American Classics in International Law

General Editor
W. Michael Reisman

International Protection of Human Rights

Edited by

Dinah Shelton

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Foreword to American Classics in International Law

Lest the reader of the volumes encompassing this collection of "American Classics" think it hubris, if not the *ne plus ultra* of "American Exceptionalism", a brief explanation of its genesis and purpose is in order. Every state has a stake in international law but few, from their very inception, have been as concerned—and conflicted—about invoking it and trying to publicly justify themselves in its terms as has the U.S. Indeed, its Declaration of Independence of 1776, with its elaborate Natural Law justifications, was, in effect, an *erga omnes* Note to the world community of the time. Later, Benjamin Franklin, on receiving a copy of Vattel's *Law of Nations*, allowed that "the circumstances of a rising State made it necessary frequently to consult the law of nations."[1] In 1793, the Supreme Court acknowledged that "the United States had, by taking a place among the nations of the earth, become amenable to the law of nations."[2] Thomas Jefferson, then Secretary of State, said that international law was "an integral part" of the law of the land. Three years later, the Court raised the bar further, holding that "[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."[3] But this warm embrace of international law was not unanimous and may be contrasted, still later, with the ambivalences toward the outside world, expressed in George Washington's Farewell Address.[4]

Nor has the focus on international law been confined to those in the government: from the earliest days of the republic until now, American international legal scholars have produced a rich and comparably varied corpus of

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1 Francis Wharton, The Revolutionary Diplomatic Correspondence of the United States 64 (Vol. II, edited under direction of Congress, 1889).

2 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

3 *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796).

4 George Washington, The Address of General Washington To The People of The United States on his declining of the Presidency of the United States (Sept. 19, 1796) *reprinted in* The Avalon Project: Documents in Law, History, and Diplomacy (Yale Law Library, 2008) ("The nation which indulges towards another a habitual hatred or a habitual fondness is in some degree a slave. It is a slave to its animosity or to its affection, either of which is sufficient to lead it astray from its duty and its interest ... As avenues to foreign influence in innumerable ways, such attachments are particularly alarming to the truly enlightened and independent patriot.").

scholarship. Much of it has provoked significant innovations in international politics and all of it provides insights into American conceptions of international law and, for better or worse, the distinctive role many of the scholars believed the United States plays—or should play—in the international legal system. The Classics series is intended to explore that literature.

The selection of "American" writers, like the identification of which of their pieces were worthy of inclusion as classics, has been made by the editors of each of the volumes in this series. Even allowing for the essential selection bias that is inherent in this type of enterprise, the selections have not been easy and are not—and could not be—comprehensive. Indeed, the very identification of the universe from which selections are to be made is challenging. Because the United States, from its inception, has been a nation of immigrants and many of the leading international law writers here had concluded their professional training before immigrating to the United States, each editor has had to make selections and some of them may appear arbitrary. Obviously, individual provenance has not been deemed decisive: thus, Francis Lieber has been included because his code was prepared here and is associated with the U.S. and American international law scholars' continuing concern with the law of armed conflict. Hans Morgenthau has also been referenced as an American theorist; even though his essential ideas were initially published while he was still in Germany, those ideas, later elaborated after he established himself in the U.S., have come to be associated with a distinctively American school of realism of which Morgenthau is considered a founder. By contrast, Hans Kelsen's international legal work has not been included; he too immigrated to the U.S. in mid-career, by which time his work was (and continues to be) admired in many parts of the world. But his ideas and later international legal scholarship, though published in English, failed to gain traction here.

Judgments about which articles are American classics do not mean that they are exclusively American. Scholarship, while influenced by national factors, is ultimately borderless and everything builds on what went before. Nor do those judgments imply that American scholars have made the most important contributions in any particular area. Far from it. Neither Hersch Lauterpacht nor René Cassin, to mention only two eminent scholars, are included in the volume on human rights. The exclusion was not due to the fact that they were not founders of that field (they certainly were) but because they were not American. Nor do judgments about the inclusion of important American contributions imply that all of them have benefitted international law and world order. It is arguable, for example, that articles by American scholars about doctrines of anticipatory and preemptive self-defense, while

now claimed by a sizeable number of states, have had the effect of undermining minimum order.

That said, the collection is animated by the conviction that the unique American political experiment and America's role in the world have produced a distinctive if richly varied scholarly literature, within which one can identify particularly influential works which can be considered, in the American experience, as "classic."

To be sure, the same can be said of many other states and their own distinctive legal scholars. But their scholarly interests in international law could not enjoy the amplification provided by the unique American scholarship-ecology: the sheer number of law faculties and, hence, international law chairs; the penchant for inter-disciplinary initiatives and the national fascination with innovation; the proliferation of journals providing opportunities for publication; the liberation from the mortmain of tradition by the unusual practice of assigning the function of gate-keeping for law journals to the most junior, rather than the most senior members of the profession; the emphasis in American higher education on publication as critical to individual academic standing; and the fact that English emerged as a leading international language. And thanks to the power position of the United States, the views—for and against—of American scholars and their influence on the foreign policies of successive American administrations have often imparted a sense of urgency and relevance to American international legal production.

If the term classic is taken to mean "ancient," only a small part of contemporary international law could qualify. It is hard to believe that Hersch Lauterpacht in his magisterial *Function of Law in the International Community* wrote that "the scope of matters governed by international law is on the whole confined to the regulation of the external relations of States [and is] more static than any other law..."[5] Because some of the most important areas of contemporary international law are of recent vintage, our editors have bestowed the term classic more generously, based on their assessment of the value and impact of particular writings.

Although the editors of the respective volumes in the series will, perforce, be grappling with the question why the American international legal production is so passionate *and* varied in its different visions and assessments, that question has long fascinated me and I permit myself a few, non-preemptive observations.

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5 Sir Hersch Lauterpacht, The Function of Law in the International Community 257 (2011).

To be sure, one must look hard for a state and those who speak on its behalf who do not avow allegiance to international law. Yet few states have not, on occasion, violated it without suffering some consequence. But the United States by virtue of its power has been able to suspend or to modify institutional rules in particular cases and to absorb, at least in the short run, the political and diplomatic costs incurred. This is often attributed by others to cynicism and the hypocrisy of American declarations of commitment to a rule-based international legal system.

It is more complex than that.

America plays four types of international political roles, not all of which are mutually compatible, but all of which are reflected in American international legal scholarship. The first role is *prophetic and reformist*. For more than a century, America has seen its destiny as leading the reform of international politics; this is an impulse that arises from many strands in American political and civic culture. It impels not only the ongoing agitation, at the constitutive level, for a "rule-based" international political order but, on the prescriptive side, the invention of multilateral treaties and the creation of international institutions. The failure to follow through and join some of those agreements and institutional arrangements is attributable to some of the other roles but is also the result of counter-tendencies which can be traced back to President Washington.

In addition to the *prophetic and reformist* role, the United States plays an *intra-institutional* role, an active and often dominant role within many of the organizations and institutional arrangements it has helped to establish. Of course, every state that joins an international organization seeks to use it as a tool to advance its own interests. Like it or not, America has been the proverbial elephant in the room. What is surprising is that, given the preponderant strength of the U.S., it does not throw its weight around as much as it could. This, too, is attributable to some of the other roles.

The United States also assumes a *custodial* role as the ultimate maintainer, in key domains, of international order, the actor of last resort in matters of fundamental international political importance. This custodial role—necessarily implicating Carl Schmitt's power "to decide the exception"—may, on occasion, involve usurping the ordinary decision-making procedures the United States was at pains to create as part of its rule-based role.

Finally, there is a *domestic pressure reactive* role: the United States is a constitutional system with a dynamic democracy. This means that those parts of the government which are delegated to act in external arenas must balance commitments made to others and specific compliances with international law with the demands of various domestic pressure and interest groups.

The net result of these four roles makes for a very complex player in international law, a fact reflected in many of the classics of American international legal scholarship which are reproduced and discussed in each of the volumes of this series.

W. Michael Reisman
General Editor

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Introduction

Dinah Shelton

Legal scholarship in the United States for more than two centuries has been divided on many issues of human rights, as have been the people, policies and practices of the nation as a whole. To a large extent, the country justifiably claims that it was founded on ideas of human rights, being partly settled by immigrants fleeing persecution and seeking civil and religious liberty. Their desire for legally guaranteed rights was developed by scholars and pamphleteers and later reflected in the Declaration of Independence, the various declarations of rights that preceded it and constitutional guarantees that followed it. Yet, the ideals of liberty and equality contained in these documents were long limited for the most part to propertied white men. Women, Native Americans, and African Americans could not enjoy the rights proclaimed until much later in U.S. history and their inclusion took a civil war, constitutional amendments, and major legislative enactments before these excluded groups could begin to claim equal participation in society. Legal scholars on one side challenged the discriminatory treatment allowed by law, while those on the other side supported the tradition of limiting rights, supporting the institution of slavery, taking of Native lands for Westward expansion, and restrictions on public roles for women. The two competing strands of full rights for all and privileges for some have not yet been fully reconciled, as scholarly debates over affirmative action, economic disparities, and the American justice system reveal.

The same disparity between proclamations and practice no doubt could be identified in other regions of the world, however, and immediately raises questions about the raison d'être of this volume: are there unique aspects to human rights scholarship in the United States or does the body of work only manifest the participation of U.S. scholars in a global epistemic community of human rights advocates? What contributions have U.S. authors made to the development of human rights law, its norms and standards, implementation and enforcement?

The contributions selected for inclusion in this volume represent a significantly larger body of work that the editor suggests does reveal themes, approaches, and analyses that have advanced human rights in ways that reflect specificities of U.S. culture, politics and legal education. Foundational documents like the Virginia Declaration of Rights, the Monroe Doctrine, and President Franklin Delano Roosevelt's Four Freedoms speech emerge from the Enlightenment ideals and belief in human rights as inherent in humankind and

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foundational to the U.S. legal system. But the selections also reflect a pragmatic approach, seeing human rights as needing protection in the national interest because failure to ensure them would threatens peace and U.S. security. This interaction of humanitarian and self-interested motives for advancing specific human rights or human rights in general is one theme of U.S. scholarship. It can be seen not only in works that link human rights to peace and security, but also in the writings of those who see respect for human rights (abroad) as good for the commercial interests of the U.S. business sector and others who link the topic to issues of immigration, especially concerning refugees and asylum. At the same time, some interdisciplinary scholars, particularly some in the U.S. school of "law and economics" have been highly critical of human rights law.

A related notable aspect of human rights legal scholarship in the United States is the intertwining of academic with popular writings or with legal advocacy and practice. Most prominent names in the field of human rights, even while based in academic institutions, have engaged in litigation as experts or amici curiae, or have taken leave to perform government service, or more recently have held positions on human rights treaty bodies or tribunals. The experiences derived from such work often infuse the scholarly work, giving it a more practical orientation than is found in writings from other regions where purely theoretical analyses are more common. In U.S. scholarship, it is often evident that the authors have emerged from or engaged in campaigns to adopt human rights standards or improve compliance, whether the focus is adopting a Bill of Rights, ending apartheid, or abolishing the death penalty. The earliest writers supported independence from Great Britain, "life, liberty and the pursuit of happiness" as well as other guaranteed rights, and many engaged in efforts to abolish slavery and the slave trade.

In the modern period, several of the most significant U.S. scholars made their contributions after arriving to the U.S. from Europe in order to escape persecution by the Nazis. They saw first-hand the need for an international legal order that would serve to restrain the worst failures of domestic politics and law. Like scholars already present in the U.S., they lamented the failure of the United States to join the League of Nations after World War I, as well as some U.S. government efforts to obstruct the development of human rights law during the inter-war period.[1] Despite or perhaps because

1 President Woodrow Wilson, as chair of the Commission on the League of Nations, successfully thwarted all efforts to include a clause in the Covenant of the League of Nations supporting racial equality. Conférence de la Paix, 1919–1920, *Recueil des actes de la Conférence*, "Secret," Partie 4. The debate is summarized in Paul Gordon Lauren, *The Evolution of Human Rights: Visions Seen* 99–101 (Univ. of Pennsylvania Press, 1998).

of this effort, NGOs and scholars actively promoted the idea of international human rights.[2]

While U.S. isolationist tendencies did not end with the outbreak of the Second World War, internationalists came to the fore, at least during the 1940s. Scholars like Louis Sohn,[3] Egon Schwelb, Louis Henkin and Oscar Schachter, having experienced the Second World War, participated directly in the development of human rights law and institutions at the global level. Sohn, for example, helped generate support for the U.N. and participated in the 1945 drafting conference in San Francisco.[4] How his participation came about is a typical dimension of U.S. legal education, where the role of mentors is important in furthering the development of the law, scholarship and scholars. During and after World War II, Sohn was a research assistant of Manley O. Hudson, judge on the Permanent Court of International Justice (PCIJ). Hudson had returned to Harvard when the PCIJ was suspended during the War. Their first project on human rights came in 1942 when Judge Hudson, along with Sohn, was consulted by the American Law Institute for guidance in drafting a statement on essential human rights that would implement President Franklin Delano Roosevelt's Four Freedoms.[5]

Their contribution to the U.N. Charter began when prominent lawyer Reginald Heber Smith, proposed a joint project between the American and Canadian Bar Associations to involve activists, lawyers and scholars in drafting a charter for a new global institution to promote international peace and security. Judge Hudson and Louis Sohn thereafter spent the period leading up to the San Francisco conference generating support for a new world institution and eliciting ideas about the structure of such a body. Following each meeting, Sohn prepared a draft article for the future U.N. Charter, based on that meeting's discussion, together with a commentary supported by available legal precedents. These efforts led to a document that influence the April 1945

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2 J. Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUMAN RIGHTS QUARTERLY 4 (1992).

3 *See* in particular Sohn's revealing article *How American International Lawyers Prepared for the San Francisco Bill of Rights*, 89 AM.J. INT'L L. 541 (1995).

4 *See* further Daniel Magraw, *Louis B. Sohn, Architect of the Modern International Legal System*, 48 HARV. L. REV. 1 (2007).

5 The final American Law Institute report, entitled, *A Statement of Essential Human Rights*, was published in 1944. Americans United for World Organization, *Statement of Essential Human Rights* (New York: American Law Institute, 1945). The text was one of the principal sources used by John Humphrey in 1947 when compiling the secretariat draft of what became the Universal Declaration of Human Rights. JOHN P. HUMPHREY, HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE 32 (Dobbs Ferry: Transnational Publishers, 1984).

drafting conference in San Francisco. The eventual choice of New York as the headquarters of the United Nations probably reinforced this evident focus on global institutions and standards. In contrast, European scholarship and practice at the time was more often devoted to creating strong European regional institutions.

With the adoption of the U.N. Charter, the Universal Declaration on Human Rights, and the Genocide Convention, U.S. scholars turned their attention to examining how international human rights norms could alleviate or remedy systemic problems in the United States, such as racial segregation and, later, the juvenile death penalty. They supported petitions to the United Nations to combat racial injustice.

The inward look at how human rights law could alter U.S. law and policy was highly controversial and led to a proposed constitutional amendment that would have precluded U.S. ratification of human rights agreements. The "Bricker Amendment" was openly supported by segregationists, but also by those reacting to the emergence of the Cold War with a strong rejection of international institutions suspected of being infiltrated by Communists. The Eisenhower administration was able to defeat the amendment, but at the price of renouncing U.S. ratification of the Genocide Convention and other human rights treaties then being drafted, including the U.N. Covenants then underway. The result was a disparity between U.S. support for developing human rights law and institutions and the failure to participate in them once concluded. This disparity remains a feature of U.S. law and policy, as discussed by Louis Henkin in his contribution on U.S. reluctance to ratify human rights treaties. As a whole, but not uniformly, U.S. scholars have supported and argued for greater U.S. acceptance of human rights treaties, but Senate approval has been limited, grudging, and hedged with reservations.

Perhaps because of the practical experience of many U.S. scholars, including involvement in the treaty drafting process, many published articles are devoted to close textual analysis of treaties or jurisprudence. This focus may also reflect the culture of U.S. legal education, where the words and even the punctuation of legal opinions, constitutional provisions, and legislative enactments are parsed with great care. Early scholarly debates over the interplay between U.N. Charter articles 55 and 56 with article 2(7) and on-going discussion of whether articles 2(4) and 51 preclude humanitarian intervention is typical of this type of scholarship, which has certainly contributed to the development of human rights law. The fact that many of those making these arguments were not only present during the drafting, but often later became part of administrations applying the Charter provisions, allowed the scholarship to be rooted in practice and in turn to influence the future evolution of the norms.