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## The Formative Years of the American Society of International Law

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# THE FORMATIVE YEARS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

By Frederic L. Kirgis\*

## I. GETTING STARTED

### *The Peace Movement at the Turn of the Twentieth Century*

The United States at the dawn of the twentieth century was just beginning to comprehend the influence it could have on the international scene. It had no desire to become involved in the European power politics that had produced, in the lifetimes of many Americans then living, the Crimean War, the Franco-Prussian War and the essentially European Boer War in South Africa. Nevertheless, a distinct strain of expansionism could be found in American foreign policy. The belief was stirring in those concerned to establish a nonviolent world order that the interaction of nation-states would benefit from exposure to American values, American economic dynamism and the lessons to be drawn from the American federal experience. This belief, combined with a deep aversion to what was seen as essentially a European proclivity for settling disputes by resort to war, motivated some of the more influential participants in the American peace movement. That movement, in turn, gave birth to the American Society of International Law.

The American peace movement was an odd collection of visionaries, world federalists and "legalists."<sup>1</sup> The legalists included lawyers, diplomats and academics who placed their faith in formal dispute settlement as the means for avoiding war. Before the first decade of the century had run its course, they would organize the ASIL as a forum for the promotion of practical (and essentially American) ways to attain the goal of peace.

The American legalists were part of a wider body of like-minded persons striving to develop international law as an instrument of peace. In England, the conditions attached by William Whewell when he established the chair in international law at Cambridge University directed the holder to aim in his work at laying down such rules and suggesting such measures as might tend ultimately to extinguish war among nations.<sup>2</sup> The Institute of International Law, a European-based body of eminent legal experts, was founded in 1873 with the aim of becoming "the organ of the legal conscience of the civilized world."<sup>3</sup> Although it failed of that lofty purpose, it worked steadily to articulate principles of international law; in 1904 it was awarded the Nobel Peace Prize in recognition of its contribution to peaceful conflict resolution.<sup>4</sup> The International Law Association, based in London, sprang from the Conference for the Reform and Codification of International Law, organized by the peace movement and held in Brussels in 1873.<sup>5</sup>

The American peace movement was building up steam as the twentieth century began. The movement itself was nothing new. The American Peace Society had been organized

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<sup>1</sup> See David S. Patterson, *An Interpretation of the American Peace Movement, 1898-1914*, in PEACE MOVEMENTS IN AMERICA 20, 23-24 (Charles Chatfield ed., 1973). For a slightly different taxonomy, see RUHL J. BARTLETT, THE LEAGUE TO ENFORCE PEACE 4 (1944).

<sup>2</sup> See HENRY SUMNER MAINE, INTERNATIONAL LAW 1 (photo reprint 1979) (New York, H. Holt 1888).

<sup>3</sup> See Irwin Abrams, *The Emergence of the International Law Societies*, 19 REV. POL. 361, 375 (1957).

<sup>4</sup> See IRWIN ABRAMS, THE NOBEL PEACE PRIZE AND THE LAUREATES 52-53 (1988).

<sup>5</sup> See Abrams, *supra* note 3, at 371-72, 376-79.

in 1828, but had failed to make much of an impact on the shapers of American foreign policy.<sup>6</sup> By 1895, though, members of the American foreign policy establishment had begun to gather annually at Lake Mohonk, in upstate New York, to discuss the preservation of peace, particularly the importance of international arbitration as an alternative to war. The first Hague Peace Conference was held in 1899 and seemed to offer hope for just that outcome.

American participants in the Hague Peace Conferences of 1899 and 1907 placed great faith in the concepts of arbitration and adjudication. They realized that the products of their efforts—the Permanent Court of Arbitration<sup>7</sup> and an international prize court<sup>8</sup>—were less than perfect: the Permanent Court, because it was not really a court or even an arbitral body but, rather, a roster of potential arbitrators; and the prize court, because its subject matter jurisdiction was quite limited.<sup>9</sup> By the time of the second Hague Conference, the American emphasis had shifted from arbitration to the creation of a permanent judicial body that would apply established, neutral rules and principles of international law to the settlement of international disputes.<sup>10</sup> Differences of opinion among the forty-four participating states about the method of selecting judges, and perhaps deeper differences as well, prevented the 1907 conference from realizing that goal.

Nevertheless, the American legalists were optimistic. Joseph Choate, who led the American delegation to the second Peace Conference, said in 1913 of the first conference:

[H]ere, for the first time, it was unanimously agreed that respect for law must be fundamental in all international arbitration.

. . . .

War had been, from the beginning, the normal condition of the world, interrupted by fitful intervals of peace, but now we are coming in sight of the new doctrine,—the American doctrine, as it may well be called—that peace is and shall be the normal condition of mankind, and that war is only an occasional incident interrupting and disturbing it, for now all nations agree that arbitration is the most efficacious and equitable method of deciding controversies which have not been capable of settlement by diplomatic methods.<sup>11</sup>

James Brown Scott, the leader among the founders of the American Society of International Law and a delegate to the second Peace Conference, asserted that “the great work of the First Conference, indeed its chief title to remembrance, lies in the creation of a court, in reality a panel of judges, to which nations might freely and with confidence resort for the constitution of a tribunal for the judicial settlement of international disputes.”<sup>12</sup> John W. Foster, a former Secretary of State, considered the “arbitration conven-

<sup>6</sup> See C. ROLAND MARCHAND, *THE AMERICAN PEACE MOVEMENT AND SOCIAL REFORM, 1898–1918*, at 5–6 (1972).

<sup>7</sup> Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, 187 Consol. TS 410, as amended, Oct. 18, 1907, 36 Stat. 2199, 205 Consol. TS 233. See also 2 JAMES BROWN SCOTT, *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907*, at 80, 308 (1909) [hereinafter SCOTT, *HAGUE CONFERENCES*].

<sup>8</sup> 2 SCOTT, *HAGUE CONFERENCES*, *supra* note 7, at 472.

<sup>9</sup> The prize court never came into existence.

<sup>10</sup> See CALVIN DEARMOND DAVIS, *THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE* 253, 260–61 (1975); Elihu Root, Instructions to the American Delegates to the Hague Conference of 1907, in 1907 FOREIGN RELATIONS OF THE UNITED STATES, pt. 2, at 1128, 1135; 1 SCOTT, *HAGUE CONFERENCES*, *supra* note 7, at 426–28 (1909).

<sup>11</sup> JOSEPH H. CHOATE, *THE TWO HAGUE CONFERENCES* 33 (1913). Choate recognized the inadequacies of the Permanent Court of Arbitration in the form it took at the Hague Conferences. *Id.* at 77–80.

<sup>12</sup> 1 SCOTT, *HAGUE CONFERENCES*, *supra* note 7, at 277. Like Choate, Scott was aware that the Permanent Court had its shortcomings, but he was optimistic about its development into a true permanent court of arbitration. *Id.* at 281, 311.

tion" to be "the most important and the crowning work of the [first] Hague Conference."<sup>13</sup>

This pervasive faith in arbitration stemmed largely from the outcome of the well-known *Alabama* claims, in which an international tribunal had awarded the United States \$15.5 million from Great Britain for the latter's failure to prevent the fitting out in Britain of Confederate warships during the American Civil War.<sup>14</sup> It was thought that the agreement to arbitrate the *Alabama* claims, and Britain's compliance with the award, may have averted a war between the two nations.<sup>15</sup>

The *Alabama* arbitration, however, was not the only source of faith for the true believers. In the three decades following the *Alabama* decision, almost a hundred cases had been submitted to international arbitration.<sup>16</sup> Many of the ensuing awards were compatible with American interests. In 1914 Scott, as Director of the Division of International Law of the Carnegie Endowment for International Peace, published a pamphlet summarizing eighty-three arbitrations and diplomatic settlements "in the nature of arbitral adjustments" to which the United States had been a party. Dissemination of the pamphlet, he thought, "would advance the cause of arbitration by showing how frequently and successfully it has been resorted to." Scott appended a table indicating that fifty-two of the awards or settlements went in favor of the United States, fourteen went the other way, and seventeen favored "all parties."<sup>17</sup>

International arbitration between governments was the sole formal topic of discussion at the Lake Mohonk Conferences, held annually from 1895 until the outbreak of World War I.<sup>18</sup> Several of the individuals in attendance at these prestigious gatherings became influential figures in the formation and early years of both the American Society of International Law and the Carnegie Endowment. Their enthusiasm for arbitration unquestionably derived in large part from their belief in it as the most promising available instrument of peace. Their ardor may have been heightened by the fact that several of them had participated as counsel, or in some other capacity, in arbitral proceedings involving the United States.<sup>19</sup> Their faith in America, as the champion of what was just and right, was probably another factor: since in their view the United States was likely to have justice on its side in any dispute, there would be little to fear if an arbitral body decided the matter.<sup>20</sup>

The American legalists also had faith in the settlement of disputes between nation-states by a permanent international court. Scott was influential in establishing the American Society for Judicial Settlement of International Disputes, and became its first President. That society held its first conference in December 1910. Scott and Elihu Root, who was by then the President of the American Society of International Law, were two

<sup>13</sup> JOHN W. FOSTER, *ARBITRATION AND THE HAGUE COURT* 39 (1904).

<sup>14</sup> The Treaty of Washington, May 8, 1871, 17 Stat. 863, 143 Consol. TS 145, established the tribunal and set out the rules of neutral conduct it was to apply. The award appears in 1 JOHN BASSETT MOORE, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY* 653 (1898).

<sup>15</sup> See Henry B. Brown, Remarks, 2 ASIL PROC. 132, 144 (1908). See also Gladstone's pronouncement in the British House of Commons on June 15, 1880: "I regard the fine imposed on this country as dust in the balance compared with the moral value of the example set when two great nations . . . went in peace and concord before a judicial tribunal rather than resort to the arbitrament of the sword." Quoted in George A. Finch, *The American Society of International Law 1906-1956*, 50 AJIL 293, 293 (1956) [hereinafter Finch, *ASIL 1906-56*].

<sup>16</sup> See MANLEY O. HUDSON, *INTERNATIONAL TRIBUNALS, PAST AND FUTURE* 5 (1944).

<sup>17</sup> James Brown Scott, *Introductory Note to ARBITRATIONS AND DIPLOMATIC SETTLEMENTS OF THE UNITED STATES* (Carnegie Endowment for International Peace, Division of International Law Pamphlet No. 1, 1914). The table is in *id.* at 20. John Bassett Moore shared Scott's belief in arbitration, as evidenced by his monumental *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (6 vols. 1898).

<sup>18</sup> See LARRY L. FABIAN, *ANDREW CARNEGIE'S PEACE ENDOWMENT: THE TYCOON, THE PRESIDENT, AND THEIR BARGAIN OF 1910*, at 25-26 (1985); Finch, *ASIL 1906-56*, *supra* note 15, at 295.

<sup>19</sup> See MARCHAND, *supra* note 6, at 45-46.

<sup>20</sup> See FABIAN, *supra* note 18, at 17.

of the three keynote speakers. The conference was devoted to the proposition that a permanent international court, preferably modeled on the United States Supreme Court, would promote peaceful resolution of international disputes by applying recognized principles of international law.<sup>21</sup> The same theme carried through to the sixth and last conference, in 1916.<sup>22</sup>

### *The Birth of the American Society of International Law*

At the eleventh Lake Mohonk Conference, held from May 31 to June 2, 1905, the American Society of International Law was conceived. By then, international lawyers had become a significant presence among the participants. Thirteen members of the conference in 1905 were international lawyers, up from one or two in 1901 and 1902.<sup>23</sup>

George W. Kirchwey, Dean of the Columbia University School of Law in 1905 and a first-time participant in the conference, told the group on the final day that he longed "for some exhibition of a more definite purpose in the gathering than the threshing of the old straw of the Constitution or treading the wine press of ancient wars." The time had come, he said, to take "some definite step in the direction of organization of machinery for forwarding the purpose" of promoting peace through the use of international arbitration.<sup>24</sup>

An informal committee consisting of Kirchwey, Robert Lansing, later to become Secretary of State, and Scott, then a Columbia University law professor, had already met to discuss forming an international law society and a journal devoted to international law.<sup>25</sup> When Kirchwey's intervention with the other members of the conference met no opposition, the three men decided to proceed.<sup>26</sup> A group of twenty-four interested members then met and decided to appoint a committee "to draft a form of organization for an American international law society."<sup>27</sup> A committee of seven members was formed. It acted as a steering committee, eventually adding fourteen more members. The members were principally professors of international law and diplomats with experience in matters involving international law.<sup>28</sup>

In the ensuing months, those members of the committee of seven who lived in New York City (Kirchwey, Scott, Oscar S. Straus, Chandler P. Anderson and John Bassett Moore) met several times to draw up a tentative constitution. Scott did much of the work.<sup>29</sup> It was later said of him: "Those of us who began our association with this Society at the outset know that it was Dr. Scott's idea, this American Society of International Law. It was his vision, and it was due to his energy, his devotion, that his idea, his vision, became a reality."<sup>30</sup>

<sup>21</sup> See INTERNATIONAL CONFERENCE OF THE AMERICAN SOCIETY FOR JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES, PROCEEDINGS OF INTERNATIONAL CONFERENCE UNDER THE AUSPICES OF THE AMERICAN SOCIETY FOR JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES, DECEMBER 15-17, 1910 (1911).

<sup>22</sup> See AMERICAN SOCIETY FOR JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES, PROCEEDINGS OF SIXTH NATIONAL CONFERENCE, DECEMBER 8-9, 1916 (1917). The focus of the sixth conference was entirely on the U.S. Supreme Court.

<sup>23</sup> MARCHAND, *supra* note 6, at 40.

<sup>24</sup> MOHONK LAKE CONFERENCE ON INTERNATIONAL ARBITRATION, REPORT OF THE ELEVENTH ANNUAL MEETING 128-29 (1905) [hereinafter MOHONK REPORT].

<sup>25</sup> See James Brown Scott, *History of the Organization of the American Society of International Law*, 1 ASIL PROC. 23 (1907), on which much of the narrative in this article regarding formation of the Society is based.

<sup>26</sup> Kirchwey and Scott must have been very close. In later correspondence, Kirchwey addressed Scott by a homespun nickname and used one for himself as well. Letter from George W. Kirchwey to James Brown Scott (Jan. 14, 1913). All letters cited in this article are in the ASIL's files.

<sup>27</sup> Scott, *supra* note 25, at 26.

<sup>28</sup> MOHONK REPORT, *supra* note 24, at 141.

<sup>29</sup> See Ralph D. Nurnberger, James Brown Scott: Peace Through Justice 58 (1975) (unpublished Ph.D. dissertation, Georgetown University).

<sup>30</sup> Jesse S. Reeves, Vice President of the Society, Address, 32 ASIL PROC. 1 (1938).

The religious metaphor to describe Scott's relationship with the Society and international law occurred to others as well. Frederic Coudert, who became a member of the Executive Council in 1907 and President of the Society much later, said in the year of Scott's death: "As a Founder, as Secretary, as President through a decade, there was no activity of the Society that did not receive [Scott's] full-hearted, enthusiastic support and leadership. For him international law was more than a study or a profession; it was, in fact, a religion."<sup>31</sup>

Scott was born in 1866 and grew up in Philadelphia. He graduated summa cum laude from Harvard College, and went on to study international law in Berlin, Heidelberg and Paris until 1894. He then practiced law in Los Angeles until 1899, organizing the Los Angeles Law School—now the University of Southern California Law Center—in 1896. In 1899 he became Dean of the University of Illinois College of Law. While he was there, he published the first American casebook on international law.<sup>32</sup> He left Illinois in 1903 to accept a professorship at Columbia. From there, he was appointed Solicitor of the Department of State in 1906 by Secretary of State Root, having written what Root described as a nonchalant letter of application that so intrigued the Secretary that he read it aloud at a Cabinet meeting. President Theodore Roosevelt was intrigued as well; he encouraged Root to pursue Scott. Next came a personal interview with Root that began with Scott's tripping over his briefcase into Root's arms.<sup>33</sup> Miraculously, it seems, Scott got the job.

Following his stint as Solicitor of the State Department, Scott settled in as Secretary and Director of the Division of International Law at the Carnegie Endowment for International Peace in 1911. At various times after he moved to Washington, he held lectureships or professorships at George Washington, Johns Hopkins and Georgetown Universities. He was, of course, a prolific scholar throughout his career. He died in 1943.<sup>34</sup>

In 1905 it remained for Scott and his colleagues to make the Society a reality. When they felt that their proposed constitution and plan for a journal of international law were ready to be vetted by the organizing committee of twenty-one, they invited the full committee, together with some other interested persons, to a dinner meeting on December 9, 1905, at the home of Straus, the committee chair and later the U.S. Secretary of Commerce and Labor. Ten committee members and ten others attended the meeting. The nonmembers included, not coincidentally, Andrew Carnegie, the industrialist/philanthropist with a known interest in international arbitration as a means of avoiding war.

Straus proposed the constitution, explaining that specialists and other interested persons would form the nucleus of the new Society's membership. The Society's *raison d'être*, in his view, was "to popularize and develop international law."<sup>35</sup> This work, he later said, "is to secure the peace of justice."<sup>36</sup> Similarly, Scott once described the Society as "a little band of workers whose only purpose is to popularize, in so far as we can, the principles of international law, and by concrete example to show how they apply to the settlement of questions between nations."<sup>37</sup>

An annual meeting would draw the members together. It would feature papers and discussion—a format that proved to have considerable staying power. Straus noted,

<sup>31</sup> Frederic R. Coudert, *An Appreciation of James Brown Scott*, 37 AJIL 559, 559 (1943).

<sup>32</sup> James Brown Scott, *Cases on International Law*, published by the Boston Book Co. in 1902 and reissued by West Publishing Co. in 1906.

<sup>33</sup> See James Brown Scott, *Elihu Root: An Appreciation*, 31 ASIL PROC. 1, 6–7 (1937). Some of the information in this paragraph comes from an interview with Eleanor H. Finch (May 16, 1994).

<sup>34</sup> This synopsis of Scott's career is based on George A. Finch, *James Brown Scott, 1866–1943*, 38 AJIL 183, 184–85 (1944).

<sup>35</sup> The quote is from James Brown Scott's paraphrase of Straus's remarks, 1 ASIL PROC. 28 (1907).

<sup>36</sup> Letter from Oscar S. Straus to James Brown Scott (Apr. 27, 1916), *reprinted in* 10 ASIL PROC. 137 (1916).

<sup>37</sup> Letter from James Brown Scott to Richard Olney (Apr. 24, 1913).

though, that the annual meetings would reach only a limited number of interested people. If that were to be the Society's sole activity, it might fail of its purpose. Thus, he proposed that the Society publish a journal devoted solely to international law. He saw a real need, since at that time there was no such journal in English.<sup>38</sup> The establishment of a journal, he concluded, would reflect credit on the Society, as well as furnish the most efficient means of developing international law.<sup>39</sup>

Root later expounded on the reasons for establishing the journal. In its first issue, he noted that uninformed public sentiment had sometimes pushed governments into wars that could have been avoided had the positions of the disputing states been more widely understood. Unnecessary wars had to be prevented. "One means to bring about this desirable condition," he said, "is to increase the general public knowledge of international rights and duties and to promote a popular habit of reading and thinking about international affairs." He conceded that "the whole body of any people" could not be expected to study international law, but enough of them could "become sufficiently familiar with it to lead and form public opinion in every community in our country upon all important international questions as they arise." Consequently, he viewed the new journal primarily as affording a practical benefit to the people of the United States.<sup>40</sup>

The December 1905 meeting endorsed the proposed constitution, with minor amendments. Scott then presented his plan for the contents of the new journal. It was the fruition of an idea he had formed a few years earlier, when he was at the University of Illinois.<sup>41</sup> He proposed that the journal contain:

- addresses and papers read at the Society's annual meetings;
- articles "of an historical or critical nature dealing with the various phases of international law";
- articles dealing with important international law of the day;
- a chronicle of important international events, such as the making of treaties and arbitral awards, governmental acts affecting the development of international law, and the issuance of decisions of domestic and foreign courts affecting international law;
- a review of the literature of international law;
- a comprehensive bibliography of publications relating to international law;
- book reviews of the more important international law publications; and
- editorial comments on international matters.

Scott contemplated that contributors to the new journal would include not only academics, but also practitioners, diplomats and students of diplomatic history. Articles should be solicited, he said, from "the great foreign authorities and publicists" and translated into English if submitted in a foreign language.<sup>42</sup> The journal should be issued quarterly. It would be under the editorial control of an editor in chief, assisted by a board of editors. Ultimate control would rest in the Society's Executive Council.

<sup>38</sup> The first issue of the *Journal* listed ten "principal periodicals devoted wholly or in part to questions of international law." Only one, the *American Political Science Review*, was published in English, and its coverage of international law was limited to a section in each issue. 1 AJIL 135-36 (1907).

<sup>39</sup> Again, the paraphrase is by James Brown Scott, 1 ASIL PROC. at 29. At the 1905 Lake Mohonk Conference, the initial group of interested members had conceived of such a journal as a vehicle "to disseminate not only the proper ideas regarding peace and arbitration, but to disseminate instruction regarding the great principles of international law and those questions that lead to differences between nations." The group also believed that the journal "would be most useful in stimulating the scholars who are devoting themselves to that subject." MOHONK REPORT, *supra* note 24, at 141.

<sup>40</sup> Elihu Root, *The Need of Popular Understanding of International Law*, 1 AJIL 1, 2-3 (1907). The *New York Tribune* reported that "the journal does not confine itself to academic essays on abstract topics of international law, but pays most attention to the issues which are at the present time of special interest." N.Y. TRIB., Feb. 9, 1907. A thorough synopsis of the articles in the first issue appeared in N.Y. SUN, Feb. 10, 1907.

<sup>41</sup> See Finch, *supra* note 34, at 188; 25 ASIL PROC. 242-43 (1931).

<sup>42</sup> 1 ASIL PROC. at 30.



At a meeting on January 12, 1906, in the offices of the Bar Association of the City of New York, the Constitution of the American Society of International Law was formally adopted. The Society was to be an unincorporated association. According to Article II, "The object of this Society is to foster the study of International Law and promote the establishment of international relations on the basis of law and justice. For this purpose it will cooperate with other societies in this and other countries having the same object."<sup>43</sup>

There was debate about the conditions, if any, that would be placed on eligibility for membership. Some favored limiting eligibility to members of the legal profession and former diplomats. Others wished to include corporate members.<sup>44</sup> Ultimately, it was decided to exclude commercial entities. Unlike the Institute of International Law, the new Society would not limit membership to international law experts: "The value of men of affairs, and the broad experience they bring to the discussion of a question of theory, cannot be or should not be overlooked or rejected."<sup>45</sup>

In the event, of course, membership was extended beyond "men of affairs." Not only were other men included, but also women eventually became eligible. In fact, one woman, Mary Elizabeth Urch, Dean of Women at Lewiston State Normal School in Idaho, appeared on the list of members at the time of the first Annual Meeting in April 1907.<sup>46</sup> Her name remained on the list in 1908, but then disappeared.

Dean Urch must have slipped onto the membership roll unnoticed. At the first meeting of the Executive Council on January 29, 1906, the question arose whether women would be eligible for membership. According to the minutes, "After discussion . . . it was moved and carried that 'any man of good moral character, interested in the objects of the Society, may be admitted to membership in the Society.'<sup>47</sup> Women more prominent than Dean Urch—such as Beva Ann Lockwood of the National Equal Rights Party and Jane Addams of Hull House—were denied membership.<sup>48</sup>

The Executive Council's decision in 1906 was a curious one, even for its time. Women were active in the Lake Mohonk Conferences and were striving to make their influence felt in the American peace movement.<sup>49</sup> The women at the conferences were not lawyers, but neither were a good many of the men. At the 1905 Lake Mohonk Conference, Judge Stiness, reporting for the original group of members interested in forming an international law society, had said that "the secretary of this committee will welcome the names of any of the gentlemen here, and ladies also, who wish to unite with us and become members of this American International Law Society."<sup>50</sup>

As it happened, women did not become formally eligible for membership until 1920.<sup>51</sup> In fact, as late as 1917, women were not even allowed to attend the annual banquet as guests, although they could attend meetings of the Society.<sup>52</sup> The *Journal* did publish a book review by a woman in 1919, but it concealed her gender by identifying her as H. K. Thompson.<sup>53</sup>

<sup>43</sup> *Id.* at 5.

<sup>44</sup> The debate over admitting corporate members made the news. See N.Y. TIMES, Jan. 13, 1906.

<sup>45</sup> Editorial Comment, 1 AJIL 129, 134 (1907).

<sup>46</sup> See Alona E. Evans & Carol Per Lee Plumb, *Women and the American Society of International Law*, 68 AJIL 290, 290 (1974).

<sup>47</sup> ASIL Executive Council, *Précis of the First Meeting* 3 (Jan. 29, 1906) (in the ASIL's files).

<sup>48</sup> Evans & Plumb, *supra* note 46, at 290–91.

<sup>49</sup> *Précis*, *supra* note 47, at 10.

<sup>50</sup> MOHONK REPORT, *supra* note 24, at 141–42.

<sup>51</sup> The Society's files contain an application for membership from Isabelle Bridge, of New York City, in 1916, and a reply from James Brown Scott turning her down.

<sup>52</sup> Letter from James Brown Scott to Ellery C. Stowell (Apr. 13, 1917), in which Scott expressed regret that the custom of excluding women from the banquet still existed.

<sup>53</sup> Evans & Plumb, *supra* note 46, at 295, identifying her as Hope K. Thompson. She reviewed LASSA OPPENHEIM, LEAGUE OF NATIONS (1919), in 13 AJIL 627 (1919).

Individuals were to be elected to membership by the Executive Council on the nomination of two members in regular standing. There were about 125 initial members, "most of them prominent men."<sup>54</sup> Two groups predominated in the founding membership: lawyers with diplomatic experience and legal academics.<sup>55</sup>

The full Executive Council soon found that it could not consider each application for membership expeditiously; it therefore created a committee on membership to do so. The committee was kept busy. By April 1907, the Society had 525 members.<sup>56</sup> Of these, only about 11 percent appear to have been academics at the higher education level.<sup>57</sup> By contrast, in 1993 academics represented slightly more than 20 percent of the membership<sup>58</sup>—a percentage that has held roughly steady for many years.<sup>59</sup>

From the outset, the Society's Constitution has provided for the election of not more than one honorary member in any year. To be eligible, persons may not be citizens of the United States and must "have rendered distinguished service to the cause which this Society is formed to promote."<sup>60</sup> The first election was held at the first Annual Meeting in 1907; two honorary members were elected, one for 1906 and one for 1907. They were Thomas Erskine Holland, professor of international law and diplomacy at Oxford, and Henri Lammasch, professor of international law at the University of Vienna.<sup>61</sup> Other distinguished publicists have followed in their footsteps, though not in every year. In some years the Society's Committee on Selection of Honorary Members has not agreed that there was anyone of significant stature to deserve nomination.

At first, the Society was operated out of Scott's home in Washington. When Scott became the chief administrative officer of the newly established Carnegie Endowment in 1911, the Endowment provided the Society with office space in its headquarters on Jackson Place, near the White House. From Jackson Place, Scott administered the day-to-day operations of the Society. He had help from George A. Finch, who became Assistant Secretary of the Endowment in 1912. The Society stayed on Jackson Place until the Carnegie Endowment moved to New York City in 1950.<sup>62</sup>

The Society's membership at the Annual Meetings has always elected the President and Vice Presidents. A Nominating Committee, appointed annually by the Executive Council in the early years (more recently, elected at the Society's business meeting), proposes each slate of officers.

The first President of the Society was Secretary of State Root, who was destined to win a Nobel Peace Prize in 1912. Root inspired great admiration and loyalty in those who worked for him.<sup>63</sup> These admirers included Scott, the Department's Solicitor. Scott's service to Root has been described as "efficient and almost worshipping."<sup>64</sup> Root himself

<sup>54</sup> N.Y. TRIB., Jan. 13, 1906.

<sup>55</sup> See Nurnberger, *supra* note 29, at 60–62. This membership, of course, reflected the composition of the initial organizing group. See text at note 28 *supra*.

<sup>56</sup> See 1 ASIL PROC. 216 (1907).

<sup>57</sup> The 1907 members are listed in *id.* at 11–22. Of the 525 listed members, 56 are identified as "Professor" or "Doctor." A few others of that ilk probably did not identify themselves as such.

<sup>58</sup> There were about 4,300 members in 1993. Approximately 880 of them were identified with institutions of higher learning. 1993 ASIL MEMBERSHIP DIRECTORY at xi, 561–76.

<sup>59</sup> In November 1933, George Finch, then the Secretary of the Society, wrote a letter to the editor rebutting an offhand assertion in the *American Bar Association Journal* that about 80% of the Society's members were law professors. Finch pointed out that of the 1,100 current members, 235 (about 21%) were connected with colleges and universities. See 20 A.B.A. J. 59 (1934).

<sup>60</sup> ASIL CONST. ART. III.

<sup>61</sup> See 1 ASIL PROC. at 261–62.

<sup>62</sup> See Finch, *ASIL 1906–56*, *supra* note 15, at 297–98; George A. Finch, Remarks, 44 ASIL PROC. 65–66 (1950).

<sup>63</sup> See 2 PHILIP C. JESSUP, ELIHU ROOT 505 (1938); RICHARD W. LEOPOLD, ELIHU ROOT AND THE CONSERVATIVE TRADITION 189 (1954).

<sup>64</sup> 1 JESSUP, *supra* note 63, at 456.

was no less loyal. When President Woodrow Wilson ordered American troops to occupy Veracruz, Mexico, in April 1914, Root (no longer Secretary of State) had serious reservations. Nevertheless, at the Society's annual banquet just four days after the troops moved in, Root—with tears running down his cheeks—pledged his loyalty to the President.<sup>65</sup> He asked the assembled Society members to drink a toast to the President. They stood while the orchestra played "The Star-Spangled Banner."<sup>66</sup>

In accordance with the principles of the Society he headed, Root also put justice before power—at least to the extent allowed by his governmental responsibilities and the realities facing him. For example, while Root was reviewing one of Scott's legal memoranda at the State Department, he is quoted as having said to Scott: "We must always be careful, and especially so in our relations with the smaller states, that we never propose a settlement which we would not be willing to accept if the situation were reversed."<sup>67</sup> Even when, as Secretary of War in 1903, Root defended President Roosevelt's role in detaching Panama from Colombia—an event Root had no prior knowledge of because he was in Europe tending to other matters—he did so in the belief that Panama had what in a later era would be called a right of self-determination.<sup>68</sup>

Root gave stature to the Society in its early days. One historian of the peace movement has said, "With Root as president, the American Society of International Law represented the emerging 'establishment status' of the peace movement in its purest form."<sup>69</sup> Root and Scott were both conservatives, though they came to it in rather different ways. Root was the quintessential political conservative of his day, reflecting his social position and his views about the need to educate and lead the public. Scott's conservatism did not stem so much from social position as from a firm belief in law and an ordered international system.<sup>70</sup>

Initially, there were twelve Vice Presidents of the Society, including Chief Justice of the United States Melville W. Fuller, Associate Justices David J. Brewer and William R. Day, former Secretaries of State Foster and Richard Olney, Secretary of War William H. Taft, and Carnegie. Scott was the first Recording Secretary. Charles Henry Butler, Reporter of the United States Supreme Court, was the Corresponding Secretary, and Chandler P. Anderson, special counselor to the State Department, was the Treasurer. The first Executive Council included former diplomats, other public servants, and distinguished academics.

In sharp contrast to the practice of the Society in recent years, turnover at the top was slow. Root remained President for eighteen consecutive years, until 1924. Scott remained Recording Secretary for the same period. In 1924 Scott became a Vice President, and served as President from 1929 to 1939. He was then elected Honorary President, a title he retained until his death in 1943. George Grafton Wilson attended the Lake Mohonk Conference in 1905 and participated in the initial discussions that led to the Society's formation. He became a member of the first Executive Council and remained a member (eventually as a Vice President and then as an Honorary Vice President) until he died in 1951, the last of those who were present at the creation. Other founding members who held offices continuously throughout their lifetimes were Charles Noble Gregory, Lansing, Straus and Theodore S. Woolsey. Two other founders, Butler and Moore, served for many years, but not continuously, as officers. Much of

<sup>65</sup> 2 *id.* at 257–60.

<sup>66</sup> See 8 ASIL PROC. 327 (1914).

<sup>67</sup> Scott, *supra* note 33, at 8.

<sup>68</sup> See 1 JESSUP, *supra* note 63, at 401–05, 518.

<sup>69</sup> MARCHAND, *supra* note 6, at 52.

<sup>70</sup> See Hatsue Shinohara, *The Rise of a New International Law in America*, 5 JAPANESE J. AM. STUD. 85, 89–90 (1993–94).

Moore's tenure was as an Honorary Vice President, a post that made minimal demands on his time.

The first meeting of the Executive Council, on January 29, 1906, approved the proposal to establish a journal, and referred the matter to the Executive Committee. The Executive Council also decided to publish a prospectus setting out the aim and scope of the Society. The prospectus asserted "that Government and people are fundamentally and constitutionally interested in international law, and that a correct understanding of the system as a whole is an essential element of good citizenship." Thus, the Society

would count for much in the formation of a sound and rational body of doctrine concerning the true principles of international relations. It is equally certain that the publication of a journal devoted to the exposition of those principles would offer a ready and valuable means of communication between jurists and students of international law on the one hand, and the scientific and lay public on the other.<sup>71</sup>

At the next Executive Council meeting, on June 1, 1906, Scott was appointed Managing Editor (the title was changed to Editor in Chief in 1909) of the new *American Journal of International Law*. Scott was initially given authority to name the Board of Editors, though the Executive Council retained the ultimate responsibility and soon began electing the board.<sup>72</sup> Members of the first board, in addition to Scott, were Gregory (University of Iowa), Lansing (Watertown, New York), Moore (Columbia University), William W. Morrow (San Francisco), Leo S. Rowe (University of Pennsylvania), Straus (District of Columbia), Wilson (Brown University), Woolsey (Yale University) and David J. Hill (The Hague, the European Editor). Editors were to serve three-year terms, with the first board's service ending on January 1, 1910.<sup>73</sup>

The formation of the Society was thus complete. It was conceived not primarily as a scholarly society, but as an instrument for peace in the world. Those who founded it were brought together by their faith in arbitration as a means of avoiding war and serving American interests, but they broadened their focus to encompass the spectrum of international relations and to promote justice as well as peace.

The founders regarded the *Journal* as an integral organ of the Society from the outset. It was designed not just as a medium for discourse among scholars and diplomats, but also as a vehicle for bringing international law into the public consciousness. Implicit in this purpose was a conception of international law not as a process, but as a set of norms ascertainable through the use of "scientific" methods. Legal scholars, including those in the field of international law, were thought to be scientists searching with the help of neutral principles to find and proclaim the law. The founders were driven by the belief that international law could control, or at least significantly influence, the conduct of national governments if its rules were clearly identified with the tools of science, and if an appropriate, law-based dispute-settlement mechanism were available.

### *The Original Goals in Retrospect*

With the benefit of hindsight, these premises seem naive. Arbitration has hardly proved to be a substitute for war. In fact, it is surprising that the men of the world who founded the Society thought that it could be. As Professor Woolsey pointed out at the first Annual Meeting, the typical arbitration treaty of the day exempted from the duty to arbitrate those matters important enough to lead to war.<sup>74</sup>

<sup>71</sup> *Prospectus: The Aim and Scope of the American Society of International Law*, 1 ASIL PROC. 35, 36 (1907).

<sup>72</sup> The results of the Executive Council's election of editorial board members first appear in the Society's annual *Proceedings* for 1910. See 4 ASIL PROC. 196 (1910).

<sup>73</sup> Letter from James Brown Scott to Oscar S. Straus 4 (Dec. 12, 1908).

<sup>74</sup> 1 ASIL PROC. at 240, 241.

International law, though it contains its share of ascertainable norms, has turned out to be an adaptable mix of principles, rules, processes and institutions used for policy making, as well as for third-party dispute settlement. Hardly anyone in the late twentieth century would deny that power, not just principle, has contributed substantially to the development of international norms.

In addition, it has not proved possible to put together a journal that is at the same time a work of scholarship, in the sense that it reflects and conveys original ideas about norms and processes, and a purveyor of international law directly to the public.<sup>75</sup> Although the *Journal* from its inception has been devoted in part to conveying information about international events and instruments, its stature has come instead from the depth of analysis in articles and comments that are not aimed at popular audiences. This dichotomy should have been apparent early on, when both the Society and the *Journal* were closely identified with the American peace movement. In the words of one commentator, the pre-World War I peace movement became elitist and thus

never developed meaningful contacts with movements for social and political change. Its rhetoric reflected this elitism. While it was always lofty in tone, it became less warmly humanistic and more coldly intellectual. Its idealistic message could arouse the interest of high-minded individuals in the peace movement, but because it expressed no urgent social message it could not sustain the active involvement of a reform-minded generation in the cause.<sup>76</sup>

Nevertheless, the Society laid the groundwork at the outset for intensive work on conflict avoidance and conflict resolution, as well as on myriad other international law and world order issues. Moreover, the Society—if not the *Journal* as such—has at various times, particularly in the 1990s, engaged in programs intended to enhance public awareness of international law as a force for justice and order in the world. From the beginning, individual Society members have tried to do the same thing.<sup>77</sup> The founders may not have had a clear vision of what the new Society could or would do, but they certainly cannot be said to have wandered off aimlessly.

## II. GAINING MOMENTUM

### *The Early Annual Meetings*

The Society's first Annual Meeting was held on Friday and Saturday, April 19 and 20, 1907, at the New Willard Hotel in Washington. It focused on five topics, each of them of considerable importance to the United States at the time:

- Would immunity from capture of nonoffending private property on the high seas during war be in the interest of civilization?
- Is trade in contraband of war unneutral, and should it be prohibited by international and municipal law?
- Is forcible collection of contract debts in the interest of international justice and peace?

<sup>75</sup> Interestingly, Scott carried over the goal of informing the public about international law into the Carnegie Endowment. One of his aims in persuading the Carnegie Institution—later the Endowment—to publish the *Classics of International Law* was to spread “the knowledge of a law of nations and [put] at the disposal of the general reader as well as the expert the process of its literary growth and development.” 9 Y.B. CARNEGIE ENDOWMENT INT'L PEACE 106 (1920). The importance of making the classics accessible to experts is undeniable; that the general reader has taken advantage of the opportunity to read Gentili, Grotius, Pufendorf et al. is doubtful, to say the least.

<sup>76</sup> Patterson, *supra* note 1, at 33.

<sup>77</sup> For example, Charles Cheney Hyde gave “a popular course on International Law, as interpreted by the United States,” consisting of 20 lectures, at Northwestern University in the spring of 1916. The Society's files contain the printed announcement of the lecture series, but they do not show what the public turnout was.

- What are the rights of foreigners in the United States in case of conflict between federal treaties and state laws?
- In what ways did the second Hague Conference contribute to the development of international law as a science?

The program for the meeting noted matter-of-factly that, at an arranged time, “[t]he President of the United States will receive the members of the Society at the White House.”<sup>78</sup> This set the stage for similar announcements—and similar receptions—at other Annual Meetings in the early years. The men then in control of the Society had direct access to the White House.

The Society’s President Root began the first Annual Meeting with an analysis of Japan’s claim that the decision by the San Francisco Board of Education in 1906 to send “all Chinese, Japanese, or Korean children to the Oriental Public School,”<sup>79</sup> rather than to the normal public schools, violated the 1894 Treaty of Commerce and Navigation between the United States and Japan.<sup>80</sup> Root’s detailed analysis focused particularly on the treaty-making power in the United States and the supremacy of a treaty over any contrary law of California or a municipality. Although he took a strong position in favor of the federal power to enter into treaties touching on the rights of aliens in this country, he did plant a seed that gave rise for many years to controversy over the extent of the treaty-making power—a seed that Charles Evans Hughes was to nurture into full flower at a later Annual Meeting.<sup>81</sup> It concerned the possibility that some matters are not sufficiently “international” to be the subjects of treaties. Root said:

It is, of course, conceivable, that, under pretense of exercising the treaty-making power, the President and Senate might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be only a colorable—not a real—exercise of the treaty-making power . . . .

. . . Although there are no express limitations upon the treaty-making power granted to the National Government, there are certain implied limitations arising from the nature of our Government and from the other provisions of the Constitution; but those implied limitations do not in the slightest degree touch the making of treaty provisions relating to the treatment of aliens within our territory.<sup>82</sup>

In later years the controversy shifted away from the federal treaty-based authority to control local officials’ treatment of aliens and raged instead over the federal authority to enter into treaties controlling state or local restrictions on the asserted rights of citizens. In either form, it was and is an issue of particular importance for a federation such as the United States.

One could even see the origin of the mid-century debate over the Bricker Amendment in Root’s comments at the first Annual Meeting. The Bricker Amendment would have amended the Constitution to provide that a treaty would be effective in U.S. domestic law only through legislation that would be valid in the absence of a treaty. Finch, like Scott a disciple of Root and Scott’s successor as the Society’s Recording Secretary, was a leading proponent of the Bricker Amendment as protection against what he regarded as abuse of the treaty-making power to regulate matters of domestic concern.<sup>83</sup> For the

<sup>78</sup> 1 ASIL PROC. at 39.

<sup>79</sup> Quoted in *id.* at 46.

<sup>80</sup> Treaty of Commerce and Navigation, Nov. 22, 1894, Art. 1, 29 Stat. 848, 9 Bevans 387.

<sup>81</sup> 23 ASIL PROC. 194–96 (1929).

<sup>82</sup> Elihu Root, Address, 1 ASIL PROC. 43, 49–50 (1907), reprinted in 1 AJIL 273, 279 (1907). The dispute was also the subject of Editorial Comments by James Brown Scott in *id.* at 150 and 449.

<sup>83</sup> See George A. Finch, *The Need to Restrain the Treaty-Making Power of the United States within Constitutional Limits*, 48 AJIL 57 (1954); George A. Finch, *Observations on Proposed Amendments to the United States Constitution*, 48 ASIL PROC. 128 (1954) [hereinafter Finch, *Proposed Amendments*]; George A. Finch, *The Treaty-Clause Amendment: The Case for the Association*, 38 A.B.A. J. 467 (1952) [hereinafter Finch, *Treaty-Clause Amendment*].

proposition that some matters are not of international concern and are therefore not legitimate treaty subjects, Finch relied in part on the views of Anderson, the Society's first Treasurer and special counsel to Root when he was Secretary of State.<sup>84</sup> Finch began his international law career in the State Department in 1906, and served there under Anderson. It is quite possible that Anderson or Finch, or both, assisted Root in the preparation of the remarks quoted above, and one of them may even have written Root's remarks.

That the scope of the federal treaty authority was the subject of the opening address at the Society's first Annual Meeting shows not only the longevity of the issue, but also the "Americanness" of the Society from the outset. It was as understandable in 1907 as it is in the 1990s that the Society would have a particular interest in what came to be called the foreign relations law of the United States, and in international law issues of particular interest to the United States.

In fact, one could view the Society at that time as rather parochial. Scott, its guiding force, was a quintessentially American international lawyer. His unofficial biographer noted that Scott "tended to project America's traditions, democratic heritage and institutions upon other nations regardless of their cultural backgrounds."<sup>85</sup> Other leading lights in the Society looked to Anglo-Saxon experience and values as prerequisites for a stable world order.<sup>86</sup> The United States Supreme Court was held up as the ideal model for a world court.<sup>87</sup>

Some other themes that were to recur surfaced at the first Annual Meeting. When William J. Coombs, of Brooklyn, expressed his disappointment with the meeting's failure to work toward a common position on the codification of international law,<sup>88</sup> he gave voice to the tension between the intellectual discussion of current issues and the impulse to reach practical conclusions that might promote world order. It is a tension that the Society has not been able to put aside.

Related to that—and also in evidence at the first Annual Meeting—has been the question whether the Society should adopt positions on controversial international law issues. As was noted above, one of the topics discussed at the first Annual Meeting concerned the forcible collection of debts. William Barnes, of Nantucket, proposed that the Society adopt a resolution disapproving the use of naval power to collect debts and approving the noninterventionist Calvo and Drago doctrines.<sup>89</sup> The draft resolution was referred to the Executive Committee,<sup>90</sup> from which it never emerged. Similar tactics were to be used in subsequent years.<sup>91</sup>

Even though the Society did not take a position on the Calvo and Drago doctrines, or on any other substantive issue, the press regarded the first Annual Meeting as newsworthy. At the last session, on April 20, 1907, former Secretary of State Olney criticized the United States Government for practically expropriating Colombian territory to build the Panama Canal without paying compensation to Colombia.<sup>92</sup> The press reported the gist

<sup>84</sup> See Finch, *Proposed Amendments*, *supra* note 83, at 131; Finch, *Treaty-Clause Amendment*, *supra* note 83, at 468. For Anderson's views, see Chandler P. Anderson, *The Extent and Limitations of the Treaty-Making Power under the Constitution*, 1 AJIL at 636, 639, 665.

<sup>85</sup> Nurnberger, *supra* note 29, at 101.

<sup>86</sup> See MARCHAND, *supra* note 6, at 46.

<sup>87</sup> *Id.* at 59–60. See Wayne Mac Veagh, Remarks, 3 ASIL PROC. 48, 51 (1909); A. J. Montague, Remarks, *id.* at 227–35; N. W. Harris, Remarks, *id.* at 236.

<sup>88</sup> 1 ASIL PROC. 96–97 (1907).

<sup>89</sup> *Id.* at 141. For a contemporaneous discussion of the doctrines, see Amos S. Hershey, *The Calvo and Drago Doctrines*, 1 AJIL 26 (1907).

<sup>90</sup> 1 ASIL PROC. at 142–43.

<sup>91</sup> See, e.g., 2 ASIL PROC. 129–30 (1908); 3 *id.* at 235–36 (1909); 10 *id.* at 169 (1916) (matters referred to the Executive Council rather than to the Executive Committee, but the effect was the same).

<sup>92</sup> Richard Olney, Address, 1 ASIL PROC. at 218, 227.

of what he said, noting that he had "created something of a sensation among his auditors."<sup>93</sup> The Washington press continued to cover the Society's Annual Meetings into the 1940s.

In those early-twentieth-century days of optimism that law and legal process could be made to supplant war, the media in the United States paid more attention to the development of international law than later in the century. Not only did the press cover the Society's Annual Meetings, but it gave considerable play to lawmaking conferences, sometimes using experts as correspondents. For example, a member of the Society, Professor Amos S. Hershey of Indiana University, served as a correspondent for the *New York Evening Post* and the *Boston Evening Transcript* at the second Hague Peace Conference in 1907.<sup>94</sup>

The discussion of substantive issues at the Society's 1907 Annual Meeting had a look that remains familiar, though the issues themselves have changed in the intervening years. Papers taking opposite sides were prepared and read. Some were a bit lengthier than the program planners had apparently contemplated. There was discussion of the papers, but it was not as wide-ranging as discussion from the floor has often been in more recent years.

Problems lurking in the nature of international law were commented upon then, as they are today. For example, Moore's paper lamented that

the two chief defects in international law at the present day are, first, the lack of a ready mode of demonstrating that a certain rule, the validity of which may be asserted by one power and denied by another, is in reality a principle of international law; and, secondly, the lack of a fixed and definite method of assuring the observance of the system.<sup>95</sup>

This refrain could still be heard ninety years later.

One verse of the refrain led off the second Annual Meeting. Root opened the proceedings with a presidential address, in accordance with what he said had already become the custom imposed on Presidents of the Society (thus establishing, presumably, that even in those days custom did not take years to develop). Root's theme was enforcement of international law through governments' sensitivities to international opinion, in the absence of effective third-party sanctions. He argued that similar sensitivities were the principal force behind compliance with municipal law, so that the international and municipal systems were not nearly as different as some believed.<sup>96</sup>

The second address was by future Secretary of State Lansing, who elaborated on Root's topic of the previous year—state responsibility toward aliéens. Among other things, he noted with approval a portion of an 1885 report by Francis Wharton in which Wharton argued that a government was responsible not only for its own treatment of aliens, but also for any injury to them if the exercise of reasonable care could have averted it.<sup>97</sup> Like Root, Lansing had put his finger on a matter that would continue to capture the attention of decision makers. A little more than a hundred years after Wharton's assertion, the Inter-American Court of Human Rights in the landmark *Velásquez Rodríguez* case found a similar duty (and extended it to a state's treatment of its own citizens) in Article 1(1) of the American Convention on Human Rights.<sup>98</sup> That article calls on all

<sup>93</sup> WASH. HERALD, Apr. 21, 1907. The *New York Herald*, on April 21, 1907, reported that Olney "caused a stir." His remarks were also reported by the *New York Times* and *New York Sun* of April 21, 1907. These clippings are on file with the Society.

<sup>94</sup> See 2 AJIL 29 n.1 (1908).

<sup>95</sup> John Bassett Moore, Address, 1 ASIL PROC. at 252, 258–59.

<sup>96</sup> Elihu Root, *The Sanction of International Law*, 2 ASIL PROC. at 14.

<sup>97</sup> Robert Lansing, Address, *id.* at 44, 47.

<sup>98</sup> *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., ser. C, No. 4, 1988 ANN. REP. 35, paras. 161–75 (July 29).



state parties to “ensure” to all persons subject to their jurisdiction the full exercise of the Convention’s rights and freedoms.<sup>99</sup> What had been asserted to be customary law benefiting aliens in the late nineteenth and early twentieth centuries became treaty law benefiting citizens as well as aliens, in the Americas and probably elsewhere,<sup>100</sup> in the late twentieth century.

Yet another issue was considered at the 1908 Annual Meeting that has resonance at the end of the century. During the discussion on the establishment of an international prize court, Scott noted that if the United States participated in such a court, a large part of its municipal law would be “transferred from its national courts . . . to an international court established at The Hague. It may seem to a certain extent a renunciation of sovereignty.”<sup>101</sup> (Scott favored such a renunciation.) Had he lived so long, he would have recognized essentially the same issue in the 1990s regarding U.S. ratification of the first Optional Protocol to the Covenant on Civil and Political Rights, which creates a procedure for individual petitions to the UN Human Rights Committee, or U.S. participation in the creation of an international criminal court.

### *The Early Leaders*

During the early years, the Society remained under the effective control of well-connected men who were either intimately involved in public affairs or closely attached to elite academic institutions. As we have seen, President Root was Secretary of State from 1905 to 1909 and had earlier served as Secretary of War. Other officers were, or would become, high public officials—a state of affairs that seems to have been taken for granted. Thus, when one of the Society’s Vice Presidents was elevated to the highest office in the land, the minutes of the next Executive Committee meeting reported dryly: “Mr. Anderson [the Society’s Treasurer] called attention to the probable vacancy in the office of vice president caused by the election of Mr. Taft to the Presidency of the United States.”<sup>102</sup> Business then went on as usual.

Scott was not politically prominent, but he was well connected in high government circles, largely through his close association with Root. Among other things, he frequently attended intergovernmental conferences, typically as a legal adviser.

The early leaders had much in common, whether they were primarily practitioners, governmental officials or scholars. They were public-spirited, and many—as in the case of Root and Scott—were identified with conservative principles. (Interestingly, these principles in the pre-World War I era encompassed support for a world court, not just support for a permanent arbitral tribunal.) The Society’s initial leaders had social stature, although not all of them were born to wealth. Many, but again not all, were the products of the most prestigious American colleges and universities.<sup>103</sup>

Root, the source of much of the Society’s stature in the early years, was the son of a mathematics professor at Hamilton College in upstate New York. Root stayed at home for college, and then got a law degree from New York University. Once he began his lustrous career, he seems to have been equally comfortable in the Washington establish-

<sup>99</sup> American Convention on Human Rights, Nov. 22, 1969, Art. 1(1), 1144 UNTS 123, OAS TS No. 36.

<sup>100</sup> The International Covenant on Civil and Political Rights, Dec. 19, 1966, Art. 2(1), 999 UNTS 171, contains language quite similar to the language in American Convention Art. 1(1). The UN Human Rights Committee has found that governments have an affirmative duty to act when it is known that a citizen’s life has been threatened. See *Delgado Páez v. Colombia*, UN GAOR, 45th Sess., Supp. No. 40, vol. 2, at 43, UN Doc. A/45/40 (1990). For the European human rights system, see *Case of X and Y v. Netherlands*, 91 Eur. Ct. H.R. (ser. A) (1985) (interpreting Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

<sup>101</sup> 2 ASIL PROC. at 152, 155.

<sup>102</sup> ASIL Executive Committee, Minutes (Dec. 12, 1908).

<sup>103</sup> See MARCHAND, *supra* note 6, at 50–51, 55–56.

ment and back home in upstate New York.<sup>104</sup> His advice was sought by governmental officials at the highest levels virtually until his death.

### *The American Journal of International Law Takes Shape*

While the Society was developing its substantive agenda, its flagship publication, the *American Journal of International Law*, was getting on its feet. It was, said Scott, “an organ of progressive and scientific thought” that would endeavor to “bring home to the English reader, layman or specialist, the theory and practice of international law. The journal is the handmaid of science and its pages will be closed to the language of prejudice and bias.”<sup>105</sup>

Managing Editor Scott personally advanced the funds needed to publish the first issue. These amounted to \$1,700, which the Society later repaid in full.<sup>106</sup> Scott also paid for the second issue (April 1907), and the Society again reimbursed him.<sup>107</sup> At about that time, the Society contracted with Baker, Voorhis and Co., of New York, to publish the *Journal* for ten years. The Society agreed to pay Baker, Voorhis half of the annual dues; Baker, Voorhis, for its part, agreed to pay the Society half of the proceeds from the sale of the *Journal*.<sup>108</sup>

The Society’s Executive Committee decided, on April 25, 1908, to invite subscriptions to a Special Publication Fund to support the *Journal*. Twenty-three members pledged amounts ranging from ten dollars (fifteen pledges) to a hundred dollars (one pledge).<sup>109</sup> Fund-raising does not appear to have been any easier then than in more recent times.

In the early years, and well into its maturity, the *Journal* had at least one influential institutional subscriber. Moreover, it was one that could be counted on to buy multiple copies. By executive order of the President of the United States, the State Department bought a copy of each issue for every U.S. embassy, legation and consulate, a total of about 450 copies.<sup>110</sup> The fact that the President of the Society was also the Secretary of State may have had something to do with this, but the subscription was renewed annually for many years after Root left the State Department. The Department continued to purchase the *Journal* for its Foreign Service until at least 1950, though the number of copies it ordered declined over time.

Scott clearly had his hands full producing the new *Journal* in addition to his full-time job as Solicitor of the Department of State. Explaining that, “[a]s I am occupied during the day I have had to devote nights, holidays and Sundays to the work,” he asked the Society for some help.<sup>111</sup> The Executive Committee responded in December 1908 by appointing W. Clayton Carpenter as full-time Business Manager of the *Journal*.<sup>112</sup> Carpenter resigned in 1909 and was replaced by Finch, who began a long and prominent association with the *Journal*—an association that was to include ten years as Editor in Chief (1943–1953).

<sup>104</sup> The definitive biography of Root is JESSUP, *supra* note 63.

<sup>105</sup> James Brown Scott, *Editorial Comment*, 1 AJIL 134, 134–35.

<sup>106</sup> Letter from James Brown Scott to Oscar S. Straus (Dec. 12, 1908) [hereinafter Scott, Letter to Straus]. The letter is an important chronicle of the start-up of the *Journal*. It is in the Society’s Executive Council Minutes file for 1906–1937.

<sup>107</sup> Finch, *ASIL 1906–56*, *supra* note 15, at 298.

<sup>108</sup> Scott, Letter to Straus, *supra* note 106. The contract with Baker, Voorhis was not renewed when its term expired. A new contract was then entered into with the American branch of Oxford University Press. AJIL Board of Editors, Minutes 1–2 (Dec. 2, 1916); 11 AJIL, title page, Jan. issue (1917). By 1920, four-fifths of the \$5 annual dues were going toward publishing the *Journal*. 14 ASIL PROC. 6 (1920).

<sup>109</sup> The list, with amounts pledged, is in the Society’s files. See also 2 ASIL PROC. 130 (1908).

<sup>110</sup> Scott, Letter to Straus, *supra* note 106.

<sup>111</sup> *Id.*

<sup>112</sup> ASIL Executive Committee, Minutes 2 (Dec. 12, 1908).

The fledgling *Journal* could not afford the luxury of sitting back and waiting for eminent publicists to submit manuscripts. Scott solicited articles from authors in the United States, Europe and Latin America. It did not take long, though, for the *Journal* to attract submissions. By the end of 1908, international law specialists were offering to write articles without being asked.<sup>113</sup>

Not only did Scott edit the *Journal* (and essentially run the Society); he was a significant contributor to the *Journal's* pages. He published seven leading articles in the first two volumes alone.<sup>114</sup> He also wrote most of the Editorial Comments in the early volumes.<sup>115</sup> These comments were based on current events. They were not of "an academic nature," because academic comments "would lose their interest to the readers."<sup>116</sup> The Editorial Comments thus were seen as purveyors of information, and in some cases as vehicles for explaining the legal issues raised by current events, to an audience that was thought to be different from the readers interested in the more scholarly lead articles.

The *Journal* contained other departments envisaged in Scott's original proposal.<sup>117</sup> The Chronicle of International Events, which ran from the first issue until 1950, outlined significant events in chronological order. It mentioned such things as the signing, ratification or denunciation of treaties; various national decrees, regulations and proclamations; the convening of significant international conferences; some national elections; and other events that caught the compiler's eye. The events were not always directly connected with international law.<sup>118</sup>

The Chronicle usually supplied only the most basic data about an event, unlike the fuller treatment given by Charles Rousseau in his *Chronique des faits internationaux*, which continues to be published in the *Revue Générale de Droit International Public*.<sup>119</sup> The list in the *Journal* was originally compiled by someone in the library of the State Department, but in 1913 the Carnegie Endowment took it over.<sup>120</sup>

Beginning with volume 1 in 1907 and ending in 1924, the *Journal* contained lists of public documents relating to international law. The lists included documents issued not only by the United States Government, but also by other governments around the world, with prices when they were available.

Another department, now defunct, was called Periodical Literature of International Law. It contained citations to articles relating to international law in publications other than the *Journal* itself. Some of the articles appeared in nonlaw periodicals, and many were in foreign languages. At first, articles were listed individually, but later lists were organized by periodical, naming the international law articles in each. The department was discontinued after 1964, because the *Index to Foreign Legal Periodicals* had begun publication and was thought to provide more comprehensive coverage.<sup>121</sup>

The Judicial Decisions (now International Decisions) and Book Reviews and Notes departments have appeared continuously from volume 1 to the present. Judicial Deci-

<sup>113</sup> Scott, Letter to Straus, *supra* note 106.

<sup>114</sup> The first of these, *The Legal Nature of International Law*, 1 AJIL 831 (1907), was based on two articles Scott had previously published. The others, on topics ranging from the peace conferences to naval warfare to the proposed court of arbitral justice, appear to have been original contributions to the *Journal*.

<sup>115</sup> In the earliest years, Editorial Comments were unsigned. That Scott was the author appears in an appendix to Scott, Letter to Straus, *supra* note 106.

<sup>116</sup> Scott, Letter to Straus, *supra* note 106.

<sup>117</sup> See text following note 41 *supra*.

<sup>118</sup> For example, under date of January 1, 1907, it was noted that Carnegie had donated \$750,000 for a new building to be used by the Bureau of American Republics. Under date of January 8, 1907, the death of the Shah of Persia was noted. Chronicle of International Events, 1 AJIL at 488, 493, 494.

<sup>119</sup> The *Chronique des faits internationaux* also contains maps where appropriate, and is organized by country rather than chronologically within the period covered.

<sup>120</sup> Letter from George A. Finch to Otis G. Stanton (July 31, 1913).

<sup>121</sup> John Hazard, Comment, 64 ASIL PROC. 269 (1970).

sions focused heavily on materials that would not be readily available in law libraries in the United States, such as decisions of foreign municipal courts and international arbitral tribunals. Extensive quotations from the opinions were used, making the department a valuable research tool for those interested in foreign and international cases.

The Book Review department had much the same outlook in 1907 as it has ninety years later. From the outset, books in major continental European languages have been reviewed, as well as books in English. The reviews, then as now, tended to be short (two or three pages), with a few exceptions for lengthy or particularly important books. The ubiquitous Scott wrote four of the five signed book reviews in the first issue of the *Journal*, and one suspects that he wrote most or all of the unsigned shorter reviews as well.

### III. ATTAINING MATURITY

#### *The Fourth Year of the Society*

When Taft took office as President of the United States in 1909, the officers of the Society looked for a way to maintain its association with him, and struck upon the idea of making him the Honorary President.<sup>122</sup> Accordingly, at the Annual Meeting in 1909, the Society's Constitution was amended to create the post, which Taft held until he left his higher office in 1913. Although the position of Honorary President remained in the Constitution, it went unfilled until 1921.<sup>123</sup>

Root's opening remarks at the Annual Meeting in 1909 touched on an issue close to the hearts of the "legalists" in the peace movement: the creation of a permanent international court.<sup>124</sup> Foster then developed the theme in some detail in his address,<sup>125</sup> and an entire session was devoted to it.<sup>126</sup> Root and the other "legalists," such as Foster, had come to believe that the typical international arbitration, though useful as a dispute-settlement mechanism, was insufficiently structured to apply and develop neutral rules of international law that could govern the conduct of nation-states. The reason was that the arbitrators, typically selected by the disputing parties on an ad hoc, case-by-case basis with only one neutral umpire on each panel, were inclined to reach settlements based on compromise and diplomatic acceptability. They could not be expected to rely on scientifically ascertainable rules of law. Far preferable to ad hoc arbitration, in the legalists' view, would be a permanent court staffed with professional, full-time judges whose duty would be to apply rules of law consistently and impartially.<sup>127</sup>

This was the goal Root had instructed the U.S. representatives to seek at the 1907 Hague Conference, where Scott, as the U.S. expert on international law, had worked indefatigably for the creation of a world court.<sup>128</sup> Although the effort failed, Root was able to announce at the 1909 Annual Meeting that two disputes involving the United States—one with Great Britain and the other with Venezuela—would be submitted to tribunals composed of neutral arbitrators who he thought would reach essentially judicial decisions.<sup>129</sup>

<sup>122</sup> Letter from James Brown Scott to Elihu Root (Apr. 5, 1909).

<sup>123</sup> When Warren Harding became the U.S. President in 1921, he became the Honorary President of the Society, until his death in 1923. Root succeeded Harding as Honorary President when he stepped down as ASIL President in 1924.

<sup>124</sup> 3 ASIL PROC. 13, 14–15 (1909).

<sup>125</sup> 3 ASIL PROC. at 25.

<sup>126</sup> *Id.* at 221–38.

<sup>127</sup> See 2 JESSUP, *supra* note 63, at 75–76.

<sup>128</sup> See Nurnberger, *supra* note 29, at 147–49.

<sup>129</sup> The cases were the North Atlantic Coast Fisheries Case (Brit./U.S.), Hague Ct. Rep. (Scott) 141 (1910), 4 AJIL 948 (1910), and the Orinoco Steamship Co. Case (U.S./Venez.), Hague Ct. Rep. (Scott) 226 (1910), 5 AJIL 230 (1911).

The 1909 Annual Meeting, like its predecessors, dealt with some subjects that have lost very little of their topicality over the years. Among them were the political offense exception in extradition treaties and the development of international law by U.S. courts. Henry B. Brown, a retired Justice of the United States Supreme Court, delivered the paper on the role of the Court. Among its interesting features is the discussion of sovereign immunity. In 1909 one could assume, as Justice Brown did, that merchant ships would be privately owned and operated. Thus, he was able to draw a tidy distinction between merchant ships (not immune) and naval vessels (immune),<sup>130</sup> without having to address the issues that would dominate discussions on sovereign immunity later in the century: whether government-operated merchant ships (or other commercial activities) should be immune and, if not, how to distinguish commercial from noncommercial activities.

### *The Codification Project*

At the Society's 1909 business meeting, held then as now during the Annual Meeting, the members voted to embark on an ambitious project close to Scott's heart. The Society adopted this resolution:

Whereas the arbitration of questions of a legal nature between nations is recognized as the most effective and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle; and

Whereas the establishment of a permanent court of international arbitration is predicated upon principles of justice universally recognized; therefore, be it

“Resolved, that the President of the American Society of International Law shall appoint a committee of seven members . . . to report to the annual meeting of this society in 1911 a draft codification of those principles of justice which should govern the intercourse of nations in times of peace; and make a preliminary report, if possible [before the 1910 Annual Meeting].”<sup>131</sup>

Scott, who introduced the resolution on behalf of Lansing, pointed out that the first paragraph was copied from the 1899 Hague Convention for the Pacific Settlement of International Disputes.<sup>132</sup> Presumably, he was trying to avoid any suggestion that the Society was taking a position on a controversial issue.

Scott accepted an interpretation offered by Crammond Kennedy, to the effect that the codification would focus on “rules or principles in view of the existing state of international law and of that ideal state which we expect to reach by the evolution of international law.”<sup>133</sup> Kennedy's interpretation suited Scott perfectly. Not only did Scott heartily endorse the idea of codification, which he thought was essential so as to give international arbitral and judicial bodies a consistent set of norms to apply in settling disputes. He also favored participation by private groups of international lawyers, and believed that it was not enough simply to codify existing practice; rules *de lege ferenda* should be articulated at the same time.<sup>134</sup>

Thus was born within the Society in 1909 the commingling of the codification and the progressive development of international law—a virtually irresistible phenomenon well-known in later years to other codifiers, including the International Law Commission.

<sup>130</sup> 3 ASIL PROC. at 166, 175.

<sup>131</sup> 3 ASIL PROC. at 268 n.1.

<sup>132</sup> Convention for the Pacific Settlement of International Disputes, *supra* note 7, Art. 16. The report of the 1909 Annual Meeting, 3 ASIL PROC. at 263, has Scott identifying the relevant article as VI, but it is actually Article 16. The same language appears in the 1907 revision of the Hague Convention, *supra* note 7, Art. 38.

<sup>133</sup> 3 ASIL PROC. at 264.

<sup>134</sup> See Nurnberger, *supra* note 29, at 123–25.

That the Society's effort eventually came to naught simply showed how ambitious, indeed utopian, the project was.

The project was still in its formative stage at the time of the 1910 Annual Meeting. Although the meeting was devoted primarily to a discussion of the rights of aliens vis-à-vis their host governments, one session dealt with codification, and the Committee on Codification submitted a preliminary report on its progress. The general discussion brought out the advantages and disadvantages of codification. The perceived advantages included the desirability of formulating clear norms for tribunals to apply. On the other side of the ledger were the risks of calcifying the law and of prematurely codifying political policies that could not reasonably be regarded as legal norms.<sup>135</sup>

The Committee on Codification had been divided into two subcommittees: one on the scope and plan of the report, and the other on the history and status of codification. The preliminary report of the former dissected the full committee's instructions as found in the 1909 resolution. It concluded that the committee's task was to declare principles of justice recognized by "civilized states" and identify the specific rules flowing from them "which have been sanctioned by conventional or other express assent." In addition, it would be appropriate to suggest wider application of the principles or modifications to the accepted rules that would bring them strictly into line with the declared principles.<sup>136</sup> This may not have been exactly what Kennedy and Scott had had in mind when they interpreted the 1909 resolution, but neither was it simply an attempt to codify existing principles and rules.

The Subcommittee on the Scope and Plan of the Report also identified the sources of state practice to which the committee should look, and outlined the topics to be covered. Although the subcommittee did not refer to the then-recent opinion of the U.S. Supreme Court in *The Paquete Habana*,<sup>137</sup> it obviously drew heavily on that case for the sources of state practice.<sup>138</sup> The topics to be covered read like a syllabus for a course on the public international law of peace, circa 1910.<sup>139</sup>

The report of the Subcommittee on the History and Status of Codification began by justifying codification and then briefly discussed previous efforts. It concluded that "[c]odification seems to be the order of the day."<sup>140</sup>

The Committee on Codification was unable to fulfill the Society's 1909 mandate that a draft codification be produced at the 1911 Annual Meeting. In fact, the committee failed to submit a formal report at that meeting. The Committee on Codification and its successors drifted on for decades, doing little more than reporting on the parallel efforts of other bodies.<sup>141</sup> Scott himself became active in codification efforts outside the Society, notably the Harvard Research in International Law and the codification program of the Institute of International Law.<sup>142</sup>

<sup>135</sup> See 4 ASIL PROC. 27-42 (1910).

<sup>136</sup> Committee on the Codification of the Principles of Justice in Times of Peace, Preliminary Report, 4 ASIL PROC. at 197, 200.

<sup>137</sup> 175 U.S. 677 (1900).

<sup>138</sup> Sources common to both the subcommittee's report and the Supreme Court's opinion included treaties, diplomatic arrangements, decisions of international and municipal tribunals, state papers, municipal legislation and the writings of publicists.

<sup>139</sup> See 4 ASIL PROC. at 203-08.

<sup>140</sup> 4 ASIL PROC. at 222.

<sup>141</sup> See James Brown Scott, Report to the Executive Council (May 1, 1937), 31 ASIL PROC. 227 (1937). In 1921 the Committee on Codification was consolidated into the Committee on the Advancement of International Law, 15 ASIL PROC. 126 (1921). In 1925 the codification effort was turned over to a Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law, 19 ASIL PROC. at vi, 173-75 (1925).

<sup>142</sup> See Nurnberger, *supra* note 29, at 125.

*The Arbitration Dream and the Real World*

The 1911 meeting culminated in a noteworthy roster of annual banquet speakers. They included President of the United States Taft (who as Honorary President of the Society might have found it difficult to stay away), the Chief Justice of Canada, and the Japanese and British Ambassadors to the United States. The Chief Justice of the United States, who had been asked to deliver an address, accepted what he thought was simply an invitation to attend the banquet and declined to speak.<sup>143</sup>

Arbitration as an instrument of peace—the motivating force behind the creation of the Society—was still very much on the agenda at the 1912 Annual Meeting, but the optimism of the founders was faltering. Root, still President of the Society but now a U.S. senator rather than Secretary of State, continued the practice he had begun in 1908 by opening the meeting with remarks about the principal events of the past year. When he came to arbitration, he devoted only a few words to the unratified treaties of arbitration with France and Great Britain.<sup>144</sup> These once-promising treaties had been so watered down in the U.S. Senate by reservations that the French and British Governments had backed off and Taft had decided not to proceed with ratification.<sup>145</sup> Root and the rest of the proarbitration core of the Society's leadership must have been greatly disappointed, even though Root had tried to have the treaties amended to withhold from arbitration some essentially "American questions" that might have been arbitrable under the agreements as negotiated.<sup>146</sup>

Root did not try to mask his disappointment that yet another blow had been dealt to the arbitration movement. He described the recently negotiated Declaration of London on the rules of blockade and neutrality in naval warfare, and noted its importance if the 1907 Hague Conference's international prize court were ever to become a reality. Governments—especially the all-important Government of Great Britain—were reluctant to ratify the convention establishing the prize court without knowing what rules it would apply. The London Declaration had been designed to supply the rules and thus reassure skeptical governments, but the British House of Lords was not satisfied with the outcome and had rejected the prize court bill. This setback effectively halted the momentum in other states. Root, who viewed the prize court as a stepping-stone to a more general permanent court of arbitration, did not refrain from pointing out just how frustrating that development was.<sup>147</sup> The prize court never did come into existence.

At the 1912 meeting, the Society for the first time as an institution urged a course of conduct on governments. The adopted resolution was uncontroversial. Prompted by the sinking of the *Titanic* less than two weeks earlier, the resolution advocated the convening of an international conference to formulate regulations increasing the safety of travel by sea, and sought the adoption of safety-at-sea regulations by the U.S. Government.<sup>148</sup> Many other voices around the world called for something to be done. As a result, the first International Conference for the Safety of Life at Sea was held in London in 1914.<sup>149</sup>

<sup>143</sup> Letters from James Brown Scott to Edward D. White (Jan. 16, Mar. 4 & Apr. 21, 1911), and from White to Scott (Mar. 1 & Apr. 19, 1911).

<sup>144</sup> 6 ASIL PROC. 1, 3 (1912).

<sup>145</sup> See DAVIS, *supra* note 10, at 322–25.

<sup>146</sup> *Id.* at 324. Senator Henry Cabot Lodge, who had led the effort in the Senate to limit the scope of the treaties, was the principal speaker at the Society's annual banquet two days after Root made his remarks. His topic was international arbitration. 6 ASIL PROC. at 200–06. Root was not present at the banquet.

<sup>147</sup> Elihu Root, *The Real Significance of the Declaration of London*, 6 ASIL PROC. 4, 6–12 (1912). For the London Declaration, Feb. 26, 1909, see 3 AJIL Supp. 179 (1909).

<sup>148</sup> 6 ASIL PROC. at 191–92.

<sup>149</sup> Later conferences were held in 1918, 1948, 1960 and 1974, culminating in the International Convention for the Safety of Life at Sea, Nov. 1, 1974 (SOLAS 1974), 32 UST 47, which—with a 1978 Protocol and several amendments—remains in force.

At the 1913 Annual Meeting, Root was unavailable to lead off with his usual summary of the past year's outstanding international events. In his place, Scott did so. He duly noted the ominous war in the Balkans, and then turned to the subject he held dear—international arbitration. Scott was enthusiastic about the decision in the *Russian Indemnity Case*, decided on November 11, 1912,<sup>150</sup> because it embodied precisely the approach to international adjudication that he thought would lead to a cohesive body of governing rules on the U.S. model. His words describe Scott's conception of the ideal arbitral decision:

[T]he court applied principles of law, cited decisions of courts of arbitration as precedents, and drew up its opinion in the form to which we are accustomed instead of adopting the labored and artificial system of French procedure heretofore used. The opinion in this case is a model, at once scientific and judicial. There is not a trace of compromise to be found in it.<sup>151</sup>

Scott also alluded to the controversy that had arisen between Great Britain and the United States over the interpretation of the Hay-Pauncefote Treaty of 1901, which called for equality of treatment among all nations using the Panama Canal. Great Britain had objected to an act of Congress exempting certain American vessels from paying tolls, and had called upon the United States to arbitrate.<sup>152</sup> This issue and related questions concerning the use of canals and treaty interpretation were the principal subjects discussed at the 1913 Annual Meeting. The Panama Canal tolls were so sensitive an issue that former Secretary of State Olney's address on the subject was vetted before the meeting by the White House.<sup>153</sup>

The 1913 Annual Meeting, like its predecessors and successors, served as a venue for meetings of the Executive Council. Even before 1913, the substantive sessions of the Annual Meeting had left little time for discussion of matters on the Executive Council's agenda, and 1913 was no exception. In 1913, however, the Executive Council for the first time coped with the problem by referring most of the difficult matters to the Executive Committee for decision. Issues had been referred to the Executive Committee in earlier years as well, but not wholesale.<sup>154</sup> The questions referred in 1913 related to the composition of the *AJIL* Board of Editors and the Committee on the Annual Meeting, a request from the publisher of the *Journal* for an increase in compensation, an invitation to hold the 1915 Annual Meeting in San Francisco, and "all unfinished business."<sup>155</sup> This substantial delegation of authority to the seven-member Executive Committee foreshadowed the questions raised in later years about the extent to which significant decisions on nonemergency matters should be made by the Executive Committee, rather than by the larger and presumably more representative Executive Council.

### *The Society's Operations During the Gathering Storm*

Root's opening remarks at the 1914 Annual Meeting were surprisingly optimistic. He made only passing reference to the gathering storm in Europe before proceeding to outline various plans and measures for the settlement of disputes. These included a series of arbitral proceedings and agreements to arbitrate that, he said, showed the

<sup>150</sup> *Russia v. Turkey*, Hague Ct. Rep. (Scott) 298 (1912), 7 *AJIL* 178 (1913).

<sup>151</sup> James Brown Scott, Address, 7 *ASIL PROC.* 1, 3 (1913).

<sup>152</sup> *Id.* at 5.

<sup>153</sup> *WASH. POST*, Apr. 26, 1913. For the address, *Panama Canal Tolls Legislation and the Hay-Pauncefote Treaty*, see 7 *ASIL PROC.* at 81.

<sup>154</sup> The precedent had been set at the first meeting of the Executive Council, in January 1906. See 1 *ASIL PROC.* 34–35 (1907).

<sup>155</sup> 7 *ASIL PROC.* at 252–53.



disposition of nations to settle their differences by peaceful means.<sup>156</sup> He then turned to the principal topic of discussion, the Monroe Doctrine, a topic that seems curious at a time when Europe was well on the way to its most momentous armed conflict yet. The guns of August would be heard in only three months.

Scott reported to the 1914 business meeting on the progress in forming an American Institute of International Law. It was to consist of representatives of the international law societies in North and South American countries. The meeting authorized Root to take the steps needed to enter into a relationship with the institute.<sup>157</sup> Scott was the moving force in the creation of the institute and became its president. It held its first meeting in December 1915, attended by representatives of the national societies that had been established in all of the American Republics—including, of course, the ASIL. The institute at its first meeting adopted a Declaration of the Rights and Duties of Nations, which appears to have been drafted primarily by Scott.<sup>158</sup>

The institute continued to meet at irregular intervals until 1938. It adopted recommendations on international organization and thirty draft projects on topics of international law.<sup>159</sup> The draft projects were presented to the Pan American Union, which placed twenty-seven of them before the International Commission of American Jurists for the Codification of International Law, in April 1927. Thirteen of the twenty-seven drafts found their way into the Commission's codification. The subjects included statehood, the treatment of aliens, the law of treaties, diplomatic and consular agents, maritime neutrality, asylum, the duties of states in case of civil war, and pacific settlement of disputes.<sup>160</sup>

To return to the Society's 1914 business meeting, Philip Brown, speaking from the floor, raised a matter involving the fundamental nature of the discussions held at the Annual Meetings: prepared papers were read, but the principal presenters paid little attention to each other's views and there was little time for discussion from the floor. In a future Annual Meeting, the Society should constitute itself into a deliberative assembly on specific questions of international law to be identified in advance. A committee would prepare and disseminate a report on the topics before the Annual Meeting so that members could come prepared to engage in meaningful discussions. Brown added, apparently without realizing how controversial it might be, that the Society would then vote some form of recommendation—presumably on the substance of the topics.<sup>161</sup>

Scott agreed. He suggested that discussions of the kind Brown had proposed, which Scott viewed as being too technical for nonspecialists in international law, could be held in the morning and afternoon sessions when teachers and practitioners would be present. "Popular" discussions or presentations could be made in the evenings when members of the public would attend. Thus, he said:

[I]nstead of reaching one class exclusively or appealing more particularly to one class, we will be able to gather up within the confines of our sessions all elements which, working together, can advance the cause of international law and promote the establishment of international relations on the basis of law and justice.<sup>162</sup>

The goal of reaching both specialists and laypersons had been a fundamental tenet of the Society from the beginning—though not one that was immune from occasional

<sup>156</sup> Elihu Root, Address, 8 ASIL PROC. 1, 2 (1914).

<sup>157</sup> 8 ASIL PROC. at 231-32.

<sup>158</sup> See Finch, *supra* note 34, at 207-08, where the declaration is quoted. It also appears in Scott's Editorial Comment, *The American Institute of International Law*, 10 AJIL 121, 124-26 (1916).

<sup>159</sup> The 30 draft projects appear in 20 AJIL Special Supp. 300-84 (Oct. 1926).

<sup>160</sup> See James Brown Scott, *The Gradual and Progressive Codification of International Law*, 21 AJIL 417 (1927).

<sup>161</sup> 8 ASIL PROC. at 239-40.

<sup>162</sup> *Id.* at 241-42.

challenges. The business meeting did not specifically endorse Scott's plan but, rather, approved a vague recommendation to the Committee on the Annual Meeting to include "constructive consideration of international law."<sup>163</sup>

The 1914 Annual Meeting ended, as did all Annual Meetings for many years, with the annual dinner. The principal speaker was then-Secretary of State William Jennings Bryan. He used the occasion to announce that the United States had that afternoon accepted an offer by the Governments of Argentina, Brazil and Chile to mediate the simmering dispute between the United States and Mexico over the treatment of Americans and American-owned property as a result of the revolution in Mexico.<sup>164</sup> The prospect of mediation averted what could well have been a war between the United States and Mexico. Bryan's announcement thus drew hearty applause from the diners. It was not to be the last time a speaker at an annual dinner made an important foreign policy announcement.

#### *Early Efforts to Make Documents of State Accessible*

In conjunction with the 1914 Annual Meeting, some forty-four teachers of international law held the first of what were to be seven Conferences of Teachers of International Law and Related Subjects. The conference was the brainchild of the ubiquitous Scott, acting in his capacity as Director of the Carnegie Endowment's Division of International Law. The Endowment's board of trustees had directed that a plan be carried out to strengthen the teaching in universities and law schools of "arbitration and international law and history as connected with arbitration."<sup>165</sup>

Among other endeavors, the conference began what would become a sustained effort by the Society to persuade governments to make documents of state accessible and to do so in a timely fashion. This initiative, of course, reflected the needs of the teacher/scholars who constituted the conference, but it also served a public interest. Specifically, the conference recommended:

That there be published in a cheap and convenient form all documents of state, both foreign and domestic, especially Latin American, bearing upon international law, including treaties, documents relating to arbitration, announcements of state policy, and diplomatic correspondence, and that the aid of the Department of State be solicited in securing copies of such documents for publication.<sup>166</sup>

In fact, the *American Journal of International Law* had been publishing documents of state, though selectively, since 1907. They appeared in *Supplements* to the *Journal* and included bilateral and multilateral treaties, diplomatic correspondence, national and international declarations, and some municipal legislation. Some of the documents published in the early years played a significant role in the twentieth-century development of international law.<sup>167</sup>

The 1914 recommendation of the Conference of Teachers induced the Society to endeavor to include all available documents of state in *AJIL Supplements*.<sup>168</sup> In April 1915, Scott wrote Secretary of State Bryan to ask if the *Journal* could publish the official

<sup>163</sup> *Id.* at 242.

<sup>164</sup> William Jennings Bryan, Address, 8 ASIL PROC. at 336, 338-39. See also Finch, *ASIL 1906-56*, *supra* note 15, at 305.

<sup>165</sup> CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, REPORT ON THE TEACHING OF INTERNATIONAL LAW IN THE EDUCATIONAL INSTITUTIONS OF THE UNITED STATES 1 (1913).

<sup>166</sup> *Id.* at 318.

<sup>167</sup> For example, the *Supplement* to volume 2 of the *AJIL* contained the Final Act and Conventions of the second Hague Peace Conference. 2 *AJIL Supp.* 1-218 (1908). The *Supplement* to volume 3 contained documents relating to the 1903 Panama Canal Treaty, dating back to 1815. 3 *AJIL Supp.* 106-39 (1909).

<sup>168</sup> See Finch, *ASIL 1906-56*, *supra* note 15, at 301.

communications of the State Department concerning World War I.<sup>169</sup> Bryan replied that President Wilson had approved of the plan, provided that the Department assemble the material.<sup>170</sup> With financial help from the Carnegie Endowment, the *Journal* then issued three *Special Supplements* containing World War I diplomatic correspondence between the United States and belligerent governments relating to neutral rights and commerce.<sup>171</sup> The *Nation* gave tribute to "the excellent service which that scholarly journal has rendered" in publishing the documents and called the 1915 *Special Supplement* "a most valuable compilation."<sup>172</sup>

### *Members and Their Participation*

The occasional stresses within the Society were evident in the Executive Council's consideration in 1916 of "the class of persons which should be sought for membership."<sup>173</sup> The question was whether to continue the policy of enrolling "all persons" (i.e., all male persons) interested in international law or to limit membership to scholars. It was a question that stemmed from the Society's mixed goals of popularizing international law and engaging in "scientific" studies of the subject. The Executive Council decided against turning the Society into a purely scholarly enterprise and, instead, resolved that "the widest membership for the Society should be sought."<sup>174</sup>

During these formative years, Scott and Finch, his assistant, did almost all of the Society's administrative work. Root performed the more prominent public functions and sometimes communicated with important people when the Society wanted something from them.

Scott and Finch, to their credit, seem to have replied faithfully to any correspondence from members (and others). Nevertheless, there is little indication in the Society's files that they actually sought to widen the inner circle of active members, other than by asking those with special expertise to participate in Annual Meetings. Scott and Finch did try to enlist new members, but that was done primarily for financial reasons.

Members' participation was uneven. Some of the prominent scholars of the day were active, such as Professor George Grafton Wilson, first of Brown University and then of Harvard. He chaired the Standing Committee on Selection of Honorary Members and the Standing Committee for the Study and Teaching of International Law before succeeding Scott as Editor in Chief of the *Journal*. On the other hand, Professor Moore, of Columbia, was active only occasionally. More than once he responded to Scott's entreaties by declining to participate in Annual Meetings or on Society committees, or to attend meetings of the *Journal's* Board of Editors, citing the burdens of his other obligations. He asked to be relieved from his position on the editorial board of the *Journal* in 1916. The Executive Council urged him to reconsider, which he did.<sup>175</sup>

Charles Cheney Hyde, first a practitioner in Chicago, then a professor at Northwestern and later at Columbia, became increasingly involved in the Society during this period. Others, such as Professors Gregory, who moved from the University of Iowa to George Washington University, and Hershey; John H. Latané, of Washington and Lee University and then of Johns Hopkins; and Paul S. Reinsch, of the University of Wisconsin; were steady contributors to the Society's work.

<sup>169</sup> Letter from James Brown Scott to William Jennings Bryan (Apr. 28, 1915).

<sup>170</sup> Letter from Bryan to Scott (May 7, 1915).

<sup>171</sup> 9 AJIL Special Supp. (July 1915); 10 AJIL Special Supp. (Oct. 1916); 11 AJIL Special Supp. (Oct. 1917).

<sup>172</sup> NATION (New York), Jan. 27, 1916, at 113.

<sup>173</sup> 10 ASIL PROC. 168 (1916).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 165; Letter from George A. Finch to John Bassett Moore (May 16, 1916); Moore's reply (May 22, 1916).

*Annual Meetings Just Prior to U.S. Entry into World War I*

In 1915 the Annual Meeting was held in December, in coordination with the Second Pan American Scientific Congress. Three of the five substantive sessions were held in conjunction with the Congress's Subsection on International Law. This collaboration was consistent with other efforts by the Society to spread the word about international law throughout the Americas, including Scott's active participation in the American Institute of International Law.

Root's opening address at the 1915 Annual Meeting was shot through with disillusionment over the war in Europe:

Many of the rules of law which the world has regarded as most firmly established have been completely and continuously disregarded, in the conduct of war, in dealing with the property and lives of civilian non-combatants on land and sea and in the treatment of neutrals. Alleged violations by one belligerent have been asserted to justify other violations by other belligerents. The art of war has been developed through the invention of new instruments of destruction and it is asserted that the changes of conditions thus produced make the old rules obsolete.

. . . It seems that if the violation of law justifies other violations, then the law is destroyed and there is no law; that if the discovery of new ways of doing a thing prohibited justifies the doing of it, then there is no law to prohibit. The basis of such assertions really is the view that if a substantial belligerent interest for the injury of the enemy come in conflict with a rule of law, the rule must stand aside and the interest must prevail. If that be so it is not difficult to reach the conclusion that for the present, at all events, in all matters which affect the existing struggle, international law is greatly impaired.<sup>176</sup>

These passages, of course, have a modern ring. Root might just as well have been speaking in the last decade of the century, alluding instead to norms concerning the use of armed force by way of reprisal or the use of nuclear weapons or other weapons of mass destruction. Nevertheless, he ended his address on a positive note, foreseeing that stronger law might rise from the ashes of a terrible war.<sup>177</sup>

Two years later, leading off the Annual Meeting held just three weeks after the United States declared war on Germany, Root reverted to his earlier disillusionment:

[T]his year I have nothing to call to the attention of the Society in the field of international law, except, so far as I can recall, that every rule which has been devised by the civilization of the century just passed for confining the operations of war within the limits of humanity, so far as that may be possible, and for distinguishing war between civilized nations from the wars of the past between barbarians—every rule of that description has been systematically, flagrantly and outrageously violated during the past year by the Empire of Germany.<sup>178</sup>

Hope for the future, Root went on to argue, lay in the spread of democracy. Only "[t]he substitution of a democratic for an autocratic regime removes the chief force which in the past has led nations to break over and destroy the limitations of law; that is, the prosecution of dynastic policies."<sup>179</sup> That view has since become commonplace among political scientists and others, including President William J. Clinton in his 1994 State of the Union Address,<sup>180</sup> though some have pointed out that it may hold true only for stable, mature democracies.<sup>181</sup>

<sup>176</sup> Elihu Root, *The Outlook for International Law*, 9 ASIL PROC. 2, 3 (1915).

<sup>177</sup> *Id.* at 10.

<sup>178</sup> Elihu Root, Opening Remarks, 11 ASIL PROC. 1-2 (1917).

<sup>179</sup> Elihu Root, *The Effect of Democracy on International Law*, *id.* at 2, 5.

<sup>180</sup> William J. Clinton, State of the Union Address (Jan. 25, 1994), 30 WEEKLY COMP. PRES. DOC. 148, 154 (Jan. 31, 1994).

<sup>181</sup> See, e.g., Edward D. Mansfield & Jack Snyder, *Democratization and War*, FOREIGN AFF., May/June 1995, at 79.

Except for Root's remarks, substantive discussions at the Annual Meetings in 1915 and 1916 tended to focus either on issues not directly raised by the war or, insofar as they dealt with the war, on issues of particular concern to the United States, such as neutral rights and duties. The discussions of the law and practice of neutrality, however, were far from bland. In 1916 James W. Garner, of the University of Illinois, addressed the arguments against the traditional rule, which allowed merchants of neutral states to sell arms to belligerents, and rejected those arguments on practical grounds.<sup>182</sup> Philip Marshall Brown of Princeton referred to "this weird thing called neutrality," and argued that nation-states have a positive duty to intervene in the interest of order and justice.<sup>183</sup>

Even though the United States had declared war on Germany just three weeks earlier, the 1917 Annual Meeting went ahead as scheduled. Much of the agenda concerned international organization. About fifty international organizations were already extant, but the one on everyone's mind had yet to be created. There was still no official draft of the Covenant of the League of Nations, but serious planning for it had begun. Influential figures from the ASIL had been involved all along—not, however, including either Root or Scott. In 1915 former President Taft, a Vice President and former Honorary President of the Society, had become the President of the American Branch of the League to Enforce Peace—itsself an outgrowth of the American peace movement. The League to Enforce Peace espoused three propositions for a new league of nations: judicial settlement of justiciable disputes between signatories, conciliation of other disputes, and a commitment to use joint economic and military force against any member that resorted to war without trying judicial settlement or conciliation first. The latter proposition, though considered appropriate by Taft, seemed otherwise to Root and Scott.<sup>184</sup> They distrusted "internationalists," favoring the judicial settlement of disputes and the holding of periodic conferences to codify international law, rather than the creation of a world body with members ostensibly committed to using force in the name of justice.<sup>185</sup> Root did not trust that states would respond to the call to arms unless it seemed to be in their own interests to do so when the occasion arose.<sup>186</sup> Scott, in private correspondence, called the League to Enforce Peace the "League to Create War."<sup>187</sup>

The Society's discussion in 1917 began with some abstract papers on international organization but eventually turned to the proposed "league for peace." Debate focused on the controversial issue of using joint force against a belligerent member. William C. Dennis supported the idea;<sup>188</sup> Scott, on the other hand, thought it naive to assume that states not directly threatened by a member's use of force would use force to resist it. Instead, there should be an appeal to reason.<sup>189</sup> In a lively debate, several speakers from the floor challenged Scott's approach.<sup>190</sup> The battle lines had been drawn between Scott, together with his generation—the defenders of the Hague Conference system—and a younger generation more amenable to some sort of concerted, sustained effort among nations to maintain and enforce peace.<sup>191</sup>

<sup>182</sup> James W. Garner, *Some True and False Conceptions Regarding the Duty of Neutrals in Respect to the Sale and Exportation of Arms and Munitions to Belligerents*, 10 ASIL PROC. 18 (1916).

<sup>183</sup> Philip Marshall Brown, *Munitions and Neutrality*, *id.* at 33, 35, 42.

<sup>184</sup> See BARTLETT, *supra* note 1, at 43–44 (discussing Root's importance to the League movement and his rejection of the invitation to join).

<sup>185</sup> See Finch, *ASIL 1906–56*, *supra* note 15, at 310–11; Shinohara, *supra* note 70, at 96.

<sup>186</sup> See 2 JESSUP, *supra* note 63, at 378.

<sup>187</sup> See Nurnberger, *supra* note 29, at 55 (referring to a letter from Scott to H. C. Phillips dated April 25, 1916).

<sup>188</sup> 11 ASIL PROC. 91 (1917).

<sup>189</sup> *Id.* at 101.

<sup>190</sup> *Id.* at 118, 119, 121, 122, 123.

<sup>191</sup> See Shinohara, *supra* note 70, at 107–08.

*The Journal in the Pre-World War I Years*

During the pre-World War I years, the *American Journal of International Law* was coming of age. In fact, it may well have come of age by 1914. At the 1914 annual banquet, toastmaster Root was heard to say that the Society was blessed with "a journal which one of the greatest authorities on international law in Europe said to me last summer is the best journal of international law in the world, a journal which is self-sustaining."<sup>192</sup> Root the statesman took obvious pride in the encomium from Europe; Root the President of the Society no doubt also took great satisfaction in the ledger entry.

From the beginning, as Managing Editor and then Editor in Chief, Scott saw to it that the *Journal's* lead articles, as well as the Editorial Comments, reflected the important issues of the day. Lead articles in volumes 1 and 2 dealt with such matters as the Calvo and Drago doctrines,<sup>193</sup> the humanitarian law of war in the aftermath of the Hague Conferences of 1899 and 1907,<sup>194</sup> international arbitration,<sup>195</sup> the nature of international law,<sup>196</sup> the evolution of international organizations,<sup>197</sup> and what is now known as the foreign relations law of the United States.<sup>198</sup>

Today many of these articles are primarily of historical significance, but some are relevant to current issues as well. For example, Oppenheim's article on the science and

<sup>192</sup> 8 ASIL PROC. 325 (1914). One suspects that the source of the praise was Lassa Oppenheim, who in 1917 wrote to congratulate Scott for editing "the leading international law periodical of the world." Letter from Lassa Oppenheim to James Brown Scott (Dec. 28, 1917). See also Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AJIL 313, 313 (1908) ("Undoubtedly, this Journal has at once with its appearance taken up the position of a leading magazine of the science of international law."). Rather more colorfully, R. S. Woodward, President of the Carnegie Institution of Washington, said in 1910, "If the legal profession does not warm up to the proper pitch of enthusiasm for your journal the members thereof will prove themselves deficient in red blood corpuscles." Letter from R. S. Woodward to James Brown Scott (Feb. 2, 1910).

<sup>193</sup> See Hershey, *supra* note 89.

<sup>194</sup> See George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AJIL 13 (1907); George B. Davis, *The Geneva Convention of 1906*, *id.* at 409; C. H. Stockton, *Would Immunity from Capture, During War, of Non-Offending Private Property upon the High Seas be in the Interest of Civilization?*, *id.* at 930; James Brown Scott, *The Work of the Second Peace Conference*, 2 AJIL 1, 15-21 (1908); Ellery C. Stowell, *Convention Relative to the Opening of Hostilities*, 2 AJIL at 50; George B. Davis, *The Amelioration of the Rules of War on Land*, *id.* at 63; Antonio S. de Bustamante, *The Hague Convention Concerning the Rights and Duties of Neutral Powers and Persons in Land Warfare*, *id.* at 95; articles by James Brown Scott, George G. Wilson, C. H. Stockton, James Brown Scott (again), Louis Renault, Simeon E. Baldwin and Charles Cheney Hyde on various aspects of maritime warfare, *id.* at 259, 271, 276, 285, 295, 307 and 507; George B. Davis, *The Launching of Projectiles from Balloons*, *id.* at 528; George B. Davis, *The Second, Third, and Fourth Voeux of the Conference*, *id.* at 811.

<sup>195</sup> See Jackson H. Ralston, *Some Suggestions as to the Permanent Court of Arbitration*, 1 AJIL at 321; William L. Penfield, *International Arbitration*, *id.* at 330; R. Floyd Clarke, *A Permanent Tribunal of International Arbitration: Its Necessity and Value*, *id.* at 342; David J. Hill, *The Second Peace Conference at The Hague*, *id.* at 670, 678-84; Amos S. Hershey, *Convention for the Peaceful Adjustment of International Disputes*, 2 AJIL at 29 (dealing with good offices and mediation as well as arbitration); James Brown Scott, *The Central American Peace Conference of 1907*, *id.* at 121, 140-43 ("the crowning glory [of the Conference] is the convention for the establishment of a Central American court of justice"); Luis Anderson, *The Peace Conference of Central America*, 2 AJIL at 144; articles by Charles Noble Gregory, Henry B. Brown and Thomas Raeburn White on the proposed international prize court, *id.* at 458, 476 and 490; William I. Hull, *Obligatory Arbitration and the Hague Conferences*, *id.* at 731; James Brown Scott, *The Proposed Court of Arbitral Justice*, *id.* at 772.

<sup>196</sup> See John Bassett Moore, *International Law: Its Present and Future*, 1 AJIL at 11; Robert Lansing, *Notes on Sovereignty*, *id.* at 105; Richard Olney, *The Development of International Law*, *id.* at 418; Scott, *supra* note 114; Oppenheim, *supra* note 192; W. W. Willoughby, *The Legal Nature of International Law*, 2 AJIL at 357; Elihu Root, *The Sanction of International Law*, *id.* at 451 (reprint of address, *supra* note 96); Frederick Charles Hicks, *The Equality of States and The Hague Conferences*, *id.* at 530.

<sup>197</sup> See Simeon E. Baldwin, *The International Congresses and Conferences of the Last Century as Forces Working toward the Solidarity of the World*, 1 AJIL at 565; Paul S. Reinsch, *International Unions and Their Administration*, *id.* at 579.

<sup>198</sup> See Elihu Root, *The Real Question under the Japanese Treaty and the San Francisco School Board Resolutions*, *id.* at 273 (reprint of Root's opening address at the first Annual Meeting, see text at and note 79 *supra*); Albert Bushnell Hart, *American Ideals of International Relations*, 1 AJIL at 624; Gaillard Hunt, *The History of the Department of State: I*, *id.* at 867, and *II*, 2 AJIL at 591; Wilbur J. Carr, *The American Consular Service*, 1 *id.* at 891; W. W. Willoughby, *Citizenship and Allegiance in Constitutional and International Law*, *id.* at 914; Thomas Raeburn White, *Constitutionality of the Proposed International Prize Court—Considered from the Standpoint of the United States*, 2 AJIL at 490.

method of international law in the second volume repays reading today as a demonstration that the several sources of custom may often be indicators of how a customary rule may ultimately develop, rather than clear evidence that a custom has crystallized. As a corollary, Oppenheim expounded on the need for, and method of, careful examination of state practice in all its forms before the existence of a customary rule is declared.<sup>199</sup>

Volume 2 engendered the first letter of protest from a disgruntled author. It was hardly to be the last. Scott had received an unsolicited short contribution from a judge in Manila. The subject was the extraterritorial application of the Japanese Penal Code. Scott published it as an Editorial Comment rather than as a lead article, and did not list the author's name in the table of contents. That prompted a written complaint from the judge, who noted that he would be obliged to withhold other contributions he had intended to send the *Journal*. Scott's reply dealt with two other matters raised in the judge's letter, but did not respond to the complaint.<sup>200</sup>

In the early years, book reviews, like lead articles, reflected Scott's interests. As we have seen, Scott wrote several of them himself. His first review, of Moore's *American Diplomacy: Its Spirit and Achievements* in volume 1, was felicitous, in view of the stated goals of the Society and the *Journal*. The book was a revised version of a series of articles Moore had written for *Harper's Magazine*, and thus was intended for the lay public. Scott applauded "the fact that specialists and men of affairs, such as Professor Moore and John W. Foster, have found time and taken a pleasure in laying before the public the results of a lifetime in a simple, accurate and attractive form."<sup>201</sup> Scott penned a similar accolade a few years later for the seventh edition of T. J. Lawrence's *Handbook of Public International Law*.<sup>202</sup>

The April 1911 issue of the *Journal* carried a critical review of J. H. Ralston's by now well-known book, *International Arbitral Law and Procedure*. The reviewer was Edwin M. Borchardt, then of the United States Supreme Court Law Library and later, with the spelling of his last name changed slightly, of the Yale law faculty.<sup>203</sup> Scott had sent Ralston a copy of Borchardt's proposed review before it was published, and Borchardt softened some of the criticism as a result of Ralston's reply.<sup>204</sup> Scott must have felt that it was only fair to let the author have a chance to correct any errors or to deflect unduly harsh comments while there was still time to change the review. Whether this was Scott's normal practice, or whether he simply did it as a courtesy to Ralston, is not apparent.

Starting with the January 1912 issue, the *Journal* was published in a Spanish edition, *Revista Americana de Derecho Internacional*, as well as in English. The Society had asked the Carnegie Endowment to finance the Spanish edition. Scott, representing the Endowment, agreed to provide the funds.<sup>205</sup> By 1920 there were about two hundred and fifty paid subscribers in Latin America, plus a large free distribution list of ministries of foreign affairs and libraries.<sup>206</sup> The total, including the free copies, was about five hundred.<sup>207</sup> In

<sup>199</sup> Oppenheim, *supra* note 192. Oppenheim, like the ASIL founders, was interested not only in the scholarly side of international law, but also in educating the public—what he called "the popularization of international law." See *id.* at 323–24.

<sup>200</sup> Letter from Charles S. Lobingier to James Brown Scott (Jan. 5, 1909); Scott's reply (Mar. 11, 1909).

<sup>201</sup> James Brown Scott, Book Review, 1 AJIL at 250, 252.

<sup>202</sup> James Brown Scott, Book Review, 4 AJIL 250 (1910).

<sup>203</sup> The review was published in 5 AJIL 534 (1911). According to the Library of Congress, where the Supreme Court Law Library was then housed, Borchardt changed his name to Borchard in 1911. He joined the Yale law faculty in 1917.

<sup>204</sup> There is a letter in the ASIL correspondence file for 1909–1912 from Ralston to Scott, dated March 2, 1911, referring to Scott's courtesy in sending Ralston a copy of the proposed review. There is also a letter from Borchardt, dated March 23, 1911, saying that he had changed several passages in response to assertions Ralston had made regarding perceived errors and exaggerations in the proposed review.

<sup>205</sup> Letter from James Brown Scott, for the Carnegie Endowment, to the Society (Apr. 6, 1912).

<sup>206</sup> ASIL Executive Council, Minutes (Nov. 13, 1920), in 14 ASIL PROC. 5, 6 (1920).

<sup>207</sup> See 10 Y.B. CARNEGIE ENDOWMENT INT'L PEACE 138 (1921).

1922, though, the Board of Editors decided that a Spanish-language journal edited and published in Latin America would better serve the demand. The Spanish edition was discontinued at the end of its tenth year, to be replaced by the *Revista de Derecho Internacional*, edited by Antonio S. de Bustamante y Sirvén and published in Havana.<sup>208</sup>

The *Journal's* first pseudonymous article was published in 1914, on the eve of World War I. Signed "Germanicus," it was written by the Military Attaché of the German Embassy in Washington, one Captain Herwarth. It argued that the "Christian Teutonic world" must stick together against the rest of humankind.<sup>209</sup>

Apparently, the *Journal's* Board of Editors drew a distinction between pseudonymous and anonymous articles. In 1924 a British official asked Finch, then the Secretary of the Board of Editors, if he could reply to an Editorial Comment Finch had written on the occupation of the Ruhr Valley—a reply that he said would have to be anonymous because of his official position.<sup>210</sup> Finch answered that it was not the *Journal's* policy to print anonymous contributions.<sup>211</sup>

In 1916 the *Journal* began its still-standing practice of having at least two members of the Board of Editors pass on any manuscript being seriously considered for publication.<sup>212</sup> At the same time, the board decided that articles should be short: as a rule, no longer than about twenty printed pages.<sup>213</sup> It was a rule destined to be observed often in the breach.

By the eve of the U.S. entry into World War I, the *Journal* had achieved an international reputation as an organ for the dissemination, in the English and Spanish languages, of international law. It enjoyed somewhat lesser credentials as a truly scholarly journal than it would achieve in later years, but that could be attributed to its dual—and not altogether consistent—objectives of spreading the word to nonscholars and publishing more theoretical or penetrating pieces. In any case, it was well on its way to preeminence in its field and was thought by some leading authorities to have already achieved that pinnacle. The lion's share of the credit had to go to Editor in Chief Scott.

#### IV. LOOKING BACK AND AHEAD

The American Society of International Law and its flagship publication, the *Journal*, are the enduring dividends of the nineteenth-century American peace movement. The legalists in the peace movement who founded the Society were members of the American political/academic establishment who had a vision of peace through law and law-based dispute-settlement institutions. They experienced some disappointment early on, when the 1899 and 1907 Hague Peace Conferences failed to produce promising mechanisms for the maintenance of peace. Nevertheless, they remained optimistic until their dreams were shattered by World War I. International law had failed of what they regarded as its real purpose—the prevention of armed conflict. It had even failed of its secondary purpose—the amelioration of the destructive effects of war if it did occur.

The Society's leaders would regroup once the war had run its course. There would be renewed efforts to codify international law and to establish a world court that could effectively settle disputes between nation-states. Eventually, there would be an awakening to the breadth and depth of international law and institutions extending beyond the

<sup>208</sup> James Brown Scott, Editorial Comment, *The Revista de Derecho Internacional*, 16 AJIL 437, 438 (1922).

<sup>209</sup> See Germanicus [Herwarth], *The Central American Question from a European Point of View*, 8 AJIL 213 (1914). That Herwarth was the author appears in a letter from George A. Finch to Jesse S. Reeves (Mar. 15, 1921).

<sup>210</sup> Letter from John Fisher Williams to George A. Finch (Jan. 5, 1924). Finch's Editorial Comment was *The Legality of the Occupation of the Ruhr Valley*, 17 AJIL 724 (1923).

<sup>211</sup> Letter from George A. Finch to John Fisher Williams (Jan. 23, 1924).

<sup>212</sup> Letter from George A. Finch to Jesse S. Reeves (Feb. 2, 1916).

<sup>213</sup> *Id.*



arena of armed conflict and into such fertile fields as international trade, the development of natural resources, and human rights. The Society would expand its horizons beyond the holding of an annual meeting and publication of the *Journal*, to include such ventures as widespread regional activities, an ambitious research and development program, the invaluable dissemination of current documents in *International Legal Materials*, active support for student activities including the Philip C. Jessup International Law Moot Court Program, and productive relations with foreign international law societies.

As the Society's ninetieth year draws to a close, one can say that it has partially achieved one of its goals: fostering the study of international law. In the law schools of this country, international law courses have proliferated. International law teachers have joined the ranks of law faculties nationwide. In political science departments, however, international law courses, once a staple of the curriculum, have faded in numbers and importance.

The Society's other goal—to promote the establishment and maintenance of international relations on the basis of law and justice—has been elusive. To the extent that first-rate scholarship and lively debate can bring that goal within reach, the Society may point with pride to its record. To the extent, though, that more direct methods are needed to bring international law home to the uninitiated, the record is spotty. The Society's leaders have had to balance their disinclination to take positions on substantive issues against their desire to persuade key decision makers and the public that international law does matter. Some strides toward achieving that delicate balance have been taken in recent years, but the work remains unfinished.