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AMERICA'S CONTRIBUTION TO THE LITERATURE OF INTERNATIONAL LAW AND DIPLOMACY

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AMERICA'S CONTRIBUTION TO THE LITERATURE OF INTERNATIONAL LAW AND DIPLOMACY.*

It is an ambitious, but a very appropriate and commendable achievement to establish in the central west, a thousand miles away from the old and familiar seats of learning, but near the center of population of the country, such a collection of works on European law and jurisprudence, so much more comprehensive than any other on the continent, as to render it unnecessary henceforth for students or scholars to resort to either the East or to Europe for research in this department of learning.

The opening of such a collection is worthy of celebration. It is a notable illustration of the intelligence and liberality of this great metropolis, which in recent years has done so much for the promotion of higher education. I esteem it an honor to be permitted to participate in an event which marks such an advanced standard of intellectual attainment.

It is an occasion when, if time permitted, we might review the labors and achievements of the multitude of statesmen, publicists, and scholars of Continental Europe who have revived and improved the jurisprudence of Imperial Rome and have given to the world such a vast and erudite literature of codes and treatises. We might, by way of comparison, consider the vast volume of law contributed by this country in its Federal and State constitutions, the decisions

* An address delivered at the opening of the Gary Collection of Continental Law of the Northwestern University, Chicago, April 29, 1904.

of its Federal and State courts, the great number of treatises on every branch of law, and the voluminous literature in its periodicals.

But in the brief time which I am to occupy I shall confine my remarks to a comparatively limited topic in the sphere of jurisprudence. I invite your attention to a consideration of the contribution which American statesmen and authors have made to the literature of international law and diplomacy.

It is to be borne in mind that this great library whose opening we celebrate represents the collected wisdom and labors of many enlightened and cultivated nations through many centuries; and, also, that our nation came into existence only yesterday, as nations count time, and that the energies of our people have of necessity been devoted rather to the physical than the intellectual labors of life. Nevertheless, there have existed reasons why Americans were led to give early attention to this branch of law and why their writings have attracted world-wide attention.

When the United States attained its independence international law was still in an unsettled state, and the public men who directed its affairs were confronted with serious embarrassments on that account. As Secretary Everett declared to a British minister, "from the breaking out of the wars of the French Revolution to the year 1812, the United States knew the law of nations only as the victim of its systematic violation by the great maritime powers of Europe." This condition of affairs compelled our statesmen to make early announcement of principles of public law, which, they maintained, ought to govern the intercourse of nations. Such was notably the case when President Washington issued his neutrality proclamation, when in 1812 the wager of battle was offered to the most powerful nation of the world to establish the principle of the freedom of the sea and the rights of neutral commerce, in 1818 when the revolt of the Spanish colonies forced the adoption of the code of neutrality which served as a model for all nations, and at various other times in our history.

These events early turned the attention of American jurists and political writers to a serious study of the law of nations, with a view to a statement or compilation of principles which should be accepted by the civilized nations of the world. American diplomacy was also establishing its rules of practice at home and abroad. The first publication of a permanent or comprehensive character was Lyman's *Diplomacy of the United States* (2 vols.), which was intended to be an account of the foreign relations of the new republic from the first treaty, that with France of 1778, down to

1828, when the work made its appearance, including the relations with the Barbary States and the newly created Latin-American nations. It contains useful information, especially relating to the revolutionary period, but otherwise it is not of much lasting value. It was soon followed by Elliott's American Diplomatic Code, which is little more than a compilation of treaties with foreign powers.

There were two youths who grew to manhood during our War of Independence and the stormy period of the French Revolution, and had their training in the law in the first generation of our national life, who were destined to take a conspicuous part in bringing international law into an accepted code of just principles, binding by their moral force upon all civilized governments. They were also by their great learning and their writings to bring fame to their country abroad in this field of jurisprudence, before little cultivated by their countrymen. In 1833, after nearly a half century of service in the law at the bar, on the bench, and in the professor's chair, James Kent put forth his Commentaries on American Law, which at once took the place in America so long occupied in England by Blackstone's Commentaries. While this work covers the wide range of jurisprudence, the first volume is devoted to international law. In its day it was recognized as the most authoritative exposition of this subject and still continues a standard work in Europe as well as America. Prof. Abdy, the well-known English author and professor of international law, writing of the first volume, says it "contains within its pages wisdom, critical skill and judicial acumen of the highest kind. . . . No other writer on international law is so safe, so impartial, and so recognized a guide and authority, whether in this country or on the Continent of Europe." From among many testimonies, I need only add that of the British statesman and publicist, Sir William Vernon Harcourt, who characterized Kent "as the greatest jurist whom this age has produced, whose writings may safely be said to be never wrong."

The other of these jurists of the first generation of our national life, Joseph Story, published his Commentaries on the Constitution of the United States and on the Conflict of Laws only a few years after the appearance of Kent's Commentaries, in both of which he treats of international law as related to those subjects. His reputation as a writer on the law of nations suffers somewhat from the fact that he compiled no separate work on that topic; but it rests upon the solid foundation of his opinions from the bench of the Supreme Court of the United States, upon the two works just cited,

on his numerous contributions to the periodicals of the day and his long service at the head of the Harvard Law School, which, as an English publicist writes, "have made his name a household word among English lawyers." That his writings have not become obsolete with the lapse of time, we have the declaration of the latest British author on international law that the name of Story "will live as long as the law of nations endures."

The English professor of international law already cited, in a preface to a London edition of Kent makes this statement: "The science of international law has never lacked able and eloquent exponents from the time of Ayala and Alberic Gentili down to our own. But it must be acknowledged that, among modern authors, at all events, there are three whose learning and labor, as judges and writers, have shed glory over the legal literature of the United States, and have earned the singular distinction of being recognized as authorities on international law throughout Europe. I need scarcely say that I speak of the honored names of Story, Kent and Wheaton." As the last of this distinguished triumvirate has produced a comprehensive treatise and is recognized as the standard American authority on this subject, I venture upon a somewhat more extended notice of his career.

Such review is called for by the topic I have in hand, but will also be useful to the young men of the present generation as an illustration of the experience and qualifications necessary to fit one for eminence in law and diplomacy. After graduating at Brown University, and devoting three years to study for his profession, Henry Wheaton, although not possessed of a fortune, found means to go to France and acquire the language and master the elements of the civil law. Passing thence to England he occupied some time in studying the constitutional system upon which rests that of our own country. Returning to his native State of Rhode Island he entered with ardor upon the practice of law for seven years, when he transferred his residence to New York, at the outbreak of the War of 1812, where he was occupied both in his profession and as the editor of a daily newspaper. This led him to devote much attention to the public discussion of the important questions of international law which occasioned our second war with Great Britain. He also had some military experience in the post of a judge advocate of the army. For four years he was on the bench of the marine court of New York, having admiralty jurisdiction.

In 1816 he received the appointment of reporter of the Supreme

Court of the United States and continued as such for eleven years. This was a most fruitful period of his life, as during that time the Court, presided over by Marshall, and containing jurists of such ripe erudition as Story and others, was busy with cases involving important principles of international law; and he was brought into intimate association with lawyers in the golden era of the American bar,—with Pinkney, Dexter, Wirt, Webster, Livingston, Ingersoll and Clay. He was not content to do the routine work of the reporter, but he enriched the volumes with learned and useful notes, which gave him preëminence in the office. Of these Daniel Webster said “no reporter in modern times has inserted so much and so valuable matter of his own”; and Justice Story wrote, “I particularly admire those notes, which bring into view the civil and continental law, a path as yet but little explored by our lawyers, but full of excellent sense and judicial acuteness”; and a German author of the day, reviewing his reports, spoke of them as “the golden book of American law.” While he occupied the position of reporter he served as a delegate to the constitutional convention and also as a member of a commission to revise the statutes of New York.

Mr. Wheaton received his appointment in the diplomatic service in 1827, and continued in it for twenty years, first as minister to Denmark and afterward at Berlin. Although he had in hand many important questions of a diplomatic character, these posts, especially that at Copenhagen, afforded him leisure for study, and it was during this period he prepared his great work on international law. He was also active in other literary labors, producing valuable books on Scandinavian subjects, and being a frequent contributor to the Paris diplomatic and scientific magazines and to the North American Review. Mr. Wheaton’s record of work while in his diplomatic posts puts to shame such American diplomats of the present day as make their ideal of duty a lavish display of social amenities and idle frivolities. Of these he has given his opinion tersely, as follows: “Nothing vexes me more than to hear an American minister say, whatever the court may be to which he is accredited, ‘There is nothing to do here,’ or ‘Nothing *can* be done.’ I do not know a post, whether important or not, which could not offer a zealous, active, and skillful agent the opportunity of doing something for the interests of his country.”

In 1836 his *Elements of International Law* appeared simultaneously in the United States and in Europe. He was so well known by that time on both continents that his work at once attracted

general attention and acceptance. Manning, the English publicist, than whom there was no more competent critic, on its publication wrote: "Dr. Wheaton's is the best elementary treatise on the law of nations that has appeared." And such was the general judgment at the time of the international critics of Continental Europe.

In 1841 he wrote a prize essay for the French Institute under the title of the "History of the Law of Nations in Europe and America," which in English version and much enlarged was published in 1845. Next to his "Elements," this is his most important work.

On his return to America, at the close of his diplomatic career, he was received with distinguished honors. Public banquets were tendered him in New York, Philadelphia and his native city of Providence. The general sentiment of his countrymen was well expressed at one of these banquets by James Buchanan, then Secretary of State, as follows: "I offer the following sentiment—The author of the Elements of International Law. While we hail with enthusiasm the victorious general engaged in fighting the battles of his country, our gratitude is due to the learned civilian, who, by clearly expounding the rights and duties of nations, contributes to preserve the peace of the world." With the prospect of many years of usefulness and honor before him, within a year after his return home a sudden illness terminated his life in 1848.

The various editions through which the Elements of International Law have passed have been enlarged by copious foot-notes by the intelligent and able editors, W. B. Lawrence and R. H. Dana, which bring the discussion down to the later phases of the law in recent years. Dana's edition of 1866 is of special value, but unfortunately is out of print. Prof. Lawrence, of Girton College, Cambridge, speaks of Mr. Dana's "robust judgment and incisive arguments," and states that he "had collected the materials for what I venture to think would have been the best of all books on international law, had he lived to write it."

Wheaton's Elements has been followed by quite a number of treatises by American authors, only a few of which can be noticed. Among the most important of these is President Woolsey's Introduction to the Study of International Law, first published in 1860, and of which a recent edition, edited by Professor Theodore S. Woolsey has been issued with useful notes. General Halleck's International Law, which appeared just at the opening of our Civil War, was given new interest by the London edition by Sir Sherston Baker

issued in 1893. These two authors are well known in Europe and are frequently cited. David Dudley Field's *Outline of an International Code*, though not a treatise, is valuable as showing in concise form the views of an able lawyer as to what are or should be recognized as the principles of international law.

The activity of interest by American students in this department is evidenced by the appearance of a number of meritorious works specially designed for use in colleges and the professional schools. Citation is made of *Wilson & Tucker's International Law*, *Snow's Cases and Opinions* and the first half of his *Treaties and Topics*, and *Professor Hart's Handbook of the Diplomacy*, etc., of the Government of the United States. The latest treatise on international law is that of ex-Minister Taylor, a very comprehensive work, which has been favorably received.

The largest contributor to the American collection of works on international law and diplomacy has been the Government of the United States and its officials. The most important of these is the *Digest of the International Law of the United States*, 3 vols., compiled by a learned solicitor of the Department of State, Dr. Francis Wharton, who is likewise the author of a treatise on *Conflict of Laws* and other legal subjects. The *Digest* consists mainly of extracts from the correspondence of the Department of State, but in it are included extracts from the messages of the Presidents of the United States, the decisions of the Supreme Court and opinions of the Attorneys-General, together with occasional quotations from various authors. It covers a wide range of topics in international law and diplomacy, and has proved a most valuable book of reference. It is so highly appreciated that a new edition is being prepared under the editorial charge of Professor John B. Moore, which will double the volume of the first edition and promises to be of greatly increased value.

The publication of the diplomatic correspondence of the United States has proved a useful contribution to international law. It is very complete for the Revolutionary period and extends down to 1828. From that date to 1861 there is no systematic or continuous publication, but in the latter year it was renewed and thenceforward there has appeared an annual issue of one or more volumes made up of the correspondence exchanged with the Department of State on the most important current diplomatic questions. It has been found of great value to statesmen, diplomats and historians. That these publications are appreciated abroad as well as in our country is seen

in the estimate of the statesman already cited, Sir William Harcourt. After referring to the high respect shown for our judicial decisions, he adds: "But an equal, if not higher, reputation belongs to the archives of American diplomatic statesmanship at the close of the last and the beginning of the present century. The published volumes of American State Papers during the early years of the French Revolutionary War present a noble monument of dignity, moderation and good faith. They are repertoires of statesmanlike principles and judicial knowledge."

A compilation of the Messages of the Presidents, published by authority of Congress (10 vols.), contains much material relating to foreign affairs.

Attached to the volume of Treaties published by the Department of State is a copious compilation of notes by J. C. B. Davis, a former Assistant Secretary, which adds much to the diplomatic history of the country and shows the part borne by our Government in maintaining correct and liberal principles of international law. A Digest of Opinions of the Attorneys-General with reference to international law and treaties, by another Assistant Secretary of State, John L. Cadwallader, is likewise a useful contribution; as well as the Printed Instructions to the Diplomatic Officers of the United States and the Consular Regulations.

Other departments of the Government have also added to the stock of information and instruction. At the beginning of the Civil War the Department of War issued a code entitled Instructions for the Guidance of the Armies of the United States, prepared by Dr. F. Lieber, which has been recognized as a correct statement of the laws and practice which ought to govern nations in time of hostilities, and which has exercised a beneficent influence in mitigating the horrors of war. General George B. Davis, the present Judge Advocate General of the Army, is the author of an excellent elementary work on international law, and Winthrop's Military Law is also useful.

The Naval Instructions and Instructions to Blockading Vessels contain a good compendium of the rules applicable to the maritime affairs of nations; and several officers of the Navy, as Dahlgren, Stockton and Glass, have enriched the literature by treatises. In this connection, reference may be made to the writings of Capt. A. T. Mahan, covering the history of naval warfare, the political interest of the United States in naval armament and defense, and the present situation of the powers on sea, and especially in the Orient, em-

bracing a full discussion of international law and diplomacy. These volumes are recognized the world over as the highest authority on the topics considered, and no living American writer has attracted more general attention in foreign lands.

The United States has been one of the most active of the nations in a resort to arbitration to adjust difficult international controversies, and this has created a large amount of documentary literature, of much value in the study of the branch of law under consideration. The arbitration proceedings which adjusted the Alabama and other questions arising out of the treaty of Washington of 1871, the Paris Bering Sea tribunal, and the late London boundary commission, have been published by the Government, and embrace discussions of important questions of international law by the first lawyers and jurists of Europe and America. A History and Digest of these arbitrations, excepting the last, has been published, consisting of six large volumes, prepared by Professor John B. Moore, and enriched by a judicious addition of notes. He is also the author of an exhaustive essay on International Arbitration, published in the report of the Arbitration Conference at Washington of 1896. Professor Moore has been one of the most industrious of American writers on international subjects, and his experience in the Department of State and his careful study make him one of the most useful of living authors in this department of literature.

It remains to be said that the department of the government of the United States which has had the greatest influence in settling disputed questions of international law and making it an accepted and liberal code controlling the intercourse of nations, has been the Supreme Court of the United States. Being made the expounder of the Federal Constitution in its relation to treaties and diplomatic intercourse, and exercising jurisdiction in admiralty and prize cases, it has been required to pass upon a great variety of questions growing out of these matters involving the law of nations.

It was fortunate for the reputation of our country that the court which had to dispose of matters of such moment was presided over near the beginning and for so many years by John Marshall, one of the ablest statesmen and the first jurist of America. It is stated that during the period of his judicial service decisions were rendered by the Supreme Court in 195 cases involving questions of international law, or in some way affecting international relations. In eighty of these cases the opinion of the Court was delivered by Marshall, the next largest number being given by Mr. Justice

Story. The decisions of this Court are more frequently cited by European publicists than any other class of American writings. It is not easy for the student to gather them out of the multitude of the Reports, but many extracts are collected in Wharton's Digest, already cited, and in Gardner's compilation.

Justices of this Court have added much to the stock of knowledge on this subject by their services as instructors in the law schools of the country. I have mentioned Story's long service at the head of the Harvard Law School, where he was the lecturer on international law; and others in the past might be named. Mr. Justice Harlan of the present Court is the professor of Constitutional Law and Conflict of Laws in the Columbian School of Law and Diplomacy, and Mr. Justice Brewer is professor of International Law.

In the special department of diplomacy the contribution of American writers has not been so great, but there are a number of works of merit. H. W. Trescot, very competent for the task, undertook a history of American diplomacy, and produced two interesting volumes covering the revolutionary period and the administrations of Washington and Adams, but unfortunately the work was not carried further by him. A volume by Eugene Schuyler is made up of lectures and magazine articles, and is valuable but incomplete. Several books have appeared recently, among which may be mentioned Latané's Diplomatic Relations with Spanish America, and four volumes by Professor Callahan on Anglo-American Relations, Cuba and International Relations, The Pacific and the Far East, and the Southern Confederacy.

The field of diplomatic memoirs and diaries, in which European countries have been so prolific, has not been much cultivated in the United States. John Adams' diary contains an account of his diplomatic experience abroad. The list embraces Gouverneur Morris' Diary and Letters, those of George M. Dallas and Richard Rush in London, and Waddy Thompson's Recollections in Mexico. But the most voluminous and valuable are the memoirs of John Quincy Adams, in 12 volumes, comprising his diary while minister abroad, during his terms as Secretary of State and President, and his long service in Congress when a member of the committee on foreign affairs. It constitutes a piquant commentary on every diplomatic question in which this country was concerned during the fifty years of his public life.

The histories of the United States have contributed much interesting matter to diplomatic affairs. Henry Adams' History of

the United States treats very fully of foreign relations during the administrations of Jefferson and Madison, and also Hildreth to some extent down to 1820. Brief notices are found throughout Schouler, and Rhodes is especially valuable for the period of the Civil War, as also Nicholay and Hay's Lincoln. Winsor's Narrative and Critical History of America is particularly rich in diplomatic material.

As a part of our international literature, there may be mentioned the various treatises having some relation to our subject, among which are Moore's Extradition, Van Dyne's Citizenship, Butler's Treaty-Making Power, a very exhaustive work; Abbott's Shipping, etc. Also a number of volumes made up of essays on various diplomatic topics, such as Professor T. S. Woolsey's America's Foreign Policy, Henderson's Diplomatic Questions, Hart's Foundations of American Foreign Policy, and Reinsch's World Politics.

The various epochs or crises in the history of the United States when important foreign questions were pressing, have produced many papers from prominent statesmen and writers. Washington's neutrality proclamation, which has played so conspicuous a role in international affairs, was the subject of much discussion. Alexander Hamilton, under an assumed name, defended the proclamation in the press. It was on this occasion that his political enemy, Jefferson, appealed to Madison, "for God's sake, my dear sir, take up your pen and cut him to pieces in the face of the public." The discussion between these able champions of public law over the titles of *Pacificus* and *Helvidius*, collected in book form, constitute an interesting part of the political discussions of the period.

Monroe's recall from France was the occasion by him of a volume, constituting a detailed review of our relations with the French Directory. The Jay treaty of 1794 was the prolific source of many able papers, as also the diplomatic phases of the War of 1812. The Monroe Doctrine from 1823 to the present day has been a perennial topic for books and essays. The Webster-Ashburton treaty of 1842 on the northeastern boundary, and other matters called forth papers from Albert Gallatin, Lewis Cass, and other less known statesmen and writers. The Northeast fisheries discussion has produced a library of articles and documents, as also the Oregon boundary. The Clayton-Bulwer treaty and the Isthmian Canal have been for a half century adding to the library of American diplomacy. The foreign relations of the Southern Confederacy are exhaustively discussed by Bulloch (2 vols.), and by John Bigelow and Professor

Callahan. The Geneva Arbitration has been treated in book form by Caleb Cushing and others. Our relations with the Orient are the subject of a number of recent books.

In this hurried review it has not been possible to give a detailed notice of all the works which are worthy of mention. The most complete bibliography yet published is that of Professor A. B. Hart, to which students are referred for fuller information.

I trust that what I have said has been sufficient to satisfy you that American statesmen, jurists and writers have not neglected this interesting and useful field of jurisprudence, but that they have contributed their full share to the commendable efforts put forth during the past century to bring the more elevated and humane principles of international law to the general acceptance of civilized nations, and to hasten the era when reason and justice will supplant the reign of force and violence, which have so often marked the history of the past. I venture the statement in closing, and for which I hope my very imperfect and hasty review has established some foundation, that no branch of American literature has been received with more favor in foreign lands or has done more to create a favorable impression of our Government and people—neither American history, poetry, romance, philosophy, or science—than the contribution of the United States to the literature of international law and diplomacy.

John W. Foster.