pluralistic society of states.<sup>108</sup> The body of obligations created through co-operation supplement, but do not replace, the rules that govern states' co-existence, in response to specific instances of increasing interdependence.<sup>109</sup> Accordingly, the remainder of this article will focus on unpacking the concept of co-existence as the foundation for systemic limitations on states' exercise of jurisdiction that form part of what Judge Shahabuddeen called the 'objective structural framework within which sovereignty must necessarily exist'.<sup>110</sup>

### A. 'Co-Existence'

The PCIJ did not specifically define 'co-existence' in *Lotus*. The plain meaning of the term as 'existing together or in conjunction' will therefore be adopted here.<sup>126</sup> Co-existence is thus concerned with ensuring that states can exercise their sovereignty in response to what they perceive as negative effects within their territory. Likewise, co-existence entails restrictions on states when the exercise of their sovereignty restricts that of other states. This approach to co-existence can also be found 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 additional layer of rights and obligations provided by the 'international law of co-operation'.<sup>127</sup> The 'international law of co-existence', as Friedman described it, covers the rules and principles guaranteeing mutual respect for each state's territorial sovereignty regardless of their social or economic structure.<sup>128</sup> Coming under the umbrella of the

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<sup>108</sup> Pellet, *supra* n 78, at 221; Spiermann, *supra* n 14, at 54.

<sup>109</sup> Wolfgang Friedmann, *The Changing Structure of International Law* (1964), at 66.

<sup>110</sup> Nuclear Weapons, *supra* n 9, Dissenting Opinion Judge Shahabuddeen, at 393.

<sup>126</sup> 'Coexistence', in *Oxford English Dictionary* 2nd ed. (1989).

<sup>127</sup> Friedmann, *supra* n 109, at 60-61.

<sup>128</sup> *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. In the 1950s and 1960s, numerous attempts were held to codify principles of peaceful co-existence, starting with the 1954 *Pancha Shila* Agreement between China and India, see 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. The agreement proclaimed five principles: (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. Commentary at the occasion of the Agreement's 50<sup>th</sup> and 60<sup>th</sup> anniversary can be found in 3 *Chinese Journal of International Law* (2004) 363-384 and 13 *Chinese Journal of International Law* (2014) 477-505 respectively. In the early 1960s, 'peaceful co-existence' became a key element of the USSR's foreign policy 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. See Nikita S. Khrushchev, 'On Peaceful Coexistence', 38 *Foreign Affairs* (1959) 1, at 3. 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

international law of co-existence are rules such as the prohibition on the use of force, the principle of non-intervention in domestic affairs, and the principles on the allocation of jurisdiction.

Ensuring co-existence between states hinges on the delineation of a state's domestic affairs, domestic jurisdiction or 'reserved domain'. These concepts, often used interchangeably, determine the matters states can exercise jurisdiction over and conversely the matters they have to refrain from and leave to other states. The scope of states' domestic affairs is not set in stone, but depends on the evolution of international relations.<sup>129</sup>

Traditionally, the scope of a state's domestic affairs is defined by its territorial boundaries,<sup>130</sup> with a state exercising jurisdiction over acts or actors within its territory. 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 that state's consent. This is an expression of the principle of non-intervention. Allocating prescriptive jurisdiction along territorial boundaries provides each state its own space 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 prescriptive jurisdiction provides certainty to individuals, who do not need to determine the nationality of those they interact with to determine which legal system governs their interaction.

However, prescriptive jurisdiction based on the territoriality of the act or the actor does not guarantee co-existence between states. As the *Lotus* case illustrates, an act and its effects are

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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. Specific codification attempts at the ILA failed to come to fruition because acceptance of a fundamental concept of communist states' foreign policy proved politically unpalatable to Western scholars, see ILA, 'Report of the Committee on Peaceful Coexistence', *Proceedings of the American Branch of the Law Association* (1963–1964) 83, at 83. As explained in John N. Hazard, 'Codifying Peaceful Co-Existence', 55 *American Journal of International Law* (1961) 109, at 110, footnote 9, they did not, however, consider 'peaceful co-existence' to have the same meaning as 'co-existence' in *Lotus*, and preferred the term 'friendly relations' instead, as used a decade later in the UN General Assembly's Friendly Relations Declaration.

<sup>129</sup> *Nationality Decrees Issues in Tunis and Morocco (French Zone) on November 8<sup>th</sup>, 1921 (Advisory Opinion)*, 1923 PCIJ Series B, No. 5, at 24.

<sup>130</sup> 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 46.

not necessarily restricted to the same territory, which can create tensions between states when the state where the act or actor is located does not regulate. Such instances have only become more frequent in today's interdependent world where questions regarding the allocation of prescriptive jurisdiction over multi-territorial activities, such as international aviation, and over multi-national actors regularly arise. Conflicting exercises of jurisdiction further arise because international law recognizes non-territorial bases of jurisdiction, such as the personality principle or — more controversially — the effects doctrine. Unlike private international law, public international law has not yet developed mechanisms to balance the competing interests reflected in concurrent exercises of jurisdiction,<sup>132</sup> leading to unresolved conflicts that threaten co-existence between states.

Conflicts of jurisdiction usually result in complaints about violations of sovereignty and interference in domestic affairs, prompting the question how to balance the competing claims of sovereignty with the aim of protecting co-existence between all states involved.

The strict territoriality of the *Lotus* dissenters, in which only the location of the act or the actor counts, is undesirable from the perspective of co-existence. It 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 of the act or the actor relies on governments to regulate so as to avoid negative effects in other states. It is unlikely that they will do so when 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 or the actor 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 a world of increasing interdependence.

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<sup>132</sup> Alex Mills, 'Rethinking Jurisdiction in International Law', 84 *British Yearbook of International Law* (2014) 187, at 209.

## **B. *The Principle of ‘Locality’***

In light of the inadequacy of territoriality for the protection of states’ co-existence, an additional criterion is needed to determine the scope of states’ domestic affairs over which they can exercise jurisdiction, and to do so in a way that promotes the co-existence of states. The additional criterion proposed here is the principle of locality. It is important to note that the principle complements rather than replaces the existing bases for the exercise of jurisdiction by helping to identify the state that is best placed to exercise jurisdiction.

The idea behind the principle of locality is, first, that to ensure co-existence between states even in a world where they have become increasingly interdependent, states should be allowed to act when they experience the effects of an act committed elsewhere. Second, limits on the exercise of jurisdiction are possible if the effects, but not necessarily the relevant act or actor, are wholly or partly localized outside a state’s territory.

This section first explains how under the proposed principle of locality, the locality of effects is necessary for a matter to come within a state’s domestic affairs, and hence for it to be able to exercise jurisdiction in a way that does not threaten states’ co-existence. Next, it explains why the locality of effects is nevertheless not a sufficient condition for the exercise of jurisdiction.

### ***a. Locality of Effects as a Necessary Condition for the Exercise of Jurisdiction***

Under the proposed principle of locality, the effects of an act within a territory are a necessary condition for the exercise of prescriptive jurisdiction over that act or actor. Conversely, 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. For example, states should be allowed to enact antitrust legislation to prohibit cartels that affect their economy, and it is no obstacle to the exercise of prescriptive jurisdiction if the cartel decisions were made elsewhere. It is important here to distinguish between prescriptive and enforcement jurisdiction. While the latter is strongly linked to territory,<sup>137</sup> 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

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<sup>137</sup> Lotus, *supra* n 5, at 18–19.

enforce its regulation. This is, however, a practical rather than legal limit on prescriptive jurisdiction, which can be exercised even if enforcement jurisdiction is not possible.<sup>138</sup> Or, as Akehurst put it, ‘ineffectiveness is not the same as illegality’.<sup>139</sup>

Not only is the physical presence of an act or actor within a state’s territory not a necessary condition for the exercise of prescriptive jurisdiction in today’s interdependent world, it is not a sufficient condition either. For example, if a cartel’s decisions took place in a state’s territory or the persons involved in the cartel are based in its territory, this does not automatically entitle this state to exercise jurisdiction ahead of other states that experience negative effects of the cartel.<sup>140</sup> 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 negatively affects another state’s capacity to decide. Conversely, 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. Such regulation is not per se incompatible with co-existence in a world of increasing interdependence. Under the principle of locality, the locus of the actors or acts does not automatically prevail over the locus of the effects.

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. It allocates the exercise of authority to the lowest possible level of government,<sup>141</sup> 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.<sup>142</sup> Locality performs a similar function, albeit in the horizontal relationships between equally sovereign states, by allowing the political

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<sup>138</sup> D. W. Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’, 53 *British Yearbook of International Law* (1983) 1, at 1.

<sup>139</sup> Michael Akehurst, ‘Jurisdiction in International Law’, 46 *British Yearbook of International Law* (1972–1973) 145, at 181.

<sup>140</sup> This does not imply that this state can never regulate the cartel, as it almost certainly would be exposed to the cartel’s effects.

<sup>141</sup> Isabel Feichtner, ‘Subsidiarity’, in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2007), at 1, 3.

<sup>142</sup> Dupuy, *supra* n 6, at 77.

decision to be made by the state that is closest to the negative effects that need to be addressed.<sup>143</sup> Depending on how widespread the negative effects are, application of the locality principle may result in multiple states exercising jurisdiction. Therefore, further limits are necessary to fully ensure co-existence between states. These limits are explored next.

***b. Locality of Effects is not a Sufficient Condition for the Exercise of Jurisdiction***

Although the locality of effects is a necessary condition for the exercise of prescriptive jurisdiction from the perspective of promoting co-existence, it is not a sufficient condition. In other words, the mere presence of effects does not entitle a state to exercise prescriptive jurisdiction over the causes of these effects. This is because the exercise of jurisdiction based on the locality of effects does not eliminate collisions of state sovereignty, as an act can produce effects in multiple states. Likewise, a state's attempt to address effects within its territory can trigger further effects elsewhere. Therefore, even if a state should be able to regulate a specific act because it is exposed to the effects thereof, the need for international law to ensure co-existence between states may require the state's discretion to be limited to avoid in turn causing a negative impact on other states. In other words, just as the locality of the act or the actors to be regulated within a state's territory does not imply that the act or actor belongs to a state's domestic affairs, the locality of effects is not sufficient either. In this sense, the principle of locality is different from the effects doctrine under which the presence of effects is enough for a state to exercise jurisdiction.

Under the proposed principle of locality, the exercise of jurisdiction based on the locality of effects is limited by 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 in 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 externalities, which distinguishes between physical,

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<sup>143</sup> Ryngaert, *supra* n 46, 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).

pecuniary and psychological externalities,<sup>144</sup> is helpful to determine which effects justify the exercise of jurisdiction. While the first types of externalities 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 effects that justify the exercise of jurisdiction is not that these are less important than the other types of externalities, but that psychological externalities reflect a clash of fundamental values.<sup>145</sup> The principle of non-intervention protects a state's independent decision-making on such fundamental values as an essential element of state sovereignty. 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. An 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<sup>146</sup> is there ground for action in response to a psychological externality, as this expression takes the matter out of the scope of a state's domestic affairs and thus outside the protection of the principle of non-intervention.<sup>147</sup>

In contrast, a state should be able to respond against the physical and pecuniary externalities of another state's actions and states should avoid acts that result in such externalities. In international law, the no harm principle embodies a prohibition against causing physical externalities. There is less clarity whether international law currently prohibits pecuniary

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<sup>144</sup> 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.

<sup>145</sup> *Ibid.*, at 104–105.

<sup>146</sup> Of course the scope of this expression will often be debated, but that is not a question that should concern us here.

<sup>147</sup> As the PCIJ recognized, the scope of domestic jurisdiction or domestic affairs 'depends on the development of international relations', see *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8<sup>th</sup>, 1921 (Advisory Opinion)* PCIJ Series B 5, at 24.

externalities,<sup>148</sup> but the application of the effects doctrine, despite its controversy, is an indication that states often consider themselves as legally able to regulate in response to the economic effects of acts in another state. Furthermore, the various limitations imposed on regulatory autonomy by free trade agreements indicate that, absent such agreements, states are free to regulate as they see fit.

While the quality of the effects is a limit on ‘locality’, the quantity of the effects should not necessarily determine the existence of a limit. There should, in other words, not be an automatic *de minimis* exception. In the end, sovereign states should be able to decide whether the effects they are exposed to, however small, warrant a response. Even so, 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 not restricted — are good neighbourliness<sup>149</sup> and reasonableness.<sup>150</sup> A detailed study of the breadth of the limits these norms can justify on the exercise of jurisdiction and sovereignty, informed by locality, with a view to ensuring co-existence in increasing interdependence, is beyond the scope of the current article and the subject of future research.

### *c. Locality and Co-existence Between States*

Applying the principle of locality to the determination of the scope of a state’s domestic affairs, and hence to the legality of its exercise of jurisdiction, promotes the co-existence between states that the majority in *Lotus* identified as a major goal for international law.

This principle promotes co-existence through its effects on the allocation of jurisdiction because it protects states’ ability to regulate when their domestic affairs are negatively

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<sup>148</sup> During the ILC’s discussions, Special Rapporteur Quentin-Baxter added that although the no harm principle could be very useful for achieving a balance in the economic area between liberty of action and freedom from adverse effects, ‘there is no possibility of proceeding inductively from the evidence of State practice in the field of the physical uses of territory to the formulation of rules or guidelines in the economic field.’ See International Law Commission, *Fourth Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, by Mr. Robert Q. Quentin-Baxter, UN Doc A/CN.4/373 (1983), 205, para. 215.

<sup>149</sup> Laurence Boisson de Chazournes and Danio Campanelli, ‘Neighbour States’, in Rüdiger Wolfrum (ed), *Max 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).

<sup>150</sup> 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).

affected. Leaving the political decision to the state or states that feel the brunt of the effects is preferable for several reasons that all benefit co-existence between states. First, states are responsible towards their inhabitants for the protection of the environment, health, economic stability and other values.<sup>151</sup> 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, that state affects people to whom it is not politically accountable, which can trigger conflict and threaten co-existence between states. The consequences of a lack of incentives are 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 act itself towards the act's effects, locality better protects states' sovereignty, because it enables states to take decisions regarding acts that affect them.

The principle of locality also promotes co-existence by ensuring that the resulting allocation of jurisdiction does not cast a 'baneful spell' on the progressive development of international law. The state whose actions negatively affect other states does not have a de facto veto right over the creation of an international law rule that prohibits that action (in a system based on prohibitions) or allows the affected state to respond (in a system based on permissions). Granted, application of the principle of locality can result in multiple states claiming that an act belongs to their domestic affairs. However, as argued above, concurrent jurisdiction plays an important role as signalling where international law needs to develop further. By creating an incentive for co-operation to avoid concurrent jurisdiction, the principle of locality can thus also help achieve the second goal for international law, that of promoting co-operation between states.

## **5. Conclusion**

Max Huber famously compared the PCIJ's decisions 'to ships which are intended to be launched on the high seas of international criticism'.<sup>152</sup> By all accounts, it has been rough

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<sup>152</sup> As quoted in Spiermann, *supra* n 14, at v and 248.

<sup>152</sup> As quoted in Spiermann, *supra* n 14, at v and 248.

sailing for the *Lotus* judgment, which has been widely understood as giving rise to the *Lotus* principle. This article 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.<sup>153</sup> The dissenters' approach, with its focus on permissive rules, suffers from the same shortcomings as the *Lotus* principle they so despise; it hollows out the idea of sovereignty as independence that is central to international law<sup>154</sup> because it 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. As a result, the dissenters' approach threatens co-existence, and undermines the progressive development of international law.

The majority's recognition of concurrent jurisdiction is preferable to the dissenters' approach in that the majority acknowledged that act or actors outside a state's territory can at times affect its territorial sovereignty, 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 court will only be able to enforce its legislation or its judgments over acts, actors or goods outside its territory with the consent of the territorial state.

The PCIJ'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

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<sup>153</sup> Ole Spiermann, 'Judge Max Huber at the Permanent Court of International Justice', 18 *European Journal of International Law* (2007) 115, at 132.

<sup>154</sup> Pellet, *supra* n 78, at 217.

intended.<sup>160</sup> 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 settling the issue for states through adjudication. 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 when it heard the *Lotus* case, 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, even after some 90 years, still has a lot to offer to international law. As argued here, *Lotus* can be allowed to bloom by reinvigorating the judgment's age-old idea of co-existence. To implement co-existence in a world of increasing interdependence, this article proposed the principle of locality, and possible limits thereon, as an additional factor in the process of delineating the scope of states' domestic jurisdiction in an effort to ensure states' co-existence and ultimately secure their co-operation where and when needed.

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<sup>160</sup> Robert Ruzé, 'L'Affaire Du Lotus', 9 *Revue de droit international et de législation comparée* (1928) 124, at 155.