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International Law a Century Ago

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SHORTER ARTICLES, COMMENTS AND NOTES

International Law a Century Ago*

In 1879, the year of the founding of the Paris office of Coudert Frères — the first American law firm to establish itself in Paris — Frédéric R. Coudert also published a little book *Marques de Fabrique: Leur Protection aux Etats-Unis et en France*. In it, he wrote that “The Pyrenees may always exist in the physical and political sense, but neither the Pyrenees nor the Atlantic can constitute a permanent obstacle to modern tendencies.” The Atlantic certainly offers no barrier today to the practice of law spanning the two continents of America and Europe.

New York City, where the firm had been established some years before, was still in what Edith Wharton called “The Age of Innocence,” when manners and morals still counted for more than money in that highly structured society, far removed from that of our contemporary New York City or, I venture to say, of Paris today. And yet, even in this “Age of Innocence,” Frédéric Coudert was able to write, “When the voice of a French trader can arrive at the ear of a businessman in New York in several minutes, it must be recognized that the old limits have disappeared.” Instant communication across the Atlantic and the very subject of protection of trademarks seem to place Coudert in our contemporary world. Indeed, the man or woman of 1979 who turns back to the world of 1879 could conceivably feel more at home in the law of a century ago than in the society of a century ago.

A certain curiosity, both antiquarian and intellectual, led me to look back at what was going on in international relations and in international law in the year in which the Paris office of the Coudert firm was established. Was this world, I asked myself, really far removed from our own? In the French *Documents Diplomatiques* for 1879, the record is one of a monetary conference of several European states, an attempt to resolve the boundary disputes between Greece and the Ottoman Government, and recognition of the independence of Romania, now once again the most independent state of Eastern Europe — all of these oddly contemporary concerns a century later. *Plus ça change,*

*This is a somewhat revised version of remarks originally delivered at a dinner held in Paris on June 23, 1979, in celebration of the centenary of the establishment of the Paris office of Coudert Frères. The author is a Judge of the International Court of Justice, The Hague.

plus c'est la même chose. The *Foreign Relations of the United States* for that year was less rewarding. I had hoped for some clue to legal problems of the day that might involve both France and the United States. If the printed record is a fair indication of the state of affairs, the American Legation in Paris must have been a sleepy place. Washington wanted to know whether the French Government had any design to establish a protectorate over Liberia. No, the Legation replied, only some private persons had raised this idea, and the Government had no thought of a protectorate. An inquiry from the Legation to the Foreign Ministry about the danger that the Mormons might establish missions in France and would promote migration to the United States led the Minister of Foreign Affairs, M. Waddington, to reply:

[T]he Mormon movement was one which he thought had never made any headway in France; he had not heard of their doing anything, and did not think it probable. The French people do not take to such attempts at religious innovation nor to schemes of emigration of any kind. They take no interest in an appeal to fanaticism, and cannot easily be led to enter into it.

And the Panama Canal was already in the public eye; a report was sent to Washington of the conclusion of the labors of the Paris Interoceanic Canal Congress.

Not by any means a great harvest of legal issues!

But as one looks more afield — outside the area of largely governmental concerns — and examines what was happening in the 1870s, it becomes quite clear that 1879 marks the threshold of a period of great dynamism and change in international law. The matters with which international lawyers were concerned and their way of thinking about them have an oddly contemporary ring — admittedly with occasional throwbacks to what seems like a much more ancient world.

France had become a party to seven multilateral treaties in the sixty-five years between the Congress of Vienna and 1880. Thereafter, France was joining groups of states in drawing up multilateral conventions at the rate of one or more a year on average. France and the United States became parties to a convention on the metric system, drawn up in 1875 — but the United States has not yet embraced this system wholeheartedly a century later. Mr. Coudert's concern with trademarks was in the mainstream of efforts to protect industrial and intellectual property, symbolized by the Convention of Paris of 1883 for the Protection of Industrial Property and the Berne Convention for the protection of literary and artistic works of 1886.

The seeds of the present-day forest of international organizations are to be seen in the establishment of the Universal Telegraphic Union of 1865 in Paris. What is now the Universal Postal Union had been established in Berne in 1874.

The great era of international arbitrations was not to come until the late 1880s and the 1890s; it was to last only until roughly the First World War. But in 1880, France and the United States agreed to take to arbitration the claims arising out of the war between France and Mexico, the Franco-Prussian War, and the Commune, as well as those arising out of the American Civil War. In

the early 1890s, the elder Frédéric R. Coudert was one of counsel for the United States in the *Bering Sea Arbitration*. His colleague as leading counsel in the case was Mr. James C. Carter, who argued to the tribunal that the fur seals were the property of the United States on the principle that "property was really a matter of trusteeship and that individuals and nations owned their property because the resources of mankind could thus be best served and most intelligently used." Here is a harbinger of our contemporary views about the protection of the environment. The President of the tribunal, Baron Courcel, was led to remark "Mr. Carter, you are taking us far into the domain of socialism."

The establishment of this first American law office in Paris came at a time when the science of international law was surging forward and undergoing remarkable change not only in its content but in its theoretical foundations. Where writers of the past had been content to restate the existing doctrine, the wise men of the seventies, eighties, and nineties devoted themselves to a scientific study of the actual content of international law. This was the era of collection of materials, of formation of new journals and organizations, of collaboration among international lawyers, of codification, in which international lawyers from both sides of the Atlantic worked together in a common cause of making international law responsive to contemporary concerns. The Institut de Droit International had been established in 1873. At the Paris and Brussels sessions of the Institut in 1878 and 1879, the Institut considered the law of war, conflict of laws (penal law, extradition, and civil procedure), the Suez Canal, submarine cables, and international statistics. These areas of law are still of contemporary interest, but one is abruptly reminded that we are in 1879 and not in 1979 when we encounter discussions of maritime prizes and the reforms desirable in judicial institutions in the Far East in connection with trials in which a *ressortissant* of a Christian power in Europe or America is involved.

The sister organization of the Institut, the International Law Association, had been founded in the same year, with the active participation of David Dudley Field, that remarkable figure in the codification movement in the United States. The concern of the times with the collection of existing laws as the first step in codification was reflected in the establishment of the *Société de Législation Comparée* in 1869 and the *Comité de Législation Etrangère* in 1875.

The great journals in France and the United States were to be a later development, although the "house organ" of the Institut, the *Revue de Droit International et de Législation Comparee* had been established in 1869. In the 1879 volume, there is typically an article on terrorism, "Les délits politiques, le régicide et l'extradition," discussing the question whether the "political crimes" exception should apply in such cases. A century later, we are still not agreed.

But the books of the time provide the clearest indication of the great change that was taking place. Funck-Brentano's and Sorel's *Précis du Droit*

des Gens (1877) is very much in the old tradition, making a distinction between “*le droit des gens théorique*” and “*le droit des gens réel*.” In 1885, Pradier-Fodéré was to publish the first volume of that massive treatise in eight volumes, cut short by his death in 1904. Eight volumes—but the modest author introduces his work with a quotation from Pascal:

Qu'on ne dise pas que je n'ai rien dit de nouveau! La disposition des matières est nouvelle. Qu'on joue à la paume, c'est une même balle dont joue l'un et l'autre. Mais l'un la place mieux.

Where in Funck-Brentano and Sorel there are general principles, in Pradier-Fodéré there is a full discussion of state practice. The pages of the older book lay out the law without deigning to indicate its sources. Pradier-Fodere cites authority, state practice, and other evidence of the law. When he comes, for example, to the subject of treaties, he tells us about the various kinds—most of them categories that we would readily acknowledge today: Navigation (maritime and fluvial), consular, literary and artistic property, industrial property, extradition, execution of judgments and judicial assistance, monetary matters, and postal, telegraph, rail, and sanitary questions.

In the United States, the standard treatises—Wheaton (edited by Dana), which had early been translated into French and published in France; Halleck, and Woolsey—were soon to be overtaken by a new approach to international law—the preparation of digests of state practice. In 1877 Cadwalader had published a *Digest of Published Opinions of the Attorneys-General and of the Leading Decisions of the Federal Courts with Reference to International Law, International Treaties, and Kindred Subjects*. And the transition from theory to practice is most strongly indicated by the publication of Wharton's three-volume survey of United States practice in 1886—the first in the great progression, followed by Moore, Hackworth, and Whiteman. The positivist, case and practice-oriented approach of American international lawyers dominates our thinking today; its origins are in the era when the Paris office was opened.

This office thus came into existence at the very time when international law was starting its takeoff into ways of thinking and ways of doing that mark the law of 1979. The past century has seen a daunting development in the volume and complexity of the law, which has made the practice of law more demanding and intellectually exciting year by year. The next century should be an equally challenging one.

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