Wilson: The International Law Standard in Treaties of the United States

Gertrude Leighton
America in which he flourished could well afford. But if it is true, as I think it is, that we need today a sounder and more supple conservatism than we had in the past, the career and mind of Elihu Root is not likely to set too illuminating an example. We need more political leaders who will be not quite what Root was but what he might have been, just as we need more biographical essays like Mr. Leopold's that do not succumb to the biographer's common temptation to exalt his subject.

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The International Law Standard in Treaties of the United States.

Compared with most fields of law, “international law” suffers a heavy burden. Branded in one instant as non-existent, it is exalted in the next as the last hope of the Atomic Age. But with all the vexatiousness that surrounds it there is an increasing sense that among the various systems of law, international law has the most pressing responsibility toward the future, a responsibility which demands that practitioner and theorizer alike discard antique disputation and windy doctrine; that they turn a deaf ear to the clamor of lay sentiment and eschew reliance on the hoped for “change of heart” in international relations; that, in short, they take cognizance of themselves and international law in the reality of the modern world. There are stirrings in the literature that give promise of this development,¹ yet almost no research has produced more than the recasting of one legal proposition in terms of another. It is astonishing that a recent writer can say without risk of contradiction that “no thorough study based on historical data of the relation between international law and international politics has ever been made.”² What is urgently needed are studies which relate doctrine and practice within the legal system to events and trends outside it.³ Without such studies it is not possible to determine what purpose is effectively served by international law in its traditional form. Moreover, the recent proliferation of official and unofficial international interaction through the United Nations, the Marshall Plan, Point Four, and like programs increases the demand for appropriate legal norms. These norms can be evolved rationally from existing international law (or created de novo, if need be) only with the assistance of a more penetrating knowledge of how “law” actually functions in the world society—what purposes it pursues, what effects it gains. It has

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1. For a recent example, see CORBETT, LAW AND SOCIETY IN THE RELATIONS OF STATES (1951).


3. The problem of “recognition” is developed in this way in JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS, IN PARTICULAR OF THE RECOGNITION OF FOREIGN POWERS (1933).
occurred to few, if any, to explore the actual, in contrast to the hoped for, effect on public opinion or national policies of, for example, the United Nations General Assembly resolutions on *apartheid* policies of South Africa. Though the cynical may say the results of such inquiry are obvious, the fact remains that no *systematic* studies, employing the appropriate skills of contemporary social sciences, are being made. Reasonable hypotheses without reasonable proof are accurate after their fashion, but they do not tell us all we wish—or should wish—to know.

The title of Professor Wilson's book arouses expectations of a realistic analysis of "international law" in the functional context of the treaty-making process. Closer inspection reveals that this was not the author's intention. Deeply concerned as to the grave responsibilities of international law and of the United States in promoting a world legal order, Professor Wilson has elected to pursue his concern within the confines of legal doctrine. At first he inquired no further than "into the use of the term 'international law' or 'law of nations' in treaties of the United States. . . ." Subsequently, recognizing that "the standard might be implied" in treaties where the term "international law" is not mentioned, and, bearing in mind "some developments . . . in which the standard was a significant factor in diplomacy or in judicial interpretation," the author expanded his project: the essential object became "the . . . modest one of seeing how treaty engagements of the United States have, ordinarily through express terms in the instruments, been related to the [international] law as a whole, and of providing a basis for judging the relative emphasis upon the standard as well as the utility of the method used in these treaties." Professor Wilson takes pains to explain that his is not a definitive piece of research, nor a catalogue of the law on all the occasions in which the term "international law" is used. He has written neither a study of international law in the context of the social process nor a legalistic manual for practitioners, but rather a legal essay of unusual interest—within these severe and self-imposed limitations.

The essay ranges over a wide variety of subjects: Pacific Settlement of Disputes, Commerce and Navigation, Independence and Jurisdiction of States, and War and Neutrality. An introduction discusses custom and international law, the extra-legal factors affecting treaties, and, in one of the most interesting summaries in the book, there appears a discussion of the various types of treaties, as well as the numerical proportion of each. A summary and conclusion state succinctly the main points of the discussion. There follows a useful appendix on the treaty-practice of six other nations and a valuable bibliography.

Professor Wilson shows that United States treaty practice generally indicates an effort to integrate "conventional," or treaty, rules with customary international law, even though the particular stipulations of most agreements contain no express reference to the latter. In exceptional cases where the standard

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4. P. vii, emphasis supplied.
5. Ibid.
6. Ibid.
7. Appendix I contains a list of the treaties referred to in the text. See p. ix.
is mentioned, it is usually introduced by verbal reference to "international law" or "the law of nations," as in prescriptions for arbitral awards, or through indirect reference to acknowledged doctrine and practice, as in settlement agreements providing for the use of "peaceful means," or in agreements to arbitrate "justiciable" questions. Commitments not to intervene in the internal affairs of states also indirectly refer to the standard, although the doctrine of "non-intervention" has not always been acknowledged, except by Latin American states, as a part of international law.

On the whole, the author concludes that incorporation of the standard in treaties, while not a substitute for the progressive development of international law, is a constructive factor in the treaty-making of the United States. Although in some instances its utility may be damaged by such devises as the Calvo clause, its role in strengthening the principle of legality is an important one. Professor Wilson believes that a formal statement of intention to adhere to the standard has often represented more than "high-sounding phraseology," and, moreover, that, in the light of the nation's growing responsibility for world order, it is highly significant that in the past the conduct of United States foreign relations has frequently inclined toward law rather than power.

The reasonableness of these conclusions is obvious. Yet, for this reviewer at least, they would rest on firmer ground were they supported by the kind of systematic analysis suggested earlier. As long as the problem is analyzed from an almost exclusively legal perspective, one can only surmise that the standard has some effect, whether positive or negative it is difficult to say; one can never be sure its inclusion in a treaty effects more than "high-sounding phraseology." But even accepting these conclusions on their own terms, there is still room to object to the effects of the narrow focus of Professor Wilson's task as he originally conceived it. He seems never really to escape from use of the term "law of nations" as though, of itself, it had particular meaning, with the result that his subsequent recognition of the need for political and historical indices only serves to confuse. Coming as afterthought, these additions make the book for all the orderly appearance of its chapters, curiously disjointed and unintegrated. Brief historical accounts (the Kellogg-Briand Pact), highly technical discussions (basis of arbitration awards), lengthy descriptions of political developments leading to a treaty in which the standard is mentioned (the Gadsden treaty with Mexico), though interesting, are too loosely strung together. In addition, the reader has difficulty in determining the criteria by which some of

9. Pp. 53, 244; see also p. 46 et seq.
11. I.e., questions "susceptible of decision" through application of law or equity. Pp. 39-41.
16. See in particular the account of American and British slave trade policies in the 19th Century, pp. 120-134.
the material is included, since admittedly the essay is not a complete catalogue of treaty practice. It is certainly not clear why a tenth of the book is devoted to the development of the *Alabama* claims rules. On the other hand, the important service Professor Wilson performs must not be overlooked: he redirects attention and provides a valuable guide to that aspect of the foreign relations of states to which international law is inextricably bound and in which lies abundant material for further profitable research.

_Gertrude Leighton_†


The study of American legal history as a distinctive field for inquiry is slowly but surely accumulating momentum. A few years ago, courses bearing the label were to be found in the announced curricula of but one or two law schools in this country. Whatever the cause, interest in American legal history has by now sufficiently manifested itself to lead to the introduction of courses or seminars in the subject in at least eight law schools. If a casebook is thought to be a pre-requisite to the christening of a field, this subject “arrived” five years ago.¹

In any collection of materials treating developments in American law in the nineteenth century, one of the principal themes to which space must be devoted is that of the “reception” of the common law in the territories. Relevant materials on this problem for the Northwest Territory are rather fully represented on libraries’ shelves by the editorial labors of Professors Blume, Pease, Philbrick, Pollack, and others.² The present volume constitutes a very welcome and a quite interesting addition to this corpus of materials.

Thomas Rodney was sent by President Jefferson, in 1803, to the Mississippi Territory as a land commissioner and territorial judge. Rodney’s diary of cases heard before him from February Term, 1804 to May Term, 1809 — preserved in four notebooks now in the Library of Congress — is the basic component of the volume here reviewed. The editor has taken great pains to supply the gaps in the diary from other collections of Rodney’s papers, notably those in the Historical Society of Delaware and in Brown University Library. Professor Hamilton has also given us a full editorial commentary — annotations, identifications of litigants and counsel, and much other contextual matter — helpfully

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1. Howe, _Readings in American Legal History_ (1949). Doubtless there are other collections in process of formulation.