REFERENCES OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE TO AMERICAN AUTHORITIES

ARTHUR K. KUHN

It is well known that there is no body of international law having a definite scope and content approved by the authoritative consensus of the governments of the world. Accordingly, the law to be applied by the Permanent Court of International Justice is to be found in no particular statute and in no particular system of law. As Chief Justice Hughes, until recently a Judge of the Court, has so strikingly expressed it: "If you were to wait for an international court until you could get a satisfactory body of international law, the only time that such a court could function would be in the millenium and most people may doubt whether at such a time it would be necessary."[1] Accordingly the law of the Court follows precedents derived from whatever system may be deemed apposite for the particular case at issue. It was doubtless with this thought in mind that the framers of the Statute of the Court provided:

> "At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications desired, but the whole body also should represent the main forms of civilization and the principal legal systems of the world." [2]

It is of considerable interest and importance, especially because the United States has not yet ratified its adherence to the Court, to survey the judgments and opinions thus far handed down during the Court's eight years of life, with a view to observe how far the Court has been influenced by the practice of the United States in its foreign relations or by the legal precedents of our courts.

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[1] Address before the Association of the Bar of the City of New York, January 16, 1930, 16 A. B. A. J. 154 (1930).

[2] STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, Art. 9.

The Function of Interpretation

Even a casual study of the sixteen judgments and the seventeen advisory opinions thus far handed down by the Court will disclose the fact that a large number of the issues before it have involved the interpretation of written instruments, for the most part international treaties. This is quite in harmony with the concept of what its functions were to be, even before the Court had assumed concrete form by the adoption of the Statute. The reconstitution of Europe after the World War was accomplished diplomatically by a multitude of treaties and supporting conventions, some of which established administrative and legislative unions like the International Labor Office, some a special *régime* in regard to such matters as ports, waterways, railways and aerial navigation, some a special guarantee for racial religious and linguistic minorities, and some a system of controlled or "mandated" governments over territories formerly in the possession of Germany or her allies.

Under Article 14 of the Covenant, the Court to be created was to be "competent to hear and determine any dispute of an international character which the parties thereto submit to it." But obviously this definition of the future jurisdiction of the Court would have been completely inadequate to confer upon it automatically the power to make the numerous and complicated international agreements to which we have referred work smoothly. For this purpose it was not only necessary to confer power upon a forum capable of judicial interpretation, but to secure in advance the voluntary submission to the Court's jurisdiction in a large number of instances. The same convention which provides for such submission also creates the rights and obligations forming the possible subject of dispute. Judge de Bustamante enumerates forty-seven of such conventions ratified before 1925.[3] It is important to remember that these agreements create an obligatory jurisdiction for the World Court quite apart from the obligatory jurisdiction which a large number of nations have conferred upon it by ratifying the so-called Optional Clause.

[3] A. de Bustamante, The World Court (1925) 208-219.

It is for this reason that the interpretation of international agreements has been the chief issue in so many of the cases thus far decided by the Court.

The Wimbledon Case

In the *Wimbledon* case,[4] it was contended by Germany that the right of free passage through the Kiel Canal "to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality," granted by Article 380 of the Treaty of Versailles, could not have been intended to deprive Germany of her rights and obligations as a neutral in time of war. Before the World War the property, sovereignty, jurisdiction, administration, and management of the Kiel Canal all resided in the German Empire.[5] The British steamship "Wimbledon," chartered by a French firm, was proceeding to the port of Danzig in March, 1921, with munitions of war destined for Poland, while Poland was in a state of war with Soviet Russia. The ship was denied passage through the Kiel Canal by the German authorities, who maintained that the Treaty of Versailles was not intended to constitute an abandonment of Germany's sovereign rights over the Canal. The Court brushed aside this contention as immaterial and said:

> "No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.[6]

It is at this point that the Court refers to the treaty of the United States with Great Britain of November 18, 1901, commonly called the Hay-Pauncefote Treaty, and the treaty of the United States with Panama of November 18, 1903. In the former there is no clause for free passage through the Panama Canal as in the article relating to the Kiel Canal, though there are various

[4] PERMANENT COURT OF INTERNATIONAL JUSTICE, COLLECTION OF JUDGMENTS, Series A, No. 1.
[5] 3 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 269.
[6] *Op. cit. supra* note 4, at 25.

stipulations for "neutralization." The Court characterizes these provisions as simply declaratory of the rules which a neutral State is bound to observe. In the treaty with Panama, however, Panama grants to the United States "in perpetuity the use, occupation and control" of a zone of territory for the purpose of the canal and incidental thereto; also "all the rights, power and authority . . . which the United States would possess and exercise if it were the sovereign of the territory . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority." The treaty further concedes to the United States the right to police the zone, and "to establish fortifications for these purposes."

The Court then proceeds to examine the view which the United States and other nations of the world have taken of the rights and liabilities of the United States under these treaties, in order to shed light upon a proper interpretation of the clauses to which we have referred establishing the post-war *régime* of the Kiel Canal. The Court refers to the President's neutrality proclamation of November 13, 1914, by which provision was made for the passage of warships of belligerents, prizes of war and merchant ships carrying contraband. Upon the entrance of the United States into the war, a further proclamation, May 23, 1917, prohibited the use of the Canal by enemy vessels, whether public or private, just as by Article 380 of the Versailles Treaty the Kiel Canal is closed to vessels of war of nations not at peace with Germany. The Court then draws an illustrative parallel, stating that no claim had ever been made that the neutrality of the United States had in any way been compromised before our entry into the war, by reason of the fact that the Panama Canal was used by belligerent warships, or by belligerent or neutral merchant vessels carrying contraband of war.

It will be observed that the Court thus applies the practice of the United States Government, a practice which, says the Court, received the tacit concurrence of other nations, and adopts such practice as an illustrative precedent and evidence of "the general opinion according to which, when an artificial waterway connecting two open seas has been permanently dedicated to the use of

the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie." [7]

Judges Anzilotti and Huber, in their joint dissenting opinion in the *Wimbledon* case, point to the differences existing between the conventions relating to the Suez and Panama Canals and the Versailles Treaty so far as it concerns the Kiel Canal. The former treaties forbid any blockade of the Suez and the Panama Canals as well as any warlike measure in the canals or in adjacent waters, thus insuring respect for the neutrality of those canals, whereas there is no such provision in respect to the Kiel Canal. The dissenting Judges therefore conclude that the legal status of the Kiel Canal ought to be held analogous to that of internal navigable waterways of international concern.[8]

References to United States Decisions

The Mavromatis Case.

In the dispute between Great Britain and Greece concerning the Mavrommatis Palestine concessions,[9] the Court was asked to interpret Article 9 of Protocol XII annexed to the Lausanne Treaty of July 24, 1923, and Articles 11 and 26 of the Mandate for Palestine, dated July 24, 1922. Greece presented a claim for damages suffered by a Greek subject, based upon an alleged violation of these instruments. The compulsory jurisdiction of the Court was invoked under the so-called Concessions Protocol of Lausanne. This agreement became operative only upon the ratification of the Lausanne Treaty, and as such ratification was not effective until several months after Great Britain had moved to dismiss the case at a regular session of the Court, it was claimed that the Court had no jurisdiction to hear the dispute because its jurisdiction was predicated upon an unratified treaty.

The Court, five Judges dissenting, took jurisdiction nevertheless, considering that the subsequent ratification cured the

[7] *Ibid.* 28.
[8] *Ibid.* 40.
[9] *Ibid.* Series A, No. 2.

original defect of jurisdiction.[10] In the forceful dissenting opinion of Judge John Bassett Moore, he justifies his objection to the assumption of jurisdiction by referring to the jurisdictional rule of the Supreme Court of the United States. He explains the division of jurisdiction between our State and Federal governments, shows that the jurisdiction of our Federal courts is, for the most part, statutory and limited, and emphasizes the fact that motions to dismiss on this ground are frequent and not dependent upon whether the defect may or may not be corrected later.[11] Judge Moore makes reference particularly to the case of *Mansfield, Coldwater & Lake Michigan RR. v. Swan,*[12] wherein the Supreme Court states it to be a rule "inflexible and without exception, which requires this Court, of its own motion, to deny its own jurisdiction and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act."

It is interesting to observe that although Judge Moore was in the minority in his view that the Permanent Court of International Justice lacked jurisdiction upon the grounds referred to, the Court, in a later judgment, had to determine whether it had retained jurisdiction over the Mavrommatis dispute. In that judgment Judge Moore, Lord Finlay and Judge Oda, who had opposed assumption of jurisdiction in the first submission of the case, held that the Court had failed to retain jurisdiction in the premises, thus finally concurring in dismissal for lack of jurisdiction. Accordingly, the citation of American authority may be

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[10] *Ibid.* 34.

[11] *Ibid.* 58.

[12] 111 U. S. 379, 4 Sup. Ct. 510 (1884). The action was originally brought in the state courts of Ohio against Ohio corporations. It was removed to the federal court by the defendant without affirmative averment that one of the plaintiffs, a necessary party, was a citizen of another state. The plaintiffs did not complain of being prejudiced by the removal, either at the trial or thereafter, but the Supreme Court reversed a judgment on the merits obtained in the circuit court. "It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted." Per Matthews, J., at 384, 4 Sup. Ct. at 512. *Accord:* Great Southern Fireproof Hotel Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690 (1899).

taken as having to that extent influenced the final disposition of the case.[13]

The Lotus Case

Probably no dispute thus far determined by the Court has evoked more general international interest than the *Lotus* case,[14] for the reason that it involved a question both of international and of municipal law and legislation. A collision occurred August 2, 1926, on the high seas, between the French steamship "Lotus" and the Turkish steamship "Boz-Kourt," resulting in the death of eight Turkish sailors and passengers aboard the latter vessel. A joint criminal proceeding pursuant to Turkish law was brought against the captain of the Turkish vessel and the officer-of-the-watch of the "Lotus." The French government contended that the arrest of this officer, a French citizen, for a crime committed upon the high seas aboard a French vessel, was cognizable only before the French courts; that even though the proceedings were regular under Turkish law, such law was contrary to the principles of international law and therefore objectionable. Under Article 15 of the Convention of Lausanne of July 24, 1923, all questions of jurisdiction arising between Turkey and the other contracting Powers are to be decided in accordance with the principles of international law.[15] One of the fundamental principles imposed upon a State by international law is the restriction against the exercise of its power in the territory of another State. The question arises frequently as to the extent of jurisdiction of national courts over persons, property and transactions outside the territory of the State. Although the territorial principle of criminal jurisdiction may be taken as primary, nearly all systems of law extend their jurisdiction to certain offenses committed outside the territory of the State. Where such offenses are committed abroad by nationals, no question of international law is usually presented when the national courts assume jurisdiction. Indeed, many European nations extend the criminal jurisdiction of their courts over many offenses committed by nationals abroad. The

[13] *Op. cit. supra* note 4, Series A, No. 11.
[14] *Ibid.* Series A, No. 10.
[15] Subject to Article 16 of the Convention, not here material.

fact that England and the United States maintain the territorial principle in regard to all but a few offenses committed abroad by nationals, naturally caused particular significance to be attached in the *Lotus* case to precedents taken from Anglo-American jurisprudence. The local law of Turkey is derived from that of Italy, and Article 6 of the Turkish Penal Code provides as follows:

> Any foreigner who, apart from the cases contemplated by Article 4, commits an offense abroad to the prejudice of Turkey or of a Turkish subject, for which offense Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code, provided that he is arrested in Turkey. . . .[16]

The Court arrived at the conclusion that in applying the Turkish jurisdictional rule to an act of a French national committed on a French vessel on the high seas, no principle of international law was violated. We shall not undertake to discuss the somewhat involved reasoning by which the Court arrived at this conclusion. The point of particular interest to us here is that the Court referred to the jurisprudence of common law countries in order to show that even under territorial principles, there is no localization of an offense within a single State, where the offender is situated in the territory of one State while the effects of his act occur in another.[17]

In addition to judicial precedents, the Court referred also to the case of John Anderson, a British seaman, who had committed a homicide on board an American vessel on the high seas. On arrival at Calcutta, the American Consul-General sought to have the offender detained for extradition, but the colonial authorities assumed to try him on account of his British nationality, claiming concurrent jurisdiction.[18] Judge Moore in his able and closely reasoned dissenting opinion points out that the Law Officers of the Crown subsequently declared the trial a nullity because the

[16] The translation is that used in the "Lotus" case, at 14.

[17] *Op. cit. supra* note 4, Series A, No. 10, 26-27, citing Reg. v. Nillins, 53 L. J. Q. B. 157 (1884); Rex v. Godfrey [1923] 1 K. B. 24; overruling on this point Reg. v. Keyn, 2 Ex. D. 63 (1876).

[18] *Ibid.* 27.

Imperial statute under which the colonial authorities essayed to act did not authorize the exercise of such jurisdiction. "It is evident that this case merely shows that a diversity of nationality as between the offender and the place of the offense may give rise to a concurrent jurisdiction. This is fully recognized in international law and does not materially affect the question before the Court." [19]

The dissent of Judge Moore was not based upon the recognition of exclusive jurisdiction in the country of the ship on which the offense was committed, but upon the ground that jurisdiction having been asserted under Article 6 of the Turkish Penal Code, it was the duty of the Court to pass upon the validity of that statute under international law. Judge Moore denies such validity, relying principally upon the authority of Hall's well-known treatise and upon the *Cutting* case.[20] Cutting, a citizen of the United States, published an article in Texas concerning a Mexican citizen with whom he had had a controversy. The article was regarded as defamatory and Cutting was arrested in Mexico under a statute similar in terms to Article 6 of the Turkish Penal Code. Representations were made by Secretary of State Bayard to the Mexican Government, complaining against the arrest, in which it was particularly emphasized that there was no proof that the alleged libel was ever circulated in Mexico so as to constitute the crime of defamation under Mexican law, or that any copies of the publication were actually found in Mexico. The United States thus carefully limited its protest to the assumption of jurisdiction for offenses committed and consummated outside of Mexican territory. An appellate tribunal subsequently released Cutting on other grounds, but the extradition treaty negotiated a few years later between the two countries practically accepted the principle enunciated by the United States. This principle, as expressed by Judge Moore in his separate opinion in the *Lotus* case, is stated

[19] *Ibid.* 72, Judge Moore's Opinion. Lord Finlay, together with four other Judges, also dissented; so that the Court, being evenly divided, gave judgment in favor of Turkey by the vote of the President of the Court, pursuant to Art. 55 of the Statute of the Court, *supra* note 2.

[20] See MOORE, REPORT ON EXTRATERRITORIAL CRIME AND THE CUTTING CASE (1886) 9; FOREIGN RELATIONS OF THE UNITED STATES (1886) 691-708; *ibid.* (1887) 751-849; *ibid.* (1888) II, 1114, 1180.

as follows: . . . "that a State cannot rightfully assume to punish foreigners for alleged infractions of laws to which they were not, at the time of the alleged offense, in any wise subject." [21]

The principle enunciated in the *Cutting* case may be taken to be good American doctrine and it is therefore important to observe that the decision of the Court in the *Lotus* case is not to the contrary. In the *Lotus* case, the effects of the negligent act were produced on board a Turkish vessel, whereas Cutting's act, assuming it to have been reprehensible, did not take effect in Mexican territory so far as the record shows. Thus the conditions for the application of the "objective" theory of jurisdiction, present in the *Lotus* case, were lacking in the *Cutting* case.

It will be seen by this survey of the United States authorities and governmental practice referred to in the comparatively small number of cases thus far decided by the Court, that these citations have been made upon the basis of complete equality with the jurisprudence and practice of all other countries, notwithstanding that the United States has not yet become a member of the Court. Of course, no American interests, national or individual, have been involved, directly or indirectly, nor has any issue been localized or connected with any part of the United States or its possessions. It has sometimes been said that the Court applies "League Law," whatever that may signify. But as Chief Justice Hughes has said: "The Court must interpret the agreement between the members of the League fairly, as it must interpret our agreements fairly, if it has occasion to do so." [22] Thus the fear expressed that the Court, in the absence of a fixed body of jurisprudence, would be apt to apply principles strange to English and American jurisprudence has thus far proved groundless.

[21] *Op. cit. supra* note 4, Series A, No. 10, 95. It is interesting to observe that Secretary Bayard accompanied his representations by a "Report on Extra-territorial Crime" prepared by Judge Moore, then Third Assistant Secretary of State.

[22] *Ut. cit.* 154.