International Law in Relation to Private Law Practice

Frederic R. Coudert

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

Part of the Law Commons

Recommended Citation
Frederic R. Coudert, International Law in Relation to Private Law Practice, 12 Cornell L. Rev. 13 (1926)
Available at: http://scholarship.law.cornell.edu/clr/vol12/iss1/2

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
International Law in Relation to Private Law Practice*

FREDERIC R. COUDERT†

There is a current notion, or, perhaps I should say a fancy, not wholly confined to layman that “international law” is a misnomer. The underlying thought appears to be that, as there is not an international sheriff who can beckon to a *posse comitatus* to enforce the final judgment of some court possessed of statutory jurisdiction, international law so-called is not really law.

One has occasionally noted the smile of a sarcastic friend in emphasizing the word “international” prefixed to lawyer. The smile may be kindly, but the thought is that the phrase is a contradiction in term. This is an attitude not uncommon and perhaps quite natural among the brethren of the bar who have never had to perplex their heads with questions of international law which had found their way into the law courts, and whose information was derived from the newspapers.

It is gratifying to find that in the law schools we have passed beyond this phase, and international public law as well as private law, (or conflict of laws), is now taught as part of the ordinary curriculum.

A quarter of a century ago, and, in fact, until quite recently, neither constitutional nor administrative law were looked upon as worthy of treatment in the schools of law. Law was confined to contracts, real property, equity, and the general matters which the ordinary country lawyer treated for a living and which alone were deemed sufficiently important to occupy the attention of technical schools.

To the School of Political Science at Columbia University, founded in 1880, and composed of a group of original thinkers and men of vast erudition, is largely due the credit of having insisted that public law was law in the wide and full sense of the term, and that to understand and apply it were needed the qualifications of the trained legal mind. The popular notion is, therefore, a mere survival of another age; it can easily be explained in the light of history.

*Of the New York bar.
†A lecture delivered at the Cornell Law School, under the Frank Irvine Lectureship of the Phi Delta Phi Foundation, May eighth, nineteen hundred and twenty-six.
International law is a recent growth and began with the rise of the national States upon the ruins of the old concept of universal empire. It was due largely to Grotius and to eminent successors who stressed international morality and the law of nature rather than treaties or judicial precedents of which there were so few.

The teachers of public law on the continent for many generations were men of academic minds whose thoughts ran upon general political or philosophic concepts and who were remote from the forum. International arbitrations were comparatively rare until the beginning of the Nineteenth Century.

Since then international law has developed so that today it is as much a thing of legal reasoning, of precedent and of juristic analysis as the law of tort or contract. This has been demonstrated with complete finality by a living jurist to whom the world owes a profound debt. I refer to John Bassett Moore, Judge of the Permanent Court of International Justice.

To the mind of John Bassett Moore, a man accustomed to dealing with questions between nations, and familiar with the history of international relations, counsel in various cases before international tribunals, the Austinian view of international law was not only false but misleading and destructive. For a generation he preached the doctrine that international law was as truly law as was constitutional law; that its uncertainties, its problems and its perplexities were due, not to its lack of sanction, but to those factors which made for uncertainty in every branch of law—the rapidly moving and changing tide of human development.

To him the idea that national States existed without subjection to law, that wrongs to the individual which would have constituted crimes, torts or breach of contract in municipal law, were without legal redress was not only abhorrent, but absurd. Instead of dealing with the matter by philosophic generalization, by subtle argument, or by sterile controversy, he undertook, alone, the work of compiling a real corpus juris of international law. This great work was begun by the writing of seven volumes, recounting in all necessary, useful and interesting detail the great body of controversies to which the United States had been a party and which had been settled before arbitral tribunals in accordance with law. (Moore’s International Arbitrations.)

I think that this work may be said to have been a real revelation even to the educated lawyer and diplomat. It demonstrated that every form of controversy, from that of national boundaries to torts committed against the humblest individual, had been satisfactorily
disposed of before tribunals administering definite rules of law in the same prosaic fashion as that applied by municipal courts. Questions between Great Britain and the United States, as appealing to belligerent instincts as any arising between nations, were, in the end, submitted to bodies of jurists who, after interminable written and sometimes oral arguments by venerable lawyers, disposed of them in accordance with the accepted canons of international law.

Nearly every one of these decisions, it was shown, had created an additional precedent, a new starting-point, a further advance toward certainty, clarity and justice in the law. Years of international friction, diplomatic wrangling, phrase-making and oratory were brought to an end by the Bering Sea Arbitration. Boasted sovereignty over closed oceans, threatened and actual seizures of ships upon the high seas, with all the concomitant stimulation of national sentiment, ended in legal arguments of interminable length through warm summer days before an intelligent, though somewhat somnolent Arbitrable Tribunal in Paris. The result was that the questions raised with such vehemence and discussed with such acrimony are now quite forgotten save by the occasional historian or international lawyer.

All these things were demonstrated by Judge Moore in two monumental works in undramatic fashion and with a conclusiveness that foreclosed discussion or academic refutation.

The World War did not invalidate, but on the contrary, it immensely emphasized the importance of international law. In consequence of the Versailles Treaty and of our own Treaty with Germany, the Berlin Treaty so-called, mixed arbitral tribunals have been established as a necessary part of the peace adjustment and have in accordance with principles of law disposed of thousands of cases in the same fashion as would have been done by the House of Lords, the Privy Council or the Supreme Court of the United States.

Throughout the war the newspapers were daily filled with the questions of the applicability of the Hague Treaty Conventions, the legality of the allied blockade, contraband lists, the doctrine of continuous voyage and ultimate destination, as well as kindred matters. These questions could no more be fully understood without a knowledge of the history of international law than could questions of equitable jurisprudence be comprehended by one without the necessary training. Sooner or later every one of these great questions must and will come before a court, either a court constituted ad hoc, or the Permanent Court now functioning at the Hague. The cases will be argued by lawyers upon definite pleadings and upon
testimony taken under fixed rules. The lawyer who was not conversant with litigation or who had no training in the proper presentation of a case would find himself as much at a loss before an international tribunal as he would before the Circuit Court of Appeals.

It was long ago held by Chief Justice Marshall that international law was part of our common law, and the Supreme Court has always been a great international tribunal not only because it decided controversies between States, but also because there are constantly arising in litigation questions dependent purely upon principles of international law.

I shall give, merely by way of example and in order to fix and emphasize these somewhat general statements, a rapid survey of a few cases that have come to me in the course of a general and miscellaneous law practice. These cases will, I think, justify the proposition that there is nothing occult, mysterious or abnormal about international law. They may also be useful to the man who thinks that international law is of so lofty and perhaps spiritual or intellectual a nature that the so-called international lawyer may dispense with the drudgery incident to the making of any other kind of a lawyer. I have known many other lawyers, both in this and in other countries, whose practice had given them some reputation as international lawyers, and I have never known one who would not have been considered by every canon of capacity an able lawyer in the fullest sense of the word. The academic dreamer and the mere philosopher are as helpless in the determination of international legal problems as they would be in the conduct of a law office in the State of New York.

My first contact with important international controversy was when as still a student in the law school I accompanied my father to Paris where he went with several colleagues to represent the United States in the Fur Seal Arbitration with Great Britain.

The counsel on both sides were men who had spent their lives in the ordinary law courts of their respective nations.

England sent Sir Charles Russell, then Attorney General, later Lord Chief Justice, under the title of Earl of Kilowen, and Sir Richard Webster, former Attorney General, later Lord Chief Justice, under the title of Lord Alverstone. With them was associated Sir Christopher Robinson, a most able Canadian barrister, whose life had been spent in the hard-fought contests of the forum.

America sent four seniors, one of them Mr. E. J. Phelps, a former Ambassador to England, who had achieved distinction in the courts of his native State, Vermont, and later was known as a lawyer
throughout the nation. Mr. James C. Carter, who had never occupied public office, but who was recognized as a great lawyer, not only in his own State of New York, but throughout the Union, and especially in the Supreme Court where he had had a large practice; Judge Blodgett, of Chicago, a well known lawyer of general practice, and my father who had for well nigh half a century practiced almost every kind of law.

On both sides there were associated juniors, some of whom have since risen to great eminence, like former Secretary of State, Robert Lansing.

The questions dealt with were of wide scope, the interpretation of history, the meaning of diplomatic documents, and, finally, the fundamental nature of property, mainly as determined by precedents found in England and in America. The court was empowered to determine the facts, and in so doing was compelled to scrutinize thousands of pages of evidence. Arguments lasted for several months in which every resource of the lawyer from rhetoric to research was exhausted.

If I had ever cherished any illusions as to the exceptional nature of international law they would have been shattered then and there.

The tribunal was exceptional in that it was composed of seven jurists and lawyers of great eminence, an English Judge and an American Judge among them; the proceedings were conducted with rigid adherence to judicial forms. When Mr. Carter closed an argument of eight days' length, in which he had upon repeated occasions referred to the law of nature, Sir Charles Russell, in opening cited the anecdote of the young barrister who finding his case insufficiently buttressed by authority referred to the Great Book of Nature, upon which the presiding Justice interrupted to ask, "What page, and what edition, please?"

The case was ultimately decided in its main elements, contrary to the contentions of the United States, but I think in conformity with settled principles of property law as developed in England and America.

Of course, most international questions presenting themselves to the practitioner do not come to him in so spectacular and exceptional a fashion.

A client is arrested for an alleged crime; he finds that the client holds some official position in a foreign Government, and he asks himself whether this may not change the nature of the prosecution, or render the client immune from the action of the ordinary courts.

My first contact with the Supreme Court arose out of an arrest in
February, 1897, in New York, of an American citizen who was invested with the office of Consul of Turkey in Boston, (Iasigi v. Van De Carr, 166 U. S. 391). He applied for a writ of habeas corpus on the ground that under the Constitution of the United States he could not be prosecuted other than in the Federal courts. This very salutary clause of the Constitution is, of course, predicated upon the general principles of international law giving to the representatives of a foreign nation peculiar privileges, and, in the case of Ministers or Ambassadors, complete immunity from suit.

The question in this case while argued at full length before the court, was rendered moot by the action of the Secretary of State in revoking the consular exequatur and thus depriving the gentleman of his consular position and rendering him subject to the process of the courts of Massachusetts and hence extraditable from New York to that State.

The intervention of the executive thus spoiled an interesting case which instead of becoming a precedent on a matter of public law is now merely cited on a narrow point of procedure in connection with the writ of habeas corpus.

Questions relating to consuls, their powers, duties and privileges under treaties and in accordance with international law, frequently find their way into the courts. The Supreme Court has been called upon to pass on the question as to how far a treaty, giving certain rights to consuls in the administration of estates of their nationals, may supersede a State statute devolving such functions upon a public administrator.

These cases, of which there are several in the higher courts of the various States, as well as in the Supreme Court of the United States, are dependent upon the interpretation of treaties and their effect upon local law, as well as upon the history of consular rights and privileges in connection with which the apposite provisions of the Treaty must be read. (Rocca v. Thompson, 223 U. S. 317.)

In everyday practice there may arise questions of interest and importance to governments. I remember one case especially because of some picturesque accompaniments.

In 1896 a Venezuelan General, bearing proudly the scars of war, entered my office and told me with dignity and righteous indignation that he had been arrested upon arrival in New York for assault and battery because of something done by him in the course of a military operation in Venezuela.

It turned out that after the taking of Ciudad Bolivar he found the supply of water threatened because a certain Underhill, an American
business man, also acting as consul in that city, was preparing to leave the city and to abandon the contract under which he was operating the municipal waterworks. Gently imposing the military hand upon him, the General insisted that he continue to operate, which he did for some time under this gentle persuasion. Soon thereafter he returned to his native city of Brooklyn, and, when a few years later the General came to visit in quasi triumph the United States he was arrested by a writ issued from the Supreme Court of the State in connection with false imprisonment, assault and battery.

Normally, such a case would have presented the prosaic elements of the usual tort action. By reason, however, of the circumstances accompanying it, it has become an important precedent in our American law. (Underhill v. Hernandez. 168 U. S. 250).

The court held that the General could not be tried in the judicial forum because

"The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact."

(Underhill v. Hernandez, supra, p. 252.)

Many American and English cases were cited to that effect and the case represents the settled law today on that subject.

The students will note, if they examine these two cases as they proceeded through the courts, that various rather intricate questions of procedure were involved and that they could only have been dealt with by the lawyer familiar with common law practice and principles.

International law is also used in the sense of international private law, perhaps more properly called conflict of laws. This is now recognized to be a branch of our common law currently taught in the law schools. It is, however, a specialty of high technical character involving such fundamental questions as status, marriage and divorce and the effect of foreign judgments.

On the continent of Europe it has been treated in rather academic fashion because the university law schools and writers on the theory of law have an influence and an importance almost, if not quite, equal to that of the courts. In this country any of these questions may at any time confront the practicing lawyer. They are incidents to a general practice and they are scarcely sufficiently numerous to warrant any attempt at specialization, but they come up with sufficient frequency, especially in our Union with its half a hundred jurisdictions, to warrant every student in giving the closest attention
to a course in the Conflict of Laws. If he does not do so he may at any time find himself sorely puzzled and of little use to a troubled client.

To mention, however, further questions of international public law, with which alone I am now dealing, it is difficult to pick from the many interesting cases that arose after the Spanish War and more especially after the Great War.

Of course the majority of such cases came before arbitral or special tribunals, like the Court of Claims. Some of them found their way into the Supreme Court and were often accompanied by questions of constitutional or administrative law.

The status of the Roman Catholic Church and its capacity for the holding of property, under our Constitution, the Treaty of Paris and in the light of its history and its relations with Spain, were given fullest consideration in the case of *Ponce v. The Roman Catholic Church*, (210 U. S. 296).

Questions of the power of the military over enemy property were involved in cases like that of *Dias v. United States*, (222 U. S. 574). That case involved the limitation upon the powers of confiscation and the Supreme Court there laid down important rules.

The case of *Vilas v. The City of Manila* (220 U. S. 345), which came up regarding a suit over a coal bill for fuel furnished to the city, involved the broad proposition of the continued corporate survival of municipalities after a change of sovereignty.

The Great War involved innumerable questions that are only in process of settlement. Some of them, however, have been already disposed of by our courts, such as the case of the steamship "Appam." This was an interesting case and in its solution we harkened back to our earliest judicial precedents as to neutrality and prize.

The cruiser "Moewe" escaping through the network of British blockading vessels in the North Sea, roamed about the world seeking whom it might devour. It captured the "Appam" a fine passenger and freight vessel in the West African service, and, fearing for her recapture, a crew was detailed to send her to Newport News as prize and there "lay her up" for the continuance of the war.

The American people were rather startled to learn of the arrival of this vessel and of the German contention that under an old Treaty of 1799 power was given to Germany to use ports of the United States for the harboring of prize vessels.

A considerable diplomatic controversy ensued, but the controversy was soon translated to the judicial forum when the original owners of the vessel libeled it in a replevin action.
The case was tried at Norfolk, Virginia, and a decree given in favor of the libelants. An appeal was taken by the German Government on behalf of the vessel to the Supreme Court of the United States. Most interesting questions not only of treaty interpretation but of the right to use neutral ports under the general rules of international law in time of war were argued. The further question of whether there remained any outstanding right in the original owners after the capture was also presented (spes recuperandi). Every known precedent from the earliest developments of international law was adduced. Analogies from the Roman law were applied and the court in a unanimous decision finally held that the vessel had violated our neutrality laws, and the complete title, not having passed by any decree of a prize court, the vessel must therefore be restored to her owners, the German right to possession having been forfeited by violation of American neutrality. (S. S. Appam, 243 U. S. 124).

During the war, it became the practice of foreign Governments to take over merchant ships and to commission them to go about the world carrying supplies or conducting what ordinarily would have been a regular business. This continued until long after the termination of hostilities. In many ways and under diverse procedures the question arose as to the liability of these ships and how far, if at all, they were subject to the ordinary processes of the court. (See the Muir Case, 254 U. S. 522, and others including the S. S. Western Maid, 257 U. S. 419).

This question, despite numerous adjudications, calls for some general international agreement. The courts of the United States and of England have held generally that if the vessels were operated by the Government they were akin to public vessels and not subject to ordinary process. There must however, be found some limitation to the extension of this rule, especially as Governments are tending more and more to embark upon what was once considered private business. Questions of this kind, however, may still come before the ordinary practitioner, and more particularly before those who practice in admiralty.

There arose recently in our Federal courts, as a result of the Great War, a most interesting case involving questions both of private and of public international law.

The British Public Trustee, appointed under British statutes to act as Alien Property Custodian, took possession of large blocks of certificates of stock in American corporations owned at the outbreak of the war by German corporations or individuals. These certifi-
cates of stock were endorsed in blank and were physically situate in England where they had been dealt in. Subsequent to the ratification of the Treaty of Versailles, the Public Trustee requested transfers from the American corporations to his nominees. These transfers were refused by the American corporations because of demands filed with them by the former German owners. The latter claimed that the seizure of the certificates did not transfer the title of the stock which was an intangible thing situated in legal contemplation at the domicile of the corporation.

The Public Trustee contended,

(1) That endorsed securities were the equivalent of bearer securities and were in the nature of chattels, all the rights evidenced by the certificates being, by modern law, merged in the documents themselves, and,

(2) That the seizure had been ratified by the German authorities by specific provisions of the Versailles Treaty.

The older authorities appeared to indicate the plausibility of the German view. The more recent authorities, however, in the United States, in accordance with modern commercial usage, held that the certificates so endorsed were in themselves property subject to the jurisdiction of the authorities in the territory where situated.

The case was decided by the United States District Court in favor of the British Public Trustee, *Disconto-Gesellschaft v. U. S. Steel Corporation*, 300 Fed. Rep. 741), and this decision was affirmed by the Supreme Court in a brief but sweeping opinion by Mr. Justice Holmes, (267 U. S. 22). The doctrine that the documents themselves were not only evidence of the ownership of the shares, but that the rights of ownership were merged in them was categorically adopted. The British authorities had jurisdiction over them and were able to pass title in accordance with the settled rules as to jurisdiction over things.

Thus the more modern view has become the law of the land—another clear instance of the evolution and development of legal principles in accordance with custom, usage and changing needs of society.

The questions as to the effect of the Versailles Treaty, although fully argued, were not passed upon by the court as they had become unnecessary in view of the sweeping decision as to the nature of the stock certificates.

New statutes dealing with ship and seamen's rights, such as the Jones Act, have given rise to considerable litigation, as has the Eighteenth Amendment, and the treaties extending the three mile limit. *Strathearn case*, 252 U. S. 348, and *Cunard S. S. Co. v. Mellon*, 262 U. S. 100.)
How far can the courts refuse to regard contracts made abroad, or payments of advance wages in countries where such is the law and the custom? Should these statutes be so construed? In how far are they constitutional, and in their construction how far should the court go in considering their anomalous nature and the injury done by such construction to foreign nations?

All these cases involve legal reasoning and a knowledge of precedents drawn from almost every department of the law. They can only be dealt with by trained lawyers who have had general experience and a wide practice. Over-specialization is a dangerous thing; it often prevents a catholicity of view and a breadth of concept. The international lawyer should be, in the first place, a sound discriminating and highly educated man. With that qualification he may readily adapt himself, if opportunity presents, to specialize in those cases which present international aspects, but in so doing he must be prepared to keep in contact with the general current of the law, for there are no watertight compartments, and international law and general private law are too closely related to permit a practitioner in any one sphere to ignore developments in another.

The progress of international law is due to lawyers, not to philosophers or moralists. A knowledge of international law is a necessary part of the equipment of any American lawyer, first, that he may fulfill his role in the community as a good citizen and as a member of the profession, and, second, that he may properly safeguard the interests of his client.

The law schools of this country have done much for the scientific development of municipal law. They have taken a similar place to the great university schools of jurisprudence on the continent of Europe. They can now do much for international law at a time when world peace and progress can only be attained through international co-operation based upon international law.

Wars can never be averted where they are the only alternative to real or supposed injustice. The creation of the World Court marks a turning point in history and is a great triumph for the lawyer class to whom the world so largely looks to substitute legal justice for armed force.