HAS THE SUPREME COURT ABDICATED ONE OF ITS FUNCTIONS?

The recent decision of the Supreme Court in the *Hoffman* case [1] must cause concern to anyone interested in the development of international law. Despite, and perhaps because of, the continuous stream of criticism of international law as a body of legal principles, no one who gives any thought to the future of international relations can fail to be concerned with the development of that law. Almost every basic declaration by statesmen refers to the necessity of the rule of law. One of the principal criticisms of the Dumbarton Oaks Proposals was their failure to lay sufficient stress upon justice and law as principles upon which the new international organization would base its efforts for the promotion of world peace. These criticisms led to the insertion in the Charter of the United Nations of several important references to law and to justice.[2]

The *Hoffman* case is one in a long series of decisions of the highest courts of very many countries of the world relative to the immunities of foreign sovereigns and their property. Largely through the normal developmental process of national court decisions, an extensive body of international law has been developed on this subject.[3] Yet one reading the opinion of Chief Justice Stone in the *Hoffman* case might well assume that this is a subject with regard to which no body of law exists, a subject governed entirely by political considerations. According to the Chief Justice, "It is therefore not for the courts to deny an immunity which our Government has seen fit to allow, or to allow an immunity on new grounds which the Government has not seen fit to recognize." It might be argued that the only question involved is one of the distribution of functions under our constitutional system between the executive and judicial branches of the government. It is familiar doctrine in the courts of the United States and in the courts of other countries that certain questions which may be raised before courts are "political," and that with regard to them the courts will merely follow the views of the political or executive branch of the government.[4] In determining whether a particular group exercising governmental functions in a foreign country is or is not "the Government" of that country, or whether a particular individual represents in a diplomatic or other capacity the Government of a foreign country, the courts have customarily and properly turned to the executive for information. This is too familiar a proposition to require citation of

[1] *Republic of Mexico v. Hoffman* (1945), 324 U. S. 30; 65 S. Ct. 530; this JOURNAL, Vol. 39 (1945), p. 585.

[2] Especially the first paragraph of Article 1, and subparagraph a of paragraph 1 of Article 13.

[3] See, for example, the Harvard Research draft on the Competence of Courts, this JOURNAL, Vol. 26 (1932), Supplement, p. 453.

[4] The distinction between legal and political questions before both international and national tribunals is the subject of an abundant literature. This brief comment merely explores the fringes of one manifestation of the problem. See Post, *The Supreme Court and Political Questions*, 1936; Jaffe, *Judicial Aspects of Foreign Relations*.

authority. The practice before the British courts has perhaps been somewhat more consistent and more orderly than that in American courts.[5] Courts have occasionally indicated that these questions are ones of which they will take judicial notice, and that they merely inform themselves by consulting the executive.[6]

In cases involving sovereign immunity, it used to be assumed that the only question which the political branch of the government was called upon to decide was the status of the government or its agents.[7] The trend of the United States decisions, culminating in the *Hoffman* case, would now make it appear that the State Department must also determine the basic legal principle governing the immunity.[8] From the international point of view, this is a most unsatisfactory role for the Department of State to discharge. It is not organized in such a way as to facilitate its rendering what are essentially judicial decisions. Moreover, as its past practices have indicated,[9] it has been most reluctant to place itself in the position of sustaining or denying a foreign government's claim to immunity. It is the normal process of international affairs to insist that a question of this character must be submitted to the courts and that the diplomatic channel should be utilized only where the courts fail to do justice. If the foreign state believes that the decision of the highest court is not in conformity with international law, and that its rights have been prejudiced by an erroneous decision, it may then make complaint through the diplomatic channel. This situation is taken into account in a provision found in a number of arbitration treaties concluded around 1926 by the Scandinavian States and Finland. Article 8 of the Sweden-Finland Treaty of January 29, 1926, provides:

> If the judicial sentence or arbitral award declares that a decision or measure of a court of law or other authority of any of the two States is

[5] See Deák, F., "The Plea of Sovereign Immunity and the New York Court of Appeals," in *Columbia Law Review*, Vol. XL (1940), p. 453.

[6] Lord Sumner in *Duff Development Co. Ltd. v. Government of Kelantan*, House of Lords, [1924] A. C. 797. For varying positions relative to the determination of territorial questions, see *The Fagerness*, Court of Appeal, [1927] Probate, 311; discussed in *British Year Book of International Law*, Vol. 9 (1928), p. 120; *Williams v. Suffolk Insurance Co.* (1839), 13 Pet. 415; *Tartar Chemical Co. v. US* (1902), 116F.726.

[7] See the excellent statement of the Attorney General in *Engelke v. Musmann*, House of Lords, [1928] A.C. 433, 436: "It is admitted, however, that such a statement [by the Secretary of State for Foreign Affairs concerning recognition of a person as a member of the diplomatic staff of a foreign ambassador] is conclusive upon the question of diplomatic status alone; and it is still for the court to determine as a matter of law whether, the diplomatic status having been conclusively proved, immunity from process necessarily follows."

[8] This seems to mark a departure from the position taken by Chief Justice Stone in *The Navemar* (1938), 303 U. S. 68, 75: "The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner if it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged."

[9] See the numerous examples in Green Hackworth, *Digest of International Law*, Vol. II, Chap. VII.

> wholly or in part contrary to international law, and if the constitutional law of that state does not permit, or only partially permits, the consequences of the decision or measure in question to be annulled, the parties agree that the judicial sentence or arbitral award shall award the injured party equitable satisfaction of some other kind.[10]

The writer cannot agree with the view expressed by Chief Justice Stone that the practice of recognition and allowance of a claim of immunity by the Department of State

> is founded upon the policy, recognized both by the Department of State and the courts that their national interest will be better served in such cases, if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than the compulsion of judicial proceedings.[11]

Far from contributing to the smooth functioning of our foreign policy, the present position of the Supreme Court, as indicated in the *Hoffman* case, may prove to be seriously detrimental. It is true that the Court recognizes that the foreign sovereign may present its claim in court, but in such a case the Chief Justice indicates that "the court will inquire whether the ground of immunity is one which it is the established policy of the Department to recognize." If it should become apparent that the State Department has a policy denying immunities in certain cases in which a foreign state believed the rule of international law to be otherwise, the foreign state might properly decline to go to the trouble and expense of court action, and demand immediate satisfaction through arbitration or otherwise. This would be in accord with the position taken by the United States in its controversy with Great Britain in 1915 concerning resort to the British Prize Courts.[12]

On this particular question of immunity, the British courts still assume a responsibility for determining the applicable rule of international law. As is clearly evident from the opinions in the case of the *Cristina*,[13] the British courts still take the view, enunciated in the classic statement of Mr. Justice Gray in *The Paquete Habana*,[14] that international law is part of the law of the land. As Dr. Ruth Masters has made clear,[15] this doctrine is not peculiar to England and the United States.[16] It is fortunate that this is the case, since it is still true, as Chief Justice Marshall pointed out in 1815, that "the decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this."[17]

[10] 1926, L.N.T.S., No. 1192.

[11] *Ex-parte Republic of Peru* (1943), 318 U. S. 578, 589. Hyde, C. C., *International Law*, 1945 (2d ed.), Vol. II, pp. 912–913. [12] Hyde, work cited, Vol. 3, Sec. 894.

[13] House of Lords, [1938] A.C. 485. To same effect: *Wright v. Cantrell* (1943), Sup. Ct. of New South Wales, 44 State Reports N.S.W., 45, 46, and *Chung Chi Cheung v. the King*, Privy Council, [1939] A.C. 168.

[14] (1900), 175 U. S. 677. [15] *International Law in National Courts*, New York, 1932.

[16] See particularly the statements of the Belgian Court of Cassation in the case of *Princesse Stéphanie c. Le Baron Goffinet* (1906), *Pandectes Périodiques*, Vol. I, 1.

[17] 30 *Hogsheads of Sugar v. Boyle* (1815), 9 Cranch. 191, 198.

The Department of State has not been wholly without fault in this new tendency to redistribute the functions between the courts and the political branch of the government, as is most clearly brought out in the statement submitted to the Appellate Division of the New York Supreme Court in the *Transandine* case.[18] In that suggestion, the State Department in effect undertook to tell the court how it should determine certain questions of law, but the New York Court of Appeals properly reached its own conclusion as to the legal rules applicable.

In recognition cases, which have led to a number of unsatisfactory decisions in our courts ever since problems arising from the Russian nationalization decrees were presented for their determination, the Supreme Court has tended more and more to yield the field to the Department of State and to enlarge the exclusive power of the executive. The *Pink* case is the latest step in this direction.[19] On the other hand, the Belgian Government has found no difficulty in leaving a larger field of operation to the courts. Replying to an interpolation in the Belgian Senate on April 6, 1933, the Belgian Minister of Foreign Affairs declared: "If the Belgian courts, judging in the plenitude of their independence, decided that Russian legislation today can produce certain effects in Belgium, the government has not seen in that fact any opposition to the policy of non-recognition of the government of the U.S.S.R. which it has followed."[20] As Lehman, J. said: "The State Department determines whether it will recognize its [the foreign Government's] existence as lawful, . . . The State Department determines only that question. It cannot determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign or with which our Government will have no dealings. That question does not concern our foreign relations. It is not a political question but a judicial question."[21]

Pending the needed fundamental changes in the international legal system which can be made only by multipartite convention,[22] there is more need to-

[18] *Anderson v. N. V. Transandine Handelmaatschappij* (194–), 289 N. Y. 9; this JOURNAL, Vol. 36 (1943), p. 701.

[19] *U. S. v. Pink* (1942), 315 U. S. 203; see this JOURNAL, Vol. 36 (1942), p. 282, and the comments upon the inadequacy of the presentation of points of international law in the case of *Guaranty Trust Co. v. U. S.* (19—), 304 U. S. 126, this JOURNAL, Vol. 32 (1938), p. 542. The effect of the decision in the Pink case upon the lower courts is brought out by the decision in *The Maret* (1944), 145 F. 2d 431.

[20] J. F. Williams, *La Doctrine de la Reconnaissance en Droit International et ses Développements Récents*, in *Recueil des Cours de l'Academie de Droit International, la Hayne*, Vol. 44 (1933), p. 255.

[21] *Russian Reïnsurance Co. v. Stoddard* (1925), 240 N. Y. 149, 158.

[22] Mr. Justice Frankfurter recognized the need for these fundamental changes in a separate opinion in the Pink case when he said: "The opinions show both the English and the New York courts struggling to deal with these business consequences of major international complications through the application of traditional judicial concepts": 315 U. S. 203, 235. It is respectfully suggested that the Supreme Court has not yet pointed the way to satisfactory new judicial concepts.

day than there ever has been before for the coöperation of national courts in contributing to the development of international law.[23] The new International Court of Justice and occasional arbitral courts will continue to play their part, but their activities should be abetted and supplemented by the courts of the various states. It would be a distinct disservice to the rule of law if it should eventuate that questions of international law should always have to be determined solely by international courts which are happily free from subservience to the national policy of any single state. It is still true, as Mr. Justice Cardozo stated in 1934,[24] that "international law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality." Such an *imprimatur* cannot be impressed by the political branch of a government.

PHILIP C. JESSUP

[23] In addition to other cases referred to in this comment, the following cases in which opinions were delivered by members of the present bench of the Supreme Court, constitute contributions to international law: *Jordan v. Tashiro* (1928), 278 U. S. 123; *Nielsen v. Johnson* (1929), 279 U. S. 47; *U. S. v. Flores*, (1933) 289 U. S. 137; *U. S. v. O'Donnell*, (1939) 303 U. S. 501.

[24] *New Jersey v. Delaware* (1934), 291 U. S. 361, 383.